

THE ABOLITION OF COPYRIGHT

Better for Artists, Third World Countries and the Public Domain

Joost Smiers

Abstract / There is convincing evidence that artistic life, which is an important sector in all societies, is better off when the concept of copyright disappears. In the digital era the concept is outdated anyway. As a consequence, our common artistic creativity will no longer be the exclusive property of a few copyright industries and piracy will cease to exist. Knowledge and creativity become once again essential elements of the public domain. Moreover, surprisingly, without the system of copyright protection many artists in both Western and non-Western countries will earn a decent income.

Keywords / copyright / culture and the arts / digitalization / globalization / Third World

Artistic Cultures

There is convincing evidence that artistic life, which is an important dimension of every society, would be better off if the concept of copyright were to be given up. As a consequence, our common artistic creativity would no longer be the exclusive property of a few corporate holders of intellectual property rights. Knowledge and creativity would once again become an essential element of the public domain. And, surprisingly enough, without the system of copyright legislation many artists in Western and non-Western countries would be able to earn a decent income!

The field of artistic cultures, for which I try to formulate an approach alternative to the current copyright system, is a broad one. The arts are specific forms of communication. In all societies we find artistic ways to express and communicate that are distinguished from the daily forms of communication, or those used in journalism, health care, business, or education. The arts constitute a specific category in every culture, in every society. The arts function more or less in isolation from daily social activities, but they may also be more integrated in daily life, for example in religious practices, in feasts or other celebrations, in the broad field of design and background music, or in publicity campaigns.

Specific to the arts are the aesthetic aspects that feed our observation and appreciation. The content and the meaning of artistic communication are more focused, dense, or slow than is common in other forms of communication. And

the arts reach the public by passing specific tracks that colour the meaning of the artistic work by the ambience they offer: prestigious places for exhibitions or venues for concerts, television screens, glamorous advertisements, sacred spaces, or the magic circle on a square created by a clown.

Among the arts as specific forms of communication we find rock concerts, raï music, cantatas by J.S. Bach, plays by Beckett, Mondrian paintings, the artistic aspects of folklore cultures from all over the world, comics, porn shows, all sorts of films and soap operas, and the artistic aspects of the Internet. Given this broad scope of expressions, the property of rights to such artistic expressions matters. After all, the question of who controls and owns the 'rights' to society's artistic creations from past and present, including what originates from the cultural industries, is not an issue of minor importance (Smiers, 1998).

A Romantic Concept and a Monopolistic Right

Several considerations force us to rethink the copyright system which gives exclusive rights on knowledge and creativity to authors of different ilk. The reality, however, is, that they appropriate artistic materials which have already existed for a long time and which actually belong to our common good. For instance, there is no poem created without former poems. In our present culture we are inclined to forget that the author or performer has used many sources – language, images, tonality, rhythms, colours, movements, meanings, humour and so on – which belong to our common cultural and intellectual domain. Therefore there is no justification to claim originality and as a result give artists monopolistic rights to their work. 'Originality' is a misleading and romantic concept.

Nevertheless, this is the essence of our present notion of authorship, which even itself is a relatively young concept, which came up with individualism in the Western culture; in many other cultures it was and still is an unknown idea. James Boyle argues:

As authors ceased to think of themselves as either craftsmen, gentlemen, or amanuenses for the Divine spirit, a recognisably different, more romantic vision of authorship began to emerge . . . in this vision the author was not the journeyman who learned a craft and then hoped to be well paid for it. The romantic author was defined not by the mastery of a prior set of rules, but instead by the transformation of genre, the revision of form. Originality became the watchword of artistry and the warrant for property rights. . . . It is the originality of the author, the novelty which he or she adds to the raw materials provided by culture and the common pool, which 'justifies' the property right. (Boyle, 1996: 54–5)

The unlucky consequence, James Boyle claims, is that, for a set of complicated reasons, 'we are driven to confer rights in information on those who come closest to the image of the romantic author, those whose contributions to information production are most easily seen as original and transformative'. He argues that this image of the romantic author

. . . is a bad thing for reasons of both efficiency and justice; it leads us to have too many intellectual property rights, to confer them on the wrong people, and dramatically to undervalue the interests of both the sources of and the audiences for the information we commodify. If I

am right, unconscious use of the author paradigm has wide-ranging negative effects, with costs in areas ranging from bio-diversity and the production of new drugs to the shape of the international economy and the structure of the computer industry. (Boyle, 1996: x, xi)

Therefore, the claim to such an absolute, monopolistic right as we grant authors in our present society cannot be justified. There is always a 'cultural debt' that should be recognized. 'How should we understand "value" in the information society?', James Boyle wonders.

Whose contributions will our system recognise and reward, whose will it ignore, or genuinely fail to see? . . . How does one break the grip of a rhetoric of entitlement that systematically obscures and undervalues the contributions of one part of the population and magnifies those of another part of the population? (Boyle, 1996: 177)

This has far-reaching consequences, James Boyle argues. 'An author-focused regime that makes the contributions of sources "invisible" is unlikely to reward those contributions. . . . Sources may become a "commons" whose exploitation is justified or obscured by an author theory.' Partly the problem is the denial of creations of the past which have contributed to the artistic creations and performances in our present time. But the problem reaches also towards the future.

In developed nations too, the blindness of an author-centred regime to the importance of the public domain can also lead to overly expansive intellectual property rights that deny future creators – novelists, scientists, programmers – the raw material they need to make new products. The tendency to undervalue the public domain is a world-wide phenomenon. (Boyle, 1996: 130)

In line with this observation it is interesting to listen to the Dutch painter Rob Scholte, who is convinced that all that has been created belongs to everybody.

This does not mean that all hereby has turned gratuitous. That would be an error of reasoning. People still experience something for the first time, authenticity continues to exist, and certain images keep their power of expression. As a postmodernist, however, I fight the idea of originality, of intellectual property, of copyright.¹

It is not necessary to be a postmodernist to share his aversion against separating a work of art from the continuing creativity in a society and turning it into an object for exploitation.

This process is exactly what might hinder, for instance, the television screening of a digital artwork by the Belgian artist Johan Grimonprez, which has been shown already on the Documenta 1997. The title of his tape is *Dial History*, and that is what it really is. He criss-crosses through history and through completely different aspects of society; 80 percent of the film consists of archive materials. Where to find the right-holders, whether they will give permission and how much it will cost are the questions which are as many barriers for the public presentation of such digital works of art. For the time being, exhibitions tend to constitute a grey area where some risks can be taken. In the

case of a television showing, this is impossible.² The copyright system makes it nearly impossible for artists to create for and within the digital domain while using lots of sources. This frustrates the development of a completely new artistic field and pushes artists into illegality.

The understanding of creativity as a collective and historical process makes the claim of an artist like Daniel Buren to copyright protection for the fountains he designed for the Place des Terreaux in Lyon in France feels very old-fashioned.³ He insists that everybody who makes a picture of the Place des Terreaux should pay him royalties – and more and more artists and architects and specially their right-holders share this opinion. But, was he not already paid for the design of those fountains? Probably generously! He made a contribution to the square, to the cultural heritage of centuries, no more and no less. What went wrong in our society that artists like Daniel Buren have the audacity to claim rights on the whole square? And why should a photographer who makes a picture of a public place be entitled to pretend to have the monopolistic right on the image of the whole surrounding, even if it is her or his particular vision on this spot? The arts are quite important in our personal and social life, but even so we should not exaggerate the uniqueness of contributions made by single artists.

Therefore Rosemary Coombe wonders how much of a star's celebrity and its value is due to the individual's own efforts and investment.

Celebrity images must be made, and, like other cultural products, their creation occurs in social contexts and draws upon other sources, institutions, and technologies. Star images are authored by studios, the mass media, public relations agencies, fan clubs, gossip columnists, photographers, hairdressers, body-building coaches, athletic trainers, teachers, screenwriters, ghost-writers, directors, lawyers, and doctors. (Coombe, 1998: 94–5)

The Marx Brothers, for example, took what they wanted from the history of the burlesque and the vaudeville (Coombe, 1998: 95). And Madonna evokes and ironically reconfigures several 20th-century sex goddesses (Marilyn Monroe, obviously, but also Jean Harlow, Greta Garbo, Marlene Dietrich, Gina Lollobrigida and perhaps a touch of Grace Kelly) (Coombe, 1998: 96–7). Let us furthermore not forget the role of the public in the creative process, about which Marilyn Monroe said herself, 'if I am a star – the people made me a star, no studio, no person, but the people did' (Coombe, 1998: 94–5)⁴

Whether one does or does not respect the work of Madonna and the artistic creations of many other artists, their own input is always only a partial one. This makes the claim to monopolistic rights a huge exaggeration. The public domain which is the main contributor to artistic creations, and inventions, has been neglected. Only one source of the creation or invention has been valued, the other sources are undervalued. The system of copyrights creates a false picture of reality, as it suggests that we live in what Rosalind Krauss calls a 'culture of originals'.⁵ This narrow opinion about creation produces the mental and material condition that we freeze our cultures, and as a result we suppress the more normal situation that cultures are basically, and should be, contradictory and conflicting ongoing processes.

The Copyright Business

Originality is a contested idea and it is particularly strange to use it as a basis for granting monopolistic copyrights to *enterprises*. They are not creative at all and they hijack what is actually common knowledge and creativity for their private business interests.

The private ownership of ideas and artistic creativity has been extended by TRIPs, the 1993 treaty on Trade Related Intellectual Property Rights (initiated by the GATT negotiations and now administered by the World Trade Organization [WTO]). TRIPs opens the rather unrestricted possibility to buy rights on knowledge and creativity everywhere in the world in order to exploit those rights.⁶ Consequently, most of the world's creativity and knowledge is becoming the private property of probably fewer than 10 multinationals. This makes it understandable that international copyright protection ranks high on the international trade agenda. This has far-reaching consequences. As Rosemary Coombe (1998: 6) observes: 'In consumer cultures, most pictures, texts, motifs, labels, logos, trade names, designs, tunes, and even some colours and scents are governed, if not controlled, by regimes of intellectual property.'

Information, knowledge and artistic cultures become commodities which are to be exploited. In this philosophy the concentration of knowledge in the hands of a few is far from absurd. Moreover, this is exactly what Western states promote by the application of copyright laws, including the hunt on piracy and unauthorized use. T. Koopmans, a former judge at the European Court, remembers the idyllic scenes depicted in the handbooks of the hard-working and gifted artist who sees her or his efforts rewarded with exclusive exploitation rights. 'Those rights have turned into "business"' (Koopmans, 1991: 454).

In this business the stakes are high, as Janine Jaquet reports in *The Nation*.

The trouble is, no one really knows which technologies will be worth having in the Information Age: Maybe it will be cable, maybe satellite TV, maybe the Internet, maybe none of these. Those companies that invested in the wrong 'hardware' will be the losers. But those that invested in what will be delivered by the new technology – the winning sort of 'content' or 'software' – will emerge with a valuable commodity. 'Content,' says Derek Bayle, an analyst at Paul Kagan Associates, 'holds its value.' If content is king, synergy is still the power behind the throne, the rationale for media conglomerates' snatching up as much copyrighted material as they can. Today's mergers aren't just about grabbing more of the market share by buying yet another record label or movie studio or book imprint. They're also about acquiring the rights to music, movies and books. It's an investment in intellectual capital, i.e. creative expression, the twenty-first century's most valuable commodity. (Jaquet, 1997)

After all, the owners of property rights like to see their 'property' exhibited, performed, registered and distributed as widely as possible. For instance, the ownership of musical compositions has become more and more valuable, Jeffrey and Todd Brabec analyse:

Hit songs and film and television scores earn increasingly large amounts of money from their use on CDs and cassettes; in audio-visual projects such as motion pictures, television series, video cassettes, and laser discs; and in an unlimited range of other entertainment-related distribution vehicles – print, karaoke, interactive media, Broadway, off-Broadway, regional

theatre, computer games, video jukeboxes, commercials, music boxes, lyric reprints in novels and nonfiction books, and so on. (Brabec and Brabec, 1994: 328)

The German media tycoon Leo Kirch owns at least 15,000 films and 55,000 hours of serials, shows, concerts, operas, documentaries and other forms of filmed entertainment (Renner, 1994: 159, 160). Bill Gates's company Corbis owns already the digital rights to 25 million photos and paintings, including those from the Smithsonian in Washington, the National Gallery in London and the Hermitage in Petersburg, and he is buying the collections of the two most important French photo agencies, Gamma and Sygma.⁷

The examples of this type of 'intellectual land grab' (Boyle, 1996: 34) are manifold. In 1997 a Zurich-based company, called Techno Tanz Veranstaltungsverwertung Zürich GbR, claimed that they had the copyright to techno dance. They urged a Berlin disco that copyright fees should be paid. In the Netherlands KPN, PTT Telecom acquired the copyright to the particular shade of green the company uses in its logo. Also in the Netherlands, the ABN/Amro Bank advertises itself as *The Bank*. The bank acquired the exclusive right to the combination of the words 'The' and 'Bank'. Just normal forms of movement of the human body, words, colours are ripped off from the public domain and become the exclusive property of private interests. One could argue that if there should be any payment at all, it should be that these commercial enterprises pay the public domain because they are using elements of the common cultural heritage!

This type of use of copyright protection unavoidably leads to an oligopolistic domination of the cultural market, by which the variety of artistic expressions and the diversity of cultural communication come under serious threat. Obviously, one may state that oligopolistic owners do produce and distribute varieties of artistic expressions, otherwise they could never explore all the segmented markets all over the world. These owners select and decide what type of cultural variety is to be offered. Real cultural variety, however, can only exist, when the majority of artistic cultural expressions in a given society proceed from a substantial variety of independent initiatives, institutes and creative individuals.

TRIPs decollates the control on the use of the intellectual and creative commons, according to Chakravarthi Raghavan: TRIPs internationalizes 'what so far has been in the domestic domain, namely establishment of the norms and criteria for industrial (intellectual) property protection' (Raghavan, 1990: 96). It broadens the scope of protection, extends the lifetime of protection, reduces or eliminates the capacity of the nation-state to regulate or attack such monopolies, blocks technical development and enhances the enforcement of rights of transnational corporations, nationally and internationally (Raghavan, 1990: 96).

The strict system of copyright protection raises a problem for new creations. James Boyle (1996: xiii) warns that intellectual property rights may become 'so expensive that they make it much harder for future independent creators actually to create'. It is even worse, Ronald Bettig reports: 'With few exceptions, copyright is based on an owner's ability to have exclusive control over the use of his or her product. This exclusive control is what protects the exchange value

of the copyrighted work in the intellectual property marketplace' (Bettig, 1996: 151). Bringing intellectual properties – monopolistic rights – into a free trade context – GATT/WTO – is turning the world upside down (Amin, 1997: 29).

This expansionist logic of capital infiltrates vast ranges of human labour and activity, including intellectual and artistic creativity.

Thus when it comes to the domains of information and culture, the logic of capital drives an unending appropriation of whatever tangible forms of intellectual and artistic creativity people may come up with, as long as this creativity can be embodied in a tangible form, claimed as intellectual property, and brought to the marketplace. (Bettig, 1996: 34)

The extension of rights also reaches the new digital communication tools, information highways and telecommunication infrastructures. The G-7 conference held in Brussels on 25 and 26 February 1995 'confirmed the need for high standards of legal and technical protection for the creative content which will be disseminated via these infrastructures' (Commission of the European Communities, 1995: 13). This was endorsed by the Commission of the European Communities, which stated in its 1995 Green Paper on Copyright and Related Rights: 'Those seeking to operate in the new environment must not find themselves hemmed in by legal constraints arising from a fragmented market' (Commission of the European Communities, 1995: 29).

The commercialization of the intellectual and creative commons has also consequences for the functioning of the so-called 'fair use' principle. This allowed, for instance, universities and schools to use parts of books, music or slides on a limited scale for educational purposes. The 'fair use' principle always meant that after nearly all rights were given out to private parties a small piece of the cake of the intellectual commons was left for the free use in the educational arena. However, even the limited application of 'fair use' is under threat. In American universities lawyers are issuing directives about the legal status of the slides used in art history classes, discouraging and perhaps prohibiting librarians from allowing certain slides to be made or used. They do this in order to prevent the university being sued. The lawyers force the librarians to show proof, before releasing a slide, that no provisions of copyright law are being violated.⁸

Shalini Venturelli pays attention to the human rights consequences of the new international intellectual property regime. This will

... turn the information superhighway into a toll road with the structure of knowledge defined exclusively by economic criteria and proprietary power. This radical privatisation of the public domain is unparalleled in history, in effect reversing the direction of modernity from the gradual expansion of information participation among social groups over time, to gradual concentration. Not only will public access rights and fair use rights be cut back, individuals will be denied the right to use information for purposes of organising themselves and participating in society at large. (Venturelli, 1997: 69)

Information diversity and pluralism will disappear (Hamelink, 1994b: 284–5). And James Boyle (1996: 171) stresses the need to be aware 'that many of the "human rights" and even more of the "international development" issues of the twenty-first century will be intellectual property issues'.

Chakravarthi Raghavan argues even that patents, trademarks and other intellectual (industrial) property rights are not at all natural human rights.

When European countries began creating patent rights, at the dawn of the industrial revolution, there were conflicts whether the 'monopoly' to exploit the invention granted to the inventor is natural right or an exception to the natural right of citizens to the invention. . . . Patents and other intellectual or industrial property are thus statutory rights – benefits created by law by the State. Even to call them 'rights' is a misnomer. They are really 'privileges' granted by the State by statute – a form of government subsidy not unlike tax credits, export incentives etc. (Raghavan, 1990: 115–16)

It is ironic that whereas the origins of industrial development are intrinsically related to the act of widespread copying, the Western world now seems to be saying to the developing world that they cannot do the same.

It would be interesting to explore the philosophies which exist in non-Western cultures and societies about knowledge and creativity as a common good versus their private appropriation. Hamid Mowlana (1993: 396) claims, for instance, that throughout 'Islamic history, especially in the early centuries, information was not a commodity but a moral and ethical imperative'. This collective approach is exactly the opposite of the private ownership of knowledge and creativity. More research should be done to understand how this contradiction has been considered in theory and in practice in predominantly Islamic countries. In any case, the crucial question 'for the Islamic societies is whether the emerging global information communication community is a moral and ethical community or just another stage in the unfolding pictures of the transformation in which the West is the centre and the Islamic world the periphery' (Mowlana, 1993: 396).

Piracy

If one tries to follow in the news the debates on intellectual rights the impression emerges that there is only one real issue which is spoiling the atmosphere of a booming and socially and culturally useful business. This is piracy. Therefore James Boyle (1996: 121) observes: 'Piracy of intellectual property products has become one of the central concerns in negotiations on world trade, a concern where both the figures for projected losses and the rhetoric of condemnation are surprising to the neophyte.'

The projected losses are considerable indeed. The International Federation of Phonogram and Videogram Producers (IFPI) *estimates* that 25 percent of the music phonograms sold throughout the world are pirate copies (Burnett, 1996: 88–9). The Recording Industry Association of America *claims* that in Thailand alone in 1992 trade losses were *estimated* at US\$24 million. Its *estimate* for worldwide losses in 1994 was US\$2.245 billion (Boyle, 1996: 121). Piracy costs the recording industry in Europe an *estimated* US\$3 billion per year. The side-effect is that this would cost the authorities in Europe up to US\$750 million each year in lost VAT alone, and about 30,000 jobs, according to M. Edwards, head of operations of IFPI.⁹ Hervé-Simon Jewell, president of the African Association against Piracy, emphasizes 'the need to stamp out piracy in Africa,

which was significantly on the increase again, bringing to some \$600 million a year the sums misappropriated from artists' earnings from copyright and neighbouring rights'.¹⁰

Where there is piracy there must be pirates. In China there are reportedly quite a few of them. Greg Mastel, writing in the *International Herald Tribune*, calls China's theft of intellectual property no 'Mickey Mouse' issue: 'For example, some 30 Chinese factories daily turn out thousands of illegal compact disks that find their way to markets as far away as Canada.'¹¹ This issue complicates the relations between the USA and China more than any infringement on human rights. Singapore is another famous place for piracy activities (Bender, 1994: 485). In Bulgaria some 25 million CDs are supposed to be produced every year.¹² And with the audio and video cassette Kenya got its own flourishing pirate industry (Malm and Wallis, 1992: 87), which seems to have found, after control in Kenya improved, a safe haven in Tanzania, from where the whole region is provided with pirated cassettes. Those are not the only and not the last countries where the multiplication of audio, visual and literary creations has become an industry.

With the introduction of the DVD, pirates acquire a growing competitive advantage to legal producers and distributors in the audio and image markets. Piracy becomes more than ever a profitable calculated risk. More can be stored on a DVD, which costs the pirate nothing while the legal entrepreneur has additional expenses for producing more software. And for the first time there is no quality difference between the legitimate and the pirated copy.

One of the reasons why mass-scale piracy is nearly unavoidable is the increase in excess production capacity of recording media such as CDs. 'There is currently more than double the manufacturing capacity available world-wide than is needed for legitimate production.' Actually the major right-holders are causing this excess capacity themselves. They operate on very tense and nervous markets and this 'obliges' them to have instantly sufficient production capacity.¹³

Also, the cost of new and second-hand machinery is constantly dropping. 'For example the new ODME miniliner costs US\$500,000 and has the capacity to produce 5 million CDs a year.'¹⁴ Anyway, for Bonnie Richardson, spokeswoman for the Motion Picture Association of America (MPAA), the situation is clear. 'All we are talking about piracy is theft. One of the fundamental roles of all states is to protect their citizens against theft.'¹⁵ In spite of all the neoliberal proclamations, a strong state seems to be needed in this field. Digitalization renders copying easier than ever before.¹⁶

As Bonnie Richardson asks:

Will protection of intellectual property be adequately cared for in government regulations as the new information infrastructure evolves, or will piracy on the Internet become just a massive problem? That is a very important issue for MPAA, and for the copyright industries, book, music publishers, recording industry, computer data basis; all of us care about the protection of what we put over the new system.

The 'struggle' against piracy takes place on three levels: information, monitoring and sanctions. Bonnie Richardson is very pleased with the initiative of the United States Information Agency:

The USIA has a number of programmes that are helpful in getting out the message about the need for protection of intellectual property. They sponsor the dialogues with countries that are looking at reviewing their intellectual property laws, giving the MPAA the chance to participate in the dialogue and get our views known.

For instance in Russia where crime is epidemic: ‘The United States is trying to assist Russia. We as an industry have participated in a seminar to help educate Russian prosecutors and law enforcement officials on how to identify pirated product.’

The next stage is to know whether, where and by whom piracy takes place. ‘U.S. embassies are now routinely used to monitor the infringement of U.S. trademarks – whether it is Marlboro in Algeria or Mickey Mouse in China’ (Boyle, 1996: 122). Inside the USA, the FBI is active in this field. Outside the USA, besides the embassies, different kinds of spies are working. ‘Richard O’Neill, a former Green Beret who received a Silver Star and six Bronze Stars in the Vietnam War, now hunts video pirates in Korea on behalf of the Motion Picture Export Association of America.’ The Korean government, eager to increase its exports to the USA permits this private American police operation (posing as a market survey) on its territory. ‘O’Neill has extended his operations to Thailand’ (Barnet and Cavanagh, 1994: 142–3).

The objective is of course to stop piracy. A whole range of sanctions must serve this purpose. There is a soft approach, the one used by several multinationals like Walt Disney, Paramount and Time Warner. Special software has been developed for them by which they search the Internet. If an infringement has been discovered, they send a request to remove the copied material from the Net. Mostly this seems to be effective. If not, the infringer will be sued. The main interest is to fight large-scale infringements (Westenbrink, 1996: 88).

There exist also tougher approaches to fight piracy. Countries may expect trade sanctions. James Boyle states: ‘The “Super 301 Regulations” of the United States Trade Act of 1988 establish a “watch list” and a “priority watch list” for nations whose lack of intellectual property safeguards represents a significant trade barrier to U.S. business’ (Boyle, 1996: 122). To avoid such trade sanctions countries must organize effective domestic law enforcement. Richard Barnet and John Cavanagh give the example of Singapore, a small republic of malls and assembly plants, which is totally dependent on exports:

Its authoritarian government has gone out of its way to cooperate with music giants by enacting a draconian copyright law that provides for five-year jail sentences and \$50,000 fines for possession of pirated tapes with intent to sell. Teenagers can earn up to \$150 by acting as informants for the police. (Barnet and Cavanagh, 1994: 142)

A comparable situation of severe sanctions has been described by Krister Malm and Roger Wallis concerning Trinidad:

Throughout the 1980s, music piracy was rife in Trinidad. The audio cassette market, even for calypso music, was dominated by street-corner pirates. Such cassettes often provided entertainment in taxis as well as in so-called maxitaxis (minibuses) that constitute the better part of the Trinidad public transport system. Thus they also functioned as a form of promotion of

the music and the pirated artists. In 1986, lobbying by the Copyright Organisation of Trinidad and Tobago (COTT, formed in 1985) led the government to introduce fairly severe legal sanctions for cassette piracy. These include prison sentences of up to six months for the first offence and up to two years for any subsequent offence. As a result, the most obvious forms of street-corner music piracy of calypso music have been wiped out. Cassette piracy has been limited to foreign music. Exceptions occur in the carnival season when local calypso and soca hits are likely to appear on 'top hit' sampler tapes featuring 'diverse artists'. (Malm and Wallis, 1992: 67–8)

It is interesting to note that the sanctions seem to work better for local music than for foreign products.

Besides the track of information, monitoring and sanctions, there are other ways to try to prevent piracy. Ronald Bettig mentions one of them:

The filmed entertainment industry has also resorted to market strategies to capture Middle Eastern home-video markets for 'legitimate' distributors. These efforts include offering a video product with a superior visual image to that of pirated products, supplying a dubbed audio track on the pre-recorded videocassette or Arabic subtitling, and releasing pre-recorded videocassettes closer to the date of initial release in the United States. The same combination of government pressure and market-based strategies are being used throughout Asia to combat piracy. (Bettig, 1996: 213–19)

Atsen Ahua, director of Synergies African Ventures, told me about a market approach to prevent piracy which originates from local music producers in Ghana and Nigeria as well.

They have organized a network of middlemen and retailers through which thousands of cassettes find their way rather quickly to buyers all over the country. This makes it more difficult for pirates to break into this market structure. If they would nevertheless do so they are offered the chance to operate within the framework of the network. The market is big enough to provide for many contenders. If they refuse to collaborate some violence may be necessary to bring them back to order because mafia tendencies should be suppressed immediately. We tell them: 'If you copy Rambo, do it, not our products, but come in business with us. Otherwise you kill us.'¹⁷

According to Atsen Ahua in a country like Kenya it is more difficult to introduce such a system because such an entrepreneurial attitude is lacking there, 'people are more attuned to be employed. Now this is beginning to be changed.' The system in Ghana has another protection against piracy as well. On the cassettes a numbered revenue band has been glued like on cigarette packs. This seems to limit piracy (Bender, 1994: 486).

However, piracy will continue as long as it is easy to copy. This issue will become even more important in the future with the further development of laser disks, MP3 and other new communication technologies.¹⁸ Interesting is the observation by Richard Barnet and John Cavanagh:

Stars now count on being seen and heard somewhere around the world many times a day. But the bigger the hit, the more likely it is that its creators and owners will have to share the profits with pirates. While intellectuals and politicians in poor countries denounced the 'cultural imperialism' of the global media giants, underground entrepreneurs did something about it. (Barnet and Cavanagh, 1994: 142)

Dave Laing makes the probably unexpected claim that, 'piracy's most important effect is not the damage it does to the income of transnational companies and their recording artists, but the way in which it encourages the spread of international music and discourages the full development of national recordings in many countries' (cited in Burnett, 1996: 88–9).

It is unlikely that the war against big mafia syndicates, which make fortunes out of piracy, will ever be won. It resembles the war on drugs. Nowadays precise control by the state is out of fashion; globalization has as a consequence that transport and production follow their own rules; it is not that difficult to find safe havens for black money; corruption is becoming common practice in a deregulated world: those are all excellent ingredients for lucrative activities in the fields of piracy and drugs, and both circuits mix, together with illegal trade in weapons.

There is undeniably a sharp conflict of interests between the software vs hardware producers. For the latter it is interesting to sell machines which can copy easily. This is exactly what film, music and book producers resent. The risk that their software is copied manifold the next day and even of good quality makes them hesitate to distribute their products through such media as pay-per-view television.

Bonnie Richardson, spokeswoman of the MPAA, has this to say:

One of the things we domestically are looking at and we are talking about internationally is the need to look at technological safeguards to be built into the next generation VCRs or laser disks, the hard ware, as well as having governments make it a crime within their legal systems to defeat those kinds of technological safeguards. We as an industry are working with our government in the next years to make sure that our own legal system recognizes the importance of protecting technological safeguards and we are working with manufacturers of the hardware to get some agreement on what kind of technological safeguards will be made.¹⁹

It is interesting to observe that strong advocates of the free market are at the same time in favour of strong state regulations!

Is Copyright Needed to Secure Creativity?

Do we need to have a system of intellectual property rights to promote the continuing creation of works of art and science? History and experience in most cultures around the world show us that marvellous creations and inventions have been generated without any copyright protection. Also, for the present and for the future, there is no reason to assume that people create or invent only when they are granted an exclusive exploitation right for decades to their inventions, their paintings, their compositions, their novels, their films or their performances.

One of the principal arguments to defend a system of extensive intellectual property rights is the supposed innovation it will bring to us. Emery Simon said it clearly at the Alai conference in Geneva, June 1994: 'So we have come a long way indeed. On balance, I believe this integrated system will provide a boost to both creative and inventive individuals' (Simon, 1994). The European Commission expressed the same belief in the 1996 Follow-Up to the Green Paper

on Copyright and Related Rights in the Information Society: ‘In line with the “Bangemann report” on “Europe and the Information Society”, the Commission’s action plan identified intellectual property protection as a key issue given the critical role creative content and innovation will play for the development of the Information Society’ (Commission of the European Communities, 1996: 5). Also in the USA, the incentive argument is familiar: creators and inventors should get incentives, otherwise we will see no more innovations and inventions (Boyle, 1996: 44).

As stated before, it is uncertain how valid this innovation argument really is. James Boyle (1996: 18–19) observes ‘To say that copyright promotes the production and circulation of ideas is to state a conclusion and not an argument. At the very least we might wonder if, *in our particular copyright regime*, the gains outweigh the losses.’ Ronald Bettig explains why some doubt is justified.

The underlying assumption here is that human beings require economic reward to be intellectually or artistically creative. The philosophy of intellectual property reifies economic rationalism as a natural human trait. Yet from our historical analysis we see that throughout most of human history there existed no concept of intellectual property rights. Nevertheless, humans still produced technological and cultural artefacts. (Bettig, 1996: 25)

Therefore Bettig thinks that it

... is questionable whether individuals pursue careers in artistic and intellectual activities on the basis of economic motivations when unemployment in these sectors runs so high. It is more plausible to assume that economic incentive appeals to the capitalists who invest in these activities and who would not invest if the potential for a profitable return on investment did not exist. (Bettig, 1996: 171)

Would fewer artistic creations and industrial inventions be produced if intellectual property rights did not exist? Based on past experience and from what we know from less commercialized cultures we may believe that human beings will always continue to create and invent.

It would seem to be quite pretentious for the capitalist owners of intellectual property rights to think that their selection capacity serves all humankind optimally. This certainly does not seem very democratic. And it may be even worse as James Boyle suggests,

There are strong reasons to believe that the system of incentives set up under the current author-centered vision of intellectual property will actually impede innovation and scientific progress, diminish the availability of our cultural heritage, inhibit artistic innovation, and restrict public debate and free speech. (Boyle, 1996: 124–8)

The Advantage for Third World Countries is Doubtful

In many non-Western countries there are myriad demonstrations of very lively cultural practices – partly thanks to the absence of copyrights and cultural industries. A good example – which stands for most traditional and popular music cultures such as calypso, samba, rap and so on – is Algerian *raï* music.

In those forms of music it is impossible to recognize a true author – as in the Western definition. The *raï* has no author. The singers ‘borrow’ songs or refrains from each other. The journalists Bouziane Daoudi and Hadj Miliani emphasize ‘that the same theme may have as many variations as there are performers. The base is shared knowledge which refers less to a repertoire of existing “texts” and more to a complete set of social signs (*el mérioula, el mehna, el minoun, e z’har*, etc.)’ The public spontaneously add words to the song. In the practice of the singers, the *chebs* and the *chabete*, theft and plagiarism of texts do not exist. It is a form of music which depends on contextuality, on period, place and public. Bouziane Daoudi and Hadj Miliani describe the *raï* as ‘a continuum of a strongly perturbed social imagination’ (Daoudi and Miliani, 1996: 126–9).

The Western copyright conception has begun to destroy this continuum of the *raï* by eliminating those social and cultural processes in many societies. The songs are frozen under the spell of copyright protection and become the property of right-holders who are mainly interested in profits, not in any form of local cultural life. This is problematic because *raï* music and similar forms of music in non-Western societies are – or to some extent were – essential components of their social and cultural life. The elimination of these cultural forms deprives societies of essential resources.

For Third World countries the commercialization of their intellectual and creative commons is a cynical nightmare. Noam Chomsky argues on intellectual property rights ‘that American companies stand to gain \$61 billion a year from the Third World if U.S. protectionist demands are met . . . at a cost to the South that will dwarf the current huge flow of debt service from South to North’ (Chomsky, 1993: 3). A substantial part from what the South pays the North for using intellectual property rights concerns rights to cultural ‘products’. Transnational cultural industries try to find as many outlets as possible, also in non-Western countries, for the cultural ‘products’ to which they hold the rights. Among the most important products are music, films and television sitcoms. In order to reach their goals they will push away works of art which are of local origin. Krister Malm and Roger Wallis experienced this on Trinidad. ‘The view generally expressed by musicians and others in our 1987–8 interviews was that the share of local music in the media was as low as 15–20 per cent except during the carnival season’ (Malm and Wallis, 1992: 78). Probably the percentage of 15–20 percent local music will now, 10 years after the research by Krister Malm and Roger Wallis, be even lower. It is clear that much more research should be done in order to get a firm grip on the takeover of cultural life in the non-Western countries by the big transnational cultural industries.

The TRIPs agreement and the other worldwide free trade and investment agreements mark a clear historical demarcation in the global control of information and impose, according to John Frow (1996: 89), a definition of intellectual property rights directly disadvantageous to Third World countries. Cees Hamelink adds to this remark:

The GATT rules have been fixed to suit the most powerful trading parties. In the issue area of intellectual property protection the conventional type of multilateral cooperation was unsatisfactory to most players. Developing countries and IPR industries wanted a different

arrangement. This evolved under the auspices of the GATT and was incorporated into the Uruguay Trade Round accord. The new trade-based practice that now emerges is likely to mainly benefit the corporate IPR traders. (Hamelink, 1994b: 266)

Another economic consequence for Third World countries is the fact that the transnational industries need thousands of hours of music, films and theatrical entertainment and miles of images and texts. With the worldwide liberalization of telecommunication operators there are a growing number of outlets which must be filled with 'content'. This means that cultural industries try to buy rights to music, images, etc. everywhere in the world. Also on this issue not enough knowledge is available. Questions to be studied are among others: Where do those developments find their peaks? In what proportions? How are those processes taking place? What are the consequences for local artistic life? An important concern regarding intellectual property rights in non-Western cultures refers to the questions which contributions to culture should be rewarded. James Boyle describes a contradiction which usually does not get enough attention:

The author concept stands as a gate through which one must pass in order to acquire intellectual property rights. At the moment, this is a gate that tends disproportionately to favour the developed countries' contributions to world science and culture. Curare, batik, myths, and the dance 'lambada' flow out of developing countries, unprotected by intellectual property rights, while Prozac, Levis, Grisham, and the movie Lambada! flow in – protected by a suite of intellectual property laws, which in turn are backed by the threat of trade sanctions. (Boyle, 1996: 124–8)

Jutta Ströter-Bender gives an example in the area of design:

For western designers the whole universe of decorations and images of artists from the Third World constitute an inexhaustible reservoir by which they serve themselves shameless and for sure without adequate payment to the source of their 'inspiration'. (Ströter-Bender, 1995: 45)

It is obvious that more research should be done to get a clearer picture of the harm that is done to cultures of Third World countries.

How complicated and at the same time how frightening this issue may turn out to be is shown by the example presented by the Indian theatre director Rustom Bharucha.

*One of the unfortunate developments of cultural tourism has been the influx of fabricated rituals within the cultures of those rituals. It is bad enough that a ritual from India, for example, is travestied in the West, but it is worse when this ritual loses its significance in India itself. The practitioners of many traditional dances and rituals in India no longer perform for the gods; they perform for tourists, research scholars and 'experts'. In payment for their performance, the actors no longer receive *prasad* or the blessings of gods – they get money and, at times, nothing at all. After all, there is no 'copyright' on traditional performance. So many of them have been videotaped without any acknowledgement or payment to the performers involved. (Bharucha, 1993: 37)*

Later in this article the discussion focuses on granting collective rights to works which have not been created by individual authors or composers. This debate has lingered on for several decades already.

This leads to yet another concern about the position of Third World countries in the matter of intellectual property rights, and specifically rights to music, theatre, audiovisual creations, texts, images, etc. As we have seen in the example of rai music, the Western concept of intellectual property rights is a foreign notion in many parts of the world. It produces a confusing set of contradictions. Ronald Bettig (1996: 213–19) reminds us that traditionally ‘Asian authors and artists have viewed the copying of their works as an honour.’ The Western concept of individual authors’ rights or copyrights undermines extremely valuable cultural patterns. How this works out and what kind of resistance is being developed should be studied in more detail concerning the different regions of the world and the varied settings of the cultural life of societies. An interesting illustration of foreign intervention comes from Japan, where changes had to be made in copyright legislation because existing laws did not provide a sufficiently long protection to Western right-holders: ‘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.’²⁰ A cultural difference, a different opinion about how long rights should hold, has been interpreted as ‘piracy’. One may wonder why Japan did conform in the end to the American demands. Specially interesting is what the arguments for and against in Japan itself have been, and whether other countries have suffered comparable infringements on their copyright cultures.

It is doubtful whether legislation against piracy works in countries where individual intellectual property rights are a foreign notion. Richard Barnet and John Cavanagh observe,

But such laws work only as well as local culture permits. In many parts of the world the tradition is that music belongs to the community, and the edict to treat a song as a piece of property is greeted by ordinary people with puzzlement and anger. (Barnet and Cavanagh, 1994: 142)

Krister Malm and Roger Wallis refer to their government spokesperson in Jamaica, who could see no simple means of redressing the problem.

There are many difficulties. What is a folk song? What is the correct arrangement, and who owns it? It's difficult to put the WIPO Tunis Model Law into practice. . . . Any functioning music copyright legislation for works which are protected by the terms of, say, the Berne or the Universal copyright conventions, presupposes the existence of functioning registers of works and copyright holders. This is a major problem in any country with a large amount of musical creative activity where copyright is not institutionalised. (Malm and Wallis, 1992: 59)

At a conference on the cultural industries in the Eastern European countries in transition (Moscow, June 1993), the Finnish researcher Vesa Kurkela presented a paper titled ‘Piracy as Innovation in Post-Communist Popular Music. The Cultural Meaning of Unauthorized Copying Revised’. He started his presentation with the common idea that many people in the Western world seem to share concerning intellectual property rights.

As everybody may know, unauthorised copying is a bad thing in all music business. It can be claimed with good reason that piracy also prevents the development of the local record

industry. It is no wonder that there are various activities carried out by multinational music industry and national copyright organisations to fight against it. . . . There are, however, at least two different forms of unauthorised copying and, accordingly, two different meanings of the term piracy. The first is the most common – it refers to the kind of business making of which the multi-nationals are mostly afraid: unauthorised copying and distribution of global megahits to wide audiences. The second meaning however has often been forgotten. With the aid of cheap analogue cassette technology many local music makers especially in poor countries can produce and circulate their own music and even give birth to new interesting popular genres. (Kurkela, 1993)

During the Communist period in Eastern European countries musical innovation could take place by unauthorized copying and this continues to happen this way. Moreover, it

. . . is important to note the very function of unauthorised copies here: the cassettes are not primarily produced for making money. The main purpose is promotion. With the aid of pirates local dance bands and artists can get more fame among local audiences and, accordingly, more gigs and other public appearances. (Kurkela, 1993)

Two questions are answered by the observations of Vesa Kurkela. First, by unauthorized copying musicians become well known, they are getting performances, and this makes it possible for them to earn a living. Otherwise, only one or two famous artists would get richer and only the copyrighted music produced by strong cultural industries would be disseminated. The basic condition is of course that there is enough demand for live music. Second, it is often argued that copyright is necessary to stimulate artists (and other inventors) to create, as discussed earlier. However surprising this may be, the contrary may also happen. The unauthorized copying may produce a lively cultural climate in which innovation is a natural result. One may even imagine that such an open cultural climate enhances a greater freedom of communication. It is interesting to note that Western advocates for strong copyright laws and practices always present the argument that it is in the self-interest of non-Western countries to fight piracy. Bonnie Richardson, spokeswoman of the MPAA, stated:

It is not just an issue of other countries having to protect American intellectual property; it is also fundamentally of interest to local legitimate video-stores, local legitimate cinemas, local producers of songs and films. There is a community of local interests too that are hurt badly by piracy.²¹

The observations by Vesa Kurkela and by Krister Malm and Roger Wallis may make very clear that it is more complicated. The pressures on poorer countries to fight piracy brings them into a situation in which they have to spend many resources for the enforcement of intellectual property rights instead of the enforcement of other laws which are perhaps more important for the development of their economic, social and cultural life (Cohen Jehoram et al., 1996: 44).

For Third World countries it must have come as a surprise that their intellectual commons would be brought under an international treaty by which they are hindered to develop their own policies in this sensitive field. Friedl Weiss gives an overview of the struggle between the North and the South:

Although there is considerable antecedent and multilateral treaty practice on industrial and intellectual property rights (IIPRs), the subject matter, as is well known, became a matter for multilateral negotiations in the Uruguay Round only upon the insistence of industrially advanced countries (IACs), especially the United States. Developing countries (DCs) were at first extremely reluctant to enter into such negotiations as there was scarcely any common ground between them and IACs, in economic philosophy, objectives or regulatory tradition. Leading DCs, for instance, considered it inappropriate to establish within the framework of the GATT any new rules and disciplines pertaining to standards and principles concerning the availability, scope and use of intellectual property rights. . . . [As a consequence] they emphatically rejected any idea of integrating the TRIPS Agreement into the GATT itself which, they claimed, played only a peripheral role in this area precisely because substantive issues of IPRs are not germane to international trade. On the other hand, DCs were content with the integration of substantive standards of the major IPR treaties into the TRIPS Agreement. In the end the deadlock in IPR negotiations was overcome through a combination of allowing DCs and LDCs more transitional time for achieving higher standards of IPR protection and of concessions in other areas, notably textiles and apparel trade. (Friedl Weiss, cited in Cohen Jehoram et al., 1996: 8–9)

More research is needed to establish what the essential considerations were, and still are, for Third World countries where intellectual property rights in the cultural domain are concerned. In *The Challenge to the South*, a report written under the chairship of the former president of Tanzania, Julius Nyerere, bitter words were spoken about what would later become TRIPs:

The objective clearly is to install a system that would oblige developing countries to restructure their national laws so as to accommodate the needs and interests of the North. This initiative seeks to expand the scope of the system governing intellectual property rights, extend the lifetime of the granted privileges, widen the geographical area where these privileges can be exercised, and ease restrictions on the use of granted rights. (Nyerere, 1990: 254–5)

Our Creative Diversity, the 1996 report of UNESCO and the UN's World Commission on Culture and Development, suggests that a better balance should be found.

The GATT accord, through its Trade Related Intellectual Property (TRIPs) agreement, has caused a subtle reorientation of copyright away from the author towards a trade-oriented perspective. One challenge will be to maintain the balance between interests of countries exporting copyright and those of countries that import it, especially in the developing world. Defending the legitimate interests of the latter, while difficult, should be pursued through the establishment of adequate protection. (Pérez de Cuéllar, 1996: 244)

In many non-Western societies, as we have seen, the notion of individual authors does not exist. In order to prevent their artistic cultures being misused the idea of collective rights has been brought forward. In *Our Creative Diversity* this is elaborated: 'traditional cultural groups possess intellectual property rights *as groups*. This leads to the radical idea that there can be an intermediary sphere of intellectual property rights between individual rights and the (national or international) public domain' (Pérez de Cuéllar, 1996: 196). This raises the difficult question about what and who needs protection. 'The simple notion provided by an imagined primeval cultural source is obviously inadequate here: the Navajo rug, for instance, contains influences which can be

traced, though Mexico and Spain, to North Africa' (Pérez de Cuéllar, 1996: 196).

The Commission thinks that it is more promising to suggest:

... that the word 'folklore' should be applied to living creative traditions shaped by powerful ties to the past. It is also been pointed out that 'intellectual property' is perhaps not the right juridical concept to be used at all. A case can be made for a new concept based on ideas inherent in traditional social rules. This might be more constructive than trying to make the forms of protection fit within a framework which was never designed for them and where the existing users and developers of copyright notions resist strenuously any such development. (Pérez de Cuéllar, 1996: 196)

Krister Malm describes how in 1996, the year in which *Our Creative Diversity* was published, the question of international copyright protection of folklore was put once again on the world political agenda by a number of Third World governments, this time in the context of the preparations for the WTO meeting which took place in Geneva in January 1997. 'The move to get the issue onto the agenda of the WTO meeting failed', he reports. 'Again the failure was due to resistance from powerful industrialised countries and the culture industries to any introduction of "collective" or "cultural property" rights into the present system of intellectual and industrial property rights' (Malm, 1998: 26–9). With the support of many countries, the decision had been made that a meeting organized jointly by UNESCO and WIPO in Phuket, Thailand, in April 1997 should take place. At this meeting there was a great consensus among the participants, particularly between the Third World countries, about the wish that an effective international legal instrument should be prepared, adopted and enforced. The American and British delegates did not agree at all. Understandably, as the world's biggest entertainment industries are found in their countries. Krister Malm reports that tension rose

... when the U.S. delegate said that since most of the folklore that was commercially exploited was U.S. folklore and third world countries would have to pay a lot of money to the U.S. if an international convention should come about. The Indian lawyer Mr. Purim answered that that was already the case with existing conventions and by the way all U.S. folklore except the Amerindian one was imported to the U.S. from Europe, Africa and other countries. Thus the money should go to the original owners of that folklore. (Malm, 1998: 26–9)

In April 1998, Krister Malm noticed that nothing thus far had come out of the Phuket meeting and his expectations that collective rights would be taken as a serious issue by the Western countries in the near future were not very high (Malm, 1998).

The Abolition of Copyright

Although it started quite modestly, as a system to remunerate creative artists and industrial inventors, it has evolved into one of the biggest commercial resources in the 21st century.²² Authors' rights, neighbouring rights, trademarks and other forms of intellectual property protection continue to expand enormously. It is time to reconsider the whole concept of intellectual property

and to bring it back to more normal proportions. One may even ask whether it should be abolished altogether?

Although it is nearly impossible to imagine what the consequences may be of this last option, it should be debated. Only then might it be possible to discover anew what kind of safeguards are needed for the construction of new knowledge and creativity and what options are available for the persons who are fabricating this, the persons we call artists and inventors.

The individualistic approach to artistic creativity and to the generation of knowledge is, as argued earlier, largely based on a romantic concept of authorship. The reality, however, is that artistic creations and new scientific and technical knowledge evolve through the use of the cultural heritage that already exists. The reality is also, that future discoveries and works of art need a broad public domain to draw ideas, insights and inspiration from. We must be aware that the private appropriation of culture and science takes place under neoliberal, capitalist and oligopolistic conditions. It enlarges the gap between haves and have-nots in the world, and this happens in fields which are decisive for social, cultural and economic development in the 21st century: knowledge and creativity.

Moreover, the arts are decisive for the development of people's cultural identity, which is a human right as well. Democracy can develop only if debate and exchange of ideas, sentiments and feelings are possible on all levels of human expression. This is exactly what the arts are doing, whether it is in the form of entertainment, as the tonal, verbal, dramatic or visual package of the new media, or expressed by and in the more traditional art forms.

It is increasingly clear that concepts such as the common good, the intellectual and creative commons, fair use, the public domain and the public sphere are on the defence worldwide and often in danger of extinction. Specifically for democratic communication this has enormous consequences, as the Canadian copyright scholar and anthropologist Rosemary Coombe emphasizes. She offers the astute analysis that

... culture is not embedded in abstract concepts that we internalise, but in the materiality of signs and texts over which we struggle and the imprint of those struggles in consciousness. This ongoing negotiation and struggle over meaning is the essence of dialogic practice. Many interpretations of intellectual property laws quash dialogue by affirming the power of corporate actors to mono-logically control meaning by appealing to an abstract concept of property. Laws of intellectual property privilege mono-logic forms against dialogic practice and create significant power differentials between social actors engaged in hegemonic struggle. (Coombe, 1998: 86)

No less than the essence of our communication as human beings – the totality of words, the symbols and the tones which bear meaning in our societies – becomes a field which is controlled by the corporate holders of the property rights to those words, symbols, tones and their varieties of meanings.

The fact is that artists and Third World countries find themselves in a real dilemma. For the non-Western countries it is clear that the current TRIPS regime works against their interests as it allows the control over their domestic markets by foreign transnational cultural industries. However, if they choose

not to participate in the global system, they can expect severe trade and other sanctions. They are not in the position to formulate alternative ways to the exploitation of knowledge and creativity. They must follow the global system and by doing this, they will lose enormous amounts of money, considerable parts of their cultural heritage and the ability to build up their own knowledge infrastructures.

The sanctions artists may experience have yet another dimension. When they refuse to participate in the present oligopolistically driven intellectual property system, they will meet full-scale exploitation and misuse of their work, and will be completely unable to make a living from their creativity. However, in the end the current concentration of right-holders brings them in a rather dependent position, in which even rather famous artists are not certain to get a fair share. Just like the Third World countries, the creative artists face a situation in which whatever they choose to do is wrong.

What then to do when we share the conviction that knowledge and creativity should not be the private property of some individual right-holders, and certainly not on the huge scale which is expected in the near future? Let us allow ourselves the intellectual courage and flexibility of mind to imagine that we rid ourselves of the intellectual property system as it developed in the Western world during the last two centuries.

What would a different cultural reality based upon different premises look like? It might be that past and present cultural and scientific achievements would belong once again to the public domain. Situated within the common good, the creations of the past and the present would be used for the development of the contemporary artistic and scientific life. Herewith the building blocks for the future of culture and science would be laid, provided that the products of the human mind are not privately appropriated. As argued later, this different reality might give artists in Western and non-Western countries alike better remunerations.

Better Remuneration for More Artists

It may seem contradictory to claim that it is to the advantage of the average artist in Western and non-Western countries to abolish the copyright system. However, we must allow ourselves to become aware of the consequences of such a new, and for many people probably unexpected, situation. What we will see, then, is that the concentration of attention by cultural industries on only a handful of artists disappears. This means that a more normal situation reappears, namely that all artists have a chance to find a public, in their own local environment or even globally. A diversity of tastes could flourish, and numerous artists could make a reasonable living. The abolition of the system of authors' rights works positively for them!

The Internet provides the average artist with a global distribution channel which makes it possible to reach local audiences, but also publics or buyers worldwide. The advantage of the use of the new media is that artists may create their own networks of interested publics for their work. They are no longer dependent upon agents, record companies and other intermediaries that

monopolistically control global market access for many artists. Artists can sell their work themselves by using the Internet. They can also decide to use the Internet for promotion purposes only, and in this way create a market for their paintings, designs, films or for their live performances.

Some artists practise such worldwide contacts already. Esther Dyson believes that what she calls content providers will be paid for ancillary services or products, not for their works.

Maybe Steven King will post his books on the Internet – and start charging for readings. University professors publish works basically for free, and make money by teaching and by giving their institutions respectability with their names. Already some software companies are distributing software for free and charging for support. (Mann, 1998; Dyson, 1998)

Obviously, it is not yet possible to present a comprehensive system for the treatment of works of music, drama, theatre, opera, dance, literary texts, visual arts, design, films and videos and all the mixed formats in a more social and humane way. It is possible though to develop some initial premises. It took more than a century to develop and refine the current intellectual property regime; it would be too demanding to expect that it is possible to construct a radical different system in detail at short notice.

When we assume that works of art should be part of the public domain, the use of these works within the public domain should be free of charge. The public domain could be tentatively defined as the broad field in which the cultural life, education and public communication take place. When the private appropriation of the creative and the intellectual commons is ended and the present copyrights system is abolished, this does not necessarily imply that artists should not be remunerated. Societies continue to bear the responsibility for the future of their artistic and cultural life, and should provide artistic initiatives with proper remuneration. This could partly be done by taxing the cultural industries – in particular – but also all other enterprises which make substantial profits from the exploitation of artistic works. In the Manifesto of the Free Software Foundation Richard Stallman thinks along similar lines for the funding of the further development of software. He proposes a Software Tax, once copyright on software is abolished. ‘Suppose everyone who buys a computer has to pay x percent of the price as a software tax’ (Stallman, 1993). The collected money should go to the further development of software.

Also in the field of culture and the arts the collected money could be put in a special fund.²³ Three kind of receivers could be distinguished. One part of the money may be destined for the further development of the artistic life of the society concerned. This will be, together with subsidies and other financial means, an important source for the finance of artistic initiatives, institutions, festivals and the like in the fields of film, video, visual arts, design, music, dance, theatre, literature, photography, new media and so forth. The condition should be that those initiatives, institutes, festivals and so on are important for the flourishing of the artistic and cultural life of the society. In the case substantial profits will be made the contribution will go back to the fund which may use this money for other initiatives, institutes, festivals and so on. Obviously the money should go to all different artistic purposes as they present themselves in

the given society, and not only to those who are considered to have traditionally a 'high' cultural background. The basic idea should be a democratic one. This means that all different voices, images and imaginations should have the chance to present themselves and to be financially supported in case profit making does not (yet) belong to the possibilities. The second part of the collected money should go to individual artists in all the different fields of the arts. It will give them the possibility to receive a salary during the time needed to produce a work of art. This part of the money makes the development of artistic works possible outside the institutional framework of cultural initiatives, institutes, festivals and so on. Also here the basic principle is that care should be taken for the development of a broad range of artistic works in all the cultural fields. When it turns out that an artist is doing well on the market and makes substantial profits, then the money should go back to the fund, by which other artists may be funded. One may consider to give a bonus to artists who may find a broad audience or who are otherwise important for the cultural life. The third part of the money should be destined for the artistic life in non-Western countries. The reason why this must be done is not difficult to understand. It may be clear that most of the profits by the use of artistic materials will be made in Western countries, but many of the sources of those artistic creations have a non-Western origin. This should be recognized. Another reason is that those countries are suffering from enormous brain drains. It is important that artists have the chance to stay at home, can make a living in their local environment and may contribute to the artistic life of their societies without always being dependent upon Western producers and intermediaries. The proposal that artists can make a living from the direct sales of their work locally or globally via the Internet and may have substantial earnings from the fund which has been filled with money from the taxation on the use of artistic creations, as just described, is a viable alternative for the monopolistically controlled marketplace of copyrights. This is the case as long as the new communication media continue to have enough space for a truly free and democratic public domain. Only then can a rich diversity of artistic creations and performances be distributed to global audiences. This is an interesting perspective because such worldwide publics are large enough to provide many artists with a decent income.

Commercialization of the digital domain, however, offers cultural conglomerates the oligopolistic possibility to catch the eyes and the attention of publics worldwide and actually control the distribution channels for artistic works and activities, even more than is the case now. This will lead to the same situation as we deplore at this moment: cultural conglomerates are in a better position to promote a small number of artists, *their* artists. Therefore, everything possible should be done to prevent the distribution channels for film, theatre, music, visual arts, design, dance, new media and books being controlled by only a handful of cultural industrial corporations!

The public domain may see flourishing artistic cultures as a result of the abolition of copyrights, the levying of taxes on the use of artistic materials, the greater possibility which may follow for many artists to get their work known and thus to make a reasonable living, the opportunities which arise for publics

to be confronted with a considerable diversity of works of art, the use of the Internet by artists and the democratization of the channels of distribution for the diversity of artistic creations.

Respect instead of Moral Rights

An important dimension of the intellectual property regime – certainly within the continental European tradition – is the protection of *moral rights*. These rights protect the integrity of a work of art and science. However, if we recognize the romantic nature of the copyright concept, and if we are aware that the moral rights aspect freezes works of art in quite unnatural ways, the logical conclusion is that we get rid of moral rights as they have been defined in present legislation.

Often it is a cultural enrichment if an artist adds something to the work of a predecessor, as Shakespeare, Bach and thousands of other artists did and continue to do. It is also important to understand that the judgement about the merits of works of art was a matter of public debate. The public debated whether the use of former works of art was an enrichment or whether this should be considered misuse, nonsense, laziness or mere plagiarism.

The central question was and should be again whether works of art from past or present were used in a respectful manner. For the further development of every culture this is a core question. Of course, nobody can be extremely creative all the time and for the complete work he or she makes. Interesting is whether something has been added to former creations which enriches the cultural life from the present and the future.

It is a remarkable cultural loss that we have actually transferred the competence of judging the progress of cultural development in relation to the use of works by other artists (past and present) from the public debate to courts of law. This means nothing less than that we have created the absurd situation that the judges are our main cultural arbiters!

This is peculiar, because in this way it becomes the role of courts of law to criminalize forms of cultural adaptation. They have been given the task to stop processes of ongoing creativity. They are the guardians of the romantic concept of 'originality'. They sanction the privatization of important artistic expressions and by doing this they allow right-holders to erode the public discourse. This really amounts to an attack on the democratic value of free and undisturbed communication. The judges have a conservative role: 'what is, should stay the same' seems to be the adage. And who 'owns' a cultural expression, may continue to own it for decades. The cultural task of judges seems to amount to the punishment of cultural creativity as an infringement of copyright legislation. Actually we have handed over to the courts a cultural task – the judgement over cultural progress – which should, however, be brought back to the public domain.

It obviously does happen that an artist does not at all make a contribution to a former work of art, but copies it and pretends it is his or hers. In a vibrant civil society in which creativity gets the *respect* it deserves, such a form of plagiarism, when discovered, makes the artist look a petty crook. The chance

that the public uncovers the plagiarism is rather great because in this kind of society the public is involved in what is going on in the field of artistic creation.

We should also ask what the terrible harm is if someone can paint a sunflower as beautifully as Vincent van Gogh. Then we have two or three or four of those magnificent paintings instead of one. Isn't this a great joy? It is open to cultural debate whether those paintings are as beautiful as the ones Vincent van Gogh produced. Evidently, some extra sunflower paintings will have enormous consequences for the art markets, where originality and uniqueness create enormous monetary value.

The Future of Artistic Creativity

It may be obvious that by formulating some basic premises only a start is made for thinking about human artistic creativity in the future. We must get used to the idea that the world can function very well without the current intellectual property rights regime. When this property system is abolished, it is even possible that the commodification of cultural expressions is no longer a viable option. Whatever advantages an alternative system may offer, it will take time before it is commonly accepted that science and culture should not be a matter of private property any longer, but belong to society's public domain. Is it a waste of time to try to change the seemingly unchangeable? Intellectual property rights represent an extremely profitable business. Against this reality, can the almost complete privatization of the cultural common good be radically changed? I felt empowered by the observation the British writer John Berger made some years ago.

Nobody foresaw the speed with which the Soviet-system disintegrated and collapsed. It surprised everybody. Now everybody is assured from the global triumph of the so-called free economics and the new so-called economic liberalism. And perhaps it will fall as unexpectedly.²⁴

Notes

The author would like to thank Suzanne Capiou, Jaap Klazema, Krister Malm, Gerard Mom and Marieke van Schijndel for their most valuable and supportive comments during the preparation of this article.

1. Interview with Rob Scholte, *De Groene Amsterdammer* (18 December 1996).
2. *De Volkskrant* (4 February 1998).
3. 'Pour les photographes, la rue n'est plus libre de droits. La défense du droit d'auteur, comme celle du droit à l'image des propriétaires de bâtiments, entraîne des procès coûteux et rend difficiles les métiers de l'image et de l'édition' (Michel Guerrin and Emmanuel de Roux, *Le Monde*, 27 March 1999).
4. See also Hamelink (1994b: 122).
5. Cited in Lury (1993: 27).
6. Copyright being big business, the USA started to look at multilateral solutions for trade disputes on intellectual property protection, in any case what *they* considered as 'trade' disputes. Herman Cohen Jehoram suggests that the UN's World Intellectual Property Organization (WIPO) framework would have been the most obvious context. 'However, this has been dominated by the developing countries. Thus it became GATT' (Cohen Jehoram, 1993: 67). In this context, the Agreement on Trade Related Intellectual Properties (TRIPs) has been prepared.

7. 'Corbis, une collection de 25 millions de clichés' (*Le Monde*, 9 April 1999); 'Les Agences photographiques françaises pourraient changer de mains' (*Le Monde*, 9 April 1999).
8. Information provided by the art historian Gary Schwartz.
9. See symposium on the 'Struggle Against Piracy', organized by the Stichting Auteursrechtsmanifestaties, 11 December 1997, Amsterdam.
10. See final report on the Pan-African Colloquium on 'The Living and Working Conditions of Artists', Brazzaville, 20–23 July 1994: 14–15.
11. *International Herald Tribune* (19 February 1996).
12. *Le Monde* (30 October 1997).
13. M. Edwards, head of operations of IFPI, at the symposium on the 'Struggle Against Piracy', organized by the Stichting Auteursrechtsmanifestaties, 11 December 1997, Amsterdam.
14. Symposium on the 'Struggle Against Piracy', organized by the Stichting Auteursrechtsmanifestaties, 11 December 1997, Amsterdam.
15. Interview with Bonnie Richardson, MPAA, 2 December 1994.
16. John Gray claims: 'The truth is that free markets are creatures of state power. . . . In the absence of a strong state dedicated to a liberal economic programme, markets will inevitably be encumbered by a myriad of constraints and regulations. These will arise spontaneously, in response to specific social problems, not as elements in any grand design. . . . Encumbered markets are the norm in every society, whereas free markets are a product of artifice, design and political coercion. *Laissez-faire* must be centrally planned; regulated markets just happen. The free market is not, as New Right thinkers have imagined or claimed, a gift of social evolution. It is an end-product of social engineering and unyielding political will' (Gray, 1998: 17).
17. Interview with Atsen Ahua, April 1998.
18. A 19-year-old schoolboy has developed a program called Napster, which makes trading music files remarkably simple. With this software users can share songs they have, copy songs they want and search a gigantic database of music that grows every time a new user signs on. MP3 is a slow bike compared to the speed of Napster. The company built around the Napster program faces a lawsuit filed by the Recording Industry Association of America. But Napster executives insist that they are merely a conduit for sharing files and cannot control users' behavior. ('Simple Song-Swapping Program Rattles a Giant Record Industry', *International Herald Tribune*, 25 February 2000).
19. Interview with Bonnie Richardson, spokeswoman of the MPAA, 2 December 1994.
20. 'U.S. Takes Music-Piracy Charge Against Japan to WTO' (*International Herald Tribune*, 10/11 February 1996).
21. Interview with Bonnie Richardson, MPAA, 2 December 1994.
22. Actually, at the beginning the authors' right system had three pillars: the exploitation right; the moral right; and the idea that it would promote cultural development.
23. This idea of replacing the copyright system by a general tax which provides the funding for the future of artistic developments has been derived from a study Belgian researchers André Nayer and Suzanne Capiiau carried out for the European Community (Nayer and Capiiau, 1991).
24. Interview with John Berger on Dutch television, 27 March 1996.

Bibliography

- Amin, S. (1997) *Capitalism in the Age of Globalization*. London: Zed Books.
- Barnet, R and J. Cavanagh (1994) *Global Dreams. Imperial Corporations and the New World Order*. New York: Simon and Schuster.
- Bender, W. (1992) *La Musique africaine contemporaine. Sweet mother*. Paris: L'Harmattan.
- Bender, W. (1994) *Das Nigerphone Land – Afrikanische Musik braucht Keine Hilfe*, in Anna Maria Brandstetter (ed.) *Afrika hilft sich selbst*. Munster and Hamburg: LIT Verlag.
- Bettig, R.V. (1996) *Copyrighting Culture. The Political Economy of Intellectual Property*. Boulder, CO: Westview Press.
- Bharucha, R. (1993) *Theatre and the World. Performance and the Politics of Culture*. London and New York: Routledge.

- Boyle, J. (1992) 'A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading', *California Law Review* 80(6): 1529–30.
- Boyle, J. (1996) *Shamans, Software, and Spleens. Law and the Construction of the Information Society*. Cambridge, MA and London: Harvard University Press.
- Brabec, J. and T. Brabec (1994) *Music, Money and Success. The Insider's Guide to the Music Industry*. New York: Schirmer Books.
- Burnett, Robert (1996) *The Global Jukebox. The International Music Industry*. London and New York: Routledge.
- Burton, J. (ed.) (1986), *Cinema and Social Change. Conversations with Filmmakers*. Austin: University of Texas Press.
- Caughie, J. (ed.) (1996) *Theories of Authorship*. London: Routledge.
- Chomsky, N. (1993) 'Notes on Nafta', pp. 1–6 in Kristin Dawkins (ed.) *Nafta. The New Rules of Corporate Conquest*, Pamphlet Series. Westfield, NJ: Open Magazine.
- Cohen Jehoram, H., P. Keuchenius and L.M. Brownlee (eds) (1996) *Trade-Related Aspects of Copyright*. Deventer: Kluwer.
- Cohen Jehoram, H. (1993) *Kernpunten van het auteursrecht*. Nijmegen: Ars Aequi Libri.
- Commission of the European Communities (1995) *Green Paper. Copyright and Related Rights in the Information Society*, 19.07.1995 COM(95) 382 final. Brussels: Commission of the European Communities.
- Commission of the European Communities (1996) *Follow-Up to Green Paper on Copyright and Related Rights in the Information Society*, 20.11.1996 COM(96) 568 final. Brussels: Commission of the European Communities.
- Coombe, R.J. (1998) *The Cultural Life of Intellectual Properties. Authorship, Appropriation, and the Law*. Durham, NC and London: Duke University Press.
- Daoudi, B. and H. Miliiani (1996) *L'Aventure du raï. Musique et société*. Paris: Éditions du Seuil.
- Dyson, E. (1998) *Release 2.1. A Design for Living in the Digital Age*. New York: Broadway Books.
- Frow, J. (1996) 'Information as Gift and Commodity', *New Left Review* 219: 89–108.
- Gray, J. (1998) *False Dawn. The Delusions of Global Capitalism*. London: Granta Books.
- Hamelink, C.J. (1994a) *Trends in World Communication. On Disempowerment and Self-Empowerment*. Penang: Southbound/Third World Network.
- Hamelink, C.J. (1994b) *The Politics of World Communication*. London: Sage.
- Jaquet, Janine (1997) 'Cornering Creativity', *The Nation* 17 March.
- Koopmans, T. (1991) 'Mini-Monopolies', pp. 454–5 in T. Koopmans (ed.) *Juridisch stippelwerk*. Deventer: Kluwer.
- Koopmans, T. (1994) 'Intellectuele eigendom, economie en politiek', *Informatierecht/AMI* 6(June–July): 107–11.
- Kurkela, V. (1993) 'Piracy as Innovation in Post-Communist Popular Music. The Cultural Meaning of Unauthorized Copying Revised', Moscow.
- Litman, J. (1992) 'Copyright and Information Policy', *Law and Contemporary Problems* 55(2).
- Lury, C. (1993) *Cultural Rights. Technology, Legality and Personality*. London: Routledge.
- Malm, K. (1998) 'Copyright and the Protection of Intellectual Property in Traditional Music', *Music, Media, Multiculture*. Stockholm: Musikaliska akademien.
- Malm, K. and R. Wallis (1992) *Media Policy and Music Activity*. London and New York: Routledge.
- Mann, C. (1998) 'Who Will Own Your Next Good Idea?', *The Atlantic Monthly* September.
- Mazziotti, N. (1996) *La industria de la telenovela. La producción de ficción en America latina*. Buenos Aires, Barcelona and Mexico: Paidós.
- Mosco, V. (1993) 'Free Trade in Communication. Building a World Business Order', pp. 193–209 in K. Nordenstreng and H. Schiller (eds) *Beyond National Sovereignty. International Communication in the 1990s*. Norwood, NJ: Ablex.
- Mowlana, H. (1993) *New Global Order and Cultural Ecology*, pp. 394–417 in K. Nordenstreng and H. Schiller (eds) *Beyond National Sovereignty. International Communication in the 1990s*. Norwood, NJ: Ablex.
- Mowlana, H. (1997) *Global Information and World Communication*. London: Sage.
- Nayer, A. and S. Capiou (1991) *Un statut pour les artistes. Dossier documentaire et propositions*. Brussels: Communauté Française de Belgique/CERP.
- Newton, K.M. (1988) *Twentieth-Century Literary Theory. A Reader*. London: Macmillan.

- Nordenstreng, K. and H. Schiller (eds) (1993) *Beyond National Sovereignty: International Communication in the 1990s*. Norwood, NJ: Ablex.
- Nyerere, J.K. (1990) *The Challenge to the South. The Report of the South Commission*. Oxford: Oxford University Press.
- Pérez de Cuéllar, J. (1996) *Our Creative Diversity: Report of the World Commission on Culture and Development*. Paris: UNESCO.
- Raghavan, C. (1990) *Recolonization. GATT, the Uruguay Round and the Third World*. London and Penang: Zed Books/Third World Network.
- Renner, J. (1994) *Der Fall Berlusconi. Rechte Politik und Mediendiktatur*. Göttingen: Verlag Die Werkstatt.
- Schneier-Madanes, G. (ed.) (1995) *L'Amérique Latine et ses télévisions. Du local au mondial*. Paris: Anthropos.
- Shiva, V. (1995) *Captive Minds, Captive Lives. Ethics, Ecology and Patents on Life*. Dehra Dun: Research Foundation for Science, Technology and Natural Resources.
- Shiva, V. (1997) *Biopiracy. The Plunder of Nature and Knowledge*. Boston, MA: South End Press.
- Shuman, M. (1994) *Towards a Global Village. International Community Development Initiatives*. London and Boulder, CO: Pluto Press.
- Simon, E. (1994) 'The Integration of Intellectual Property and Trade Policy', paper presented at the Alai Conference, Geneva, 27–28 June.
- Smiers, J. (1998) *État des lieux de la création en Europe. Le tisse culturel déchiré*. Paris: L'Harmattan.
- Spoor, J.H. (1990) *De gestage groei van merk, werk en uitvinding*. Zwolle: Tjeenk Willink.
- Stallman, R. (1993) *The GNU Manifesto*. Free Software Foundation.
- Sterling, B. (1992) *The Hacker Crackdown. Law and Disorder on the Electronic Frontier*. London: Penguin.
- Ströter-Bender, J. (1995) *L'Art contemporain dans les pays du 'Tiers-monde'*. Paris: L'Harmattan.
- Venturelli, S. (1997) 'Prospects for Human Rights in the Political and Regulatory Design of the Information Society', pp. 61–74 in Jan Servaes and Rico Lie (eds) *Media and Politics in Transition. Cultural Identity in the Age of Globalization*. Leuven and Amersfoort: Acco.
- Vink, N. (1988) *The Telenovela and Emancipation. A Study on TV and Social Change in Brazil*. Amsterdam: Royal Tropical Institute.
- Webster, F. (1995) *Theories of the Information Society*. London and New York: Routledge.
- Westenbrink, B.N. (1996) *Juridische aspecten van het Internet*. Amsterdam: Otto Cramwinckel.

Joost Smiers is director of the Centre of Research of the Utrecht School of the Arts, the Netherlands, and visiting professor at the Department of World Arts and Cultures at the UCLA, Los Angeles. His most recent book is titled *Rough Weather. Essays on the Social and Cultural Conditions for the Arts in Europe in the 1990s* (published in Dutch and in French). His present research focuses on the consequences of world free trade, globalization and new communication technologies for the arts in different parts of the world.

Address Hogeschool voor de Kunsten Utrecht, Postbus 1520, 3500 BM Utrecht, The Netherlands. [email: joost.smiers@central.hku.nl]