

Visions of the Information Society

Information wants to be free



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Summary

Much of the discourse surrounding the 'Information Society' is inadequate for developing a deeper understanding of this society and the role of information in it, because it assumes either that information is only now taking a central role in society, or that the social and economic changes currently being experienced are the inevitable consequences of new information technologies. In fact, information and communication have always been at the core of human society, and while technology is playing a role as *catalyst*, the true dynamics are much more complex.

In this paper we explore the role of information (and of *communication*, to which it is inextricably linked) as the central element of two basic pillars of all societies: **the means by which we encourage and promote creativity and innovation**, and **the means by which we build and sustain social and political interactions and institutions**. After reviewing historical trends and current concerns in relation to both, we conclude that the two are coming into conflict, which could have serious consequences for the future.

For the first pillar a core question for every society has been how to cultivate and reward the creative spirit while at the same time ensuring that the fruits of that creativity are available for all of society. First emerging in industrial capitalist societies of the eighteenth and nineteenth centuries, and more recently codified in international agreements, intellectual property rights (IPR) are at the core of a system intended to strike a balance between private ownership and public use of information. At their essence, IPRs are an economic tool, granting inventors, authors and publishers limited monopolies to exploit their creations before they are released into the public domain, where they are freely available for use by all.

The second role of information is the role it plays in the shaping and operation of the social and political institutions that govern societies. Key issues here are the rights people have in relation to accessing, using and communicating information and knowledge. Among these are free speech, freedom of the press, freedom of association and the right to privacy, all of which underpin other rights by freeing information from the barriers and constraints of secrecy, by stimulating transparency and the open exchange of ideas, and in some cases to limit the freedom to access certain information that leads to a diminution of other rights. While the roots can be traced further back, key moments in the industrialized world of the eighteenth and nineteenth centuries once again played a role by establishing the framework for representative democracy, which cannot exist without the communication rights and freedoms that enable a vigorous public sphere.

From roughly the middle of the twentieth century the production and reproduction of information became 'turbo-charged'. Innovation followed innovation, each posing new challenges to the delicate balancing mechanisms worked out in previous centuries. New technologies and new media appeared and, facilitated by the advent of digitization, began to converge. The media proliferated and rose in sophistication: publishing, cinema, music, radio, television, video, DVDs, the Internet; new technologies mixing with old and adding to the value of copyright and the economic influence of the media. At the same time, the new media technologies also exposed new vulnerabilities for industry, making it increasingly easy to copy and distribute content and thus increasingly difficult to prevent copyright violation.

Rise of copyright industries

But the changes were not only technological and the same period has also been marked by the rediscovery of the ideology of the unfettered markets and globalization, and the dominance of global media and communication corporations. Inevitably the rules and regulations governing copyright were swept into this vortex of growth. The copyright industries sought and obtained the extension of their monopolies in two ways: by having the length of time they could exercise those monopolies extended, and by standardizing international copyright regimes at levels beneficial to the main global corporations located in industrialized countries. The latter involved moving much of the responsibility for international regimes out of the World Intellectual Property Organization (WIPO) and the UN Conference on Trade and Development (UNCTAD) and into the World Trade Organization (WTO) in the form of the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The transfer of responsibility to the WTO had a number of other benefits for the global copyright industries, including giving them access to the WTO's powerful international enforcement procedures and very significant penalties.

The battle is by no means over yet. Copyright industries have not succeeded in every endeavour and a significant lobby has emerged around sustaining the creative potential of the Internet, the highest prize, against a wide range of efforts to impose onerous copyright and other restrictions in order to maximise short-term commercial gain.

The public sphere, information rights and the media

During the same half century, the media have adopted an increasingly important public role. While the public sphere is comprised of many non-media forums, the media are increasingly important and are one of modern society's most important institutions, exercising influence in virtually all aspects of social and political life as one of the primary ways by which we learn about and interact with the world and with each other.

During the immediate post Second World War period, the international climate was conducive to the internationalization of human rights, including information, communication and cultural rights. While not without setbacks and exceptions, the period saw a general decline in the political control of the public sphere and a rise in individual and collective freedoms. However, by the 1970s other forces came into play, with technology once again taking the role of catalyst and enabler. During the last few decades liberalization and private ownership of the media has become the dominant model.

In the United States and countries which had traditionally adopted private ownership, liberalization has gradually eroded both public service obligations and restrictions on concentration of ownership and cross-ownership of media. By the 1980s Brazil, Argentina and Mexico all had greater concentration of ownership of the media than the United States, where three national networks accounted for over ninety per cent of viewership.

In the European Union, liberalization was accompanied by a decline in the public service media and an increasing presence of private media. The mixed model remains, but there is a notable slide in the direction of a minimally regulated market-based model.

In much of the rest of the world, including the global South and Eastern Europe, early aspirations of a public service model were dropped in favour of a predominantly private sector model, although often with direct or indirect government control.

At the international level, portable technologies facilitated the prising open of new markets for the video and recorded music industries. Satellite broadcasting and the Internet continued this trend of expanding global markets for media products. Meanwhile, the convergence of media and the rise of cross-ownership in the United States, Europe and Japan enabled the emergence of a handful of multimedia giants with access to capital and to economies of scale and scope that allowed them to dominate these global markets. Also at the international level the extra-territorial nature of much global electronic media (including satellite television and the Internet), and the inability to reach any agreement on their regulation, have left few policy options available to governments wanting, for example, to support the development of national media. There is a growing governance vacuum in which governments are excluded and market studies are the only form of public consultation.

A current balance sheet

In recent decades, the balance of IPRs has tilted in favour of private ownership—perhaps beyond a level which might be regarded as required as an incentive—with significant economic, cultural and educational consequences that threaten development and have implications for ongoing innovation. The understanding of copyright has shifted from its founding idea of granting a monopoly right tolerated by the public as a reward and to encourage creativity, to one where copyright is an asset held virtually in perpetuity. Concern for balance between private ownership of intellectual property and the public domain has all but disappeared from the mainstream debate.

In relation to the public sphere and information rights, concentration of ownership and cross-ownership have resulted in economies of scale and helped optimize profits, but this has been accompanied by reduced diversity, limited cultural specificity, and fewer real choices as all content is subjugated to commercial imperatives. Beyond this, however, we also see the spectre of a more intimate convergence of media and

economic interests and reduced checks and balances on the media, matters of serious concern, since they are at the very foundation of representative democracy.

More significantly, we argue that a further characteristic is appearing that sets the current era apart from the past and that may have major consequences for the future: the two pillars of social norms on information—copyright and the public sphere—are increasingly coming into conflict. The depth and breadth of the copyright regime has reached such a point that it is not only questionable from an economic and development perspective, can also be perceived as carrying the risk of undermining the public sphere, and hence the system of representative democracy.

Our conclusions and proposals for the way forward cover both long-term goals and a series of practical actions. The World Summit on the Information Society (WSIS), organized by ITU under the aegis of the United Nations (to be held in Geneva in 2003 and Tunis in 2005¹) has a role to play in both.

As a long-term goal, WSIS can be the platform from which to launch a comprehensive review of copyright with the goal of realigning it with its intended purpose of striking a balance between rewarding creativity and ensuring that information and knowledge circulate freely for the good of all. Second, WSIS can be the platform from which to launch a declaration on the public sphere and information and communication rights.

For short-term action, we propose a number of practical initiatives that could be put forward by WSIS as a contribution to democratising copyright and sustaining and expanding the public sphere.

1 Introduction

At one level, the label ‘Information Society’ only very poorly encapsulates the essence of an era. For information is to be found at the core of all societies, everywhere and throughout time. It is difficult to conceive of meaning itself without at the same time evoking information. The capacity to fix ideas in information is a *sine qua non* not just of all societies but even of individual social existence.

At another level, most users unconsciously believe they understand what Information Society means. They see it as derivative of ‘information technologies’ or more recently of ‘information and communication technologies’ (ICT). It is the era in which ICTs have become a major driving force in social and economic change, so much so that the entire epoch derives its nomenclature from it. Just as the ‘industrial society’ was defined by the technology of heavy industry and manufacture, the Information Society is characterized by the technology of information and communication.

Neither, however, achieves a satisfactory definitional level. The first fails for the obvious reason that it is too abstract and general—the concept of the information society is vacuous if information is everywhere and always at the centre of social development. The second—technological determinism: the idea that successive technologies compel society to mould itself in their image, driven by inexorable internal imperatives—has long been unacceptable as a theory of social and economic change. It may be a useful descriptive shorthand for what appears on the surface and is thus probably adequate for many practical actors in the Information Society—but it does not proffer the needed deeper understanding of the dynamics of this society and of the role of information in it.

In this paper, we elaborate an argument concerning some critical functions of information in the Information Society. These functions are not *derived* from ICTs, though ICTs do have a key part to play in the story, in their proper role as *enablers* and *catalysts*. These functions are also linked inextricably to *communication*, for (paralleling the shift in usage from IT to ICT) information *per se* lacks a social dynamic until activated by communication. Thus we depart from the conventional approach and displace technologies from the starring role. In so doing, we can bring into play more fundamental roles of information in society, and thereby instil some historical depth into the notion of the Information Society.

It might be simpler to announce that our focus here is, on the one hand, intellectual property rights (IPRs) (the ownership, reward and dissemination structure of creativity); and on the other, the public sphere, and information and communication rights (norms governing the role of information and communication in political institutions and forums), and on their relationship—for this is what we will end up talking about. But all the prejudices wrapped around these terms would immediately surface, quickly lining us up across the current battlefield of the information society.

Instead, a short historical scene-setting detour will remind us that despite ongoing struggles and differences, all sides at least claim to be aiming for the same Information Society—a creative, equitable, democratic polity and society, with justice and freedom for all. History might throw into relief our commonalities, before we revisit our differences.

2 Two pillars of the information society

Our lives are surrounded by a taken-for-granted, apparently limitless, stockpile of knowledge. We find it in everything from daily life and advanced scientific, social and engineering feats, to the relatively orderly, open and peaceful existence a few have the privilege of living in and the rest of us aspire to. All these embody human information and knowledge accumulated layer upon layer over generations and eons. The strata in this geology of human insight are demarcated by great events, bursts of creativity and explosions of knowledge generation still clearly visible today; but the great bulk is composed of an accrual of incremental improvements, tiny acts of practical, social and mental creativity achieved amid and despite lives busy with the practical chores of existence.

Creative ideas and their use are infinitely reproducible; they do not wear out. And the more people use them, the better, since each user gains at no loss to another. They thus have what economists call the character of *non-rival public goods*. But they do not come from nowhere—no idea is entirely original, or even largely so.

The most astounding breakthrough depends hugely on all that goes before it, not just in content but in the instruments for expression and conception. And each is also fashioned within, and extrudes from, the specific context and experience of the time and the author, who adds the creative spark. But once a good idea is let loose on the world it cannot easily be forced back into the bottle. It can spread by word of mouth, in written form, and be put to good use by demonstrating technique, by fashioning tools, by putting it into action, by using it to build effective social and political movements and structures. It can be suppressed or locked away for a time. But only in exceptional cases, the most extreme being the destruction of an entire civilization, can ideas and knowledge be eliminated altogether. Even then, history shows them arising again from the ashes, nurtured by humanity's common needs and drawing on the deepest recesses of ancient shared knowledge.

Distinctions must be made within the huge body of humanly generated knowledge, lines drawn in different places in different societies. Two types of knowledge are of concern to us here:

- Information and knowledge used in the material reproduction of our world, its application to concrete human needs; and **specifically the means by which we encourage and promote the flow of human creativity and innovation** that in turn constantly recreates and transforms our material world;
- Information and knowledge used in constructing and sustaining social and political institutions, and in how we organize ourselves into relationships, including the relations *between* people that govern the differential access of each to the material world. In particular, we are concerned with the role of information and knowledge in **how we build and sustain fair, equitable and democratic social and political interactions, forums and institutions.**

Each is constituted by and concerned with knowledge; the first in cultivating and rewarding the creative spirit in producing knowledge for material reproduction; the second through the privileged role of knowledge and information in creating and sustaining our social and political existence.

The former is destined for the economic arena and the arrangements made there regarding access and use; while the latter is destined for the a social and institutional context. But each is of such importance to society that immense effort has historically been devoted to codifying and legislating for them, a necessary process, but one that has also tended to obscure their simple and basic rationale behind walls of legal volumes and legislative and court proceeding. *The means by which each of these uses of knowledge is governed and organized, the specific regime adopted in each type of society, is what we call the two pillars of the information society.*

Below we consider each in turn, briefly reviewing its genesis and then its provenance in industrial society today.

Cultivating creativity and enabling use

We can state the core problem in this sphere as follows: Given how easily knowledge can flow when released upon the world, and given that knowledge is fully valorised only when it is applied for general use, the issue is how to ensure a balance between on the one hand encouraging and nurturing the creation of ideas; and on the other, ensuring the fruits of such creativity are maximised for all of society.

Certainly, individuals, groups or even entire societies have often conspired together to keep their ideas secret, whilst extracting excessive benefits from others in return for the products.² But at the same time, there arises in parallel a recognition that general well-being is best served by binding agreements whereby knowledge becomes available for all to use, and the creators of that knowledge are rewarded—in addition to the great human pleasure of creativity itself—with the material means to continue these efforts. In some simple societies where material well-being is shared anyhow, an additional reward is perhaps enhanced status and standing in the community. But in others, material rewards are necessary, in recognition of the contribution made and recompense for the effort devoted to it.

The solution of each society reflects its basic organizing principles. In industrial capitalism of the eighteenth and nineteenth centuries in Europe and the United States, the system became known as intellectual property rights (IPR) and reflected the recently asserted private ownership of the productive system. In parallel to granting individuals exclusive access to material property, there emerged a system in which ideas were classed as a form of property, and monopoly rights for their use were granted to their creators. Yet it soon became evident that rights associated with ideas would, of necessity, have to be quite different from those

associated with material goods. One issue was the simple reproducibility and hence immortality of ideas—they do not wear out, and their inherent value is undiminished through replication of use. This posed problems for the enforcement of such a right. However, a related but deeper issue was the notion of *perpetual* control over an idea that would enable the ‘owner’ to continue indefinitely to extract private gain for its use, or to arbitrarily limit the general social benefit. Apart from moral objections to such an idea, the constraints it would impose on general creativity in society were clear.

As early as 1710, the English Parliament passed the Statute of Anne, the first copyright law, the intent of which was to restrict the length of time publishers could exercise monopoly control over published works, initially to fourteen years.³ This put an end to the ancient and lucrative publishers’ monopoly over the works of Shakespeare, and indeed much of public knowledge, and put them in the public domain, that area in which everyone has the right to access and use ideas and their expression.

Thus very early on, the ultimate destiny of ideas in the public domain, where they were available to all for use, was recognized. The balance became a question of determining the length, depth and scope of such monopoly rights that would adequately reward creators while ensuring maximal use for the benefit of society.⁴ But additional safeguards also came into being: carefully circumstanced exemptions from copyright were permitted as ‘fair dealing’ and ‘fair use’, designed to allow immediate limited and partial access for educational, scientific and research purposes.

Thus copyright, the IPR of most interest to us here, granted a monopoly right over the use of a literary work, but for a fixed period only after which the work would enter the public domain.⁵ The creator or owner could grant others that right in return for an economic reward, but only for a time. It should be noted also that from the outset, copyright was not an inalienable right: it could, and very often was, sold by the author, sometimes even before the work was produced.

Copyright did not immediately catch on a mass scale. In the United States, between the enactment of their law in 1790 and 1799, 13,000 titles were published, but only 556 copyrights were filed.⁶ Only gradually were derivative rights established requiring permission for instance for translation of a book into another language, or the rendering of a novel into a play. And the emergence of IPR regimes within countries did not automatically mean the application of similar rights between national jurisdictions or to nationals of other jurisdictions, since IPRs have always been used by countries to further their own economic interests.

But there was pressure to harmonize, especially between countries at similar levels of development. Fear of widespread copying of new inventions and subsequent exploitation in other countries led to foreign exhibitors pulling out of an international inventor’s show in Vienna in the mid-1870s. Artists, writers and performers faced a similar problem leading to the *Berne Convention for the Protection of Literary and Artistic Works* of 1886 creating the framework for creators in one country to pursue their rights under the national law of another.

During this part of history, the most notably reluctant country in the granting of such rights to non-nationals was the United States. Between 1790 and 1861, arguing the need to import technology, patent fees for foreigners were higher than for nationals (until 1836 by a multiple of ten). Until 1891, copyright protection was afforded only to US citizens. Other restrictions remained in place, for instance regarding moral rights of authors and mandatory printing on US typesets, ultimately until 1989 when the US finally signed the Berne Convention.

Nevertheless, by the middle of the last century, the building blocks of an IPR regime were firmly in place in powerful nations, incidentally covering their colonial acquisitions, and were codified in national law and a set of binding international Conventions. Gradually, these were rooted into the United Nations body of institutions.

An important general lesson emerges from this potted history.⁷ Countries have always and everywhere pursued IPR regimes to suit their own technological and industrial development and interests, but over time have seen the benefits of cooperating in building international regimes. **Within these, however, very considerable flexibility was permitted, by mutual consent and interest, to allow the tailoring of a regime to the specific development circumstances of each country.**⁸

Through this period, copyright and IPRs began from a relatively small kernel, encompassing only a fraction of output for individual areas of creative activity, only gradually extending to include transposition between different types of activity.

Building and sustaining the public sphere and information rights

The second role of information is the key part it plays in shaping and operating the social and political institutions that govern societies. Key issues are the rights and responsibilities people have in relation to accessing, using and communicating information and knowledge, within and beyond the economic sphere governed by IPRs. Such communication rights underpin other rights by liberating information from the barriers and constraints of secrecy, by stimulating open exchange of ideas and transparency, and indeed in some cases by limiting freedom to access information that leads to a diminution of other rights. At the very heart is the *public sphere*, that area in which people and society get to develop and exercise political freedoms and decisions.

Again, different societies have found different ways of interpreting and supporting the rights and responsibilities of social and political discourse, for instance through religious, humanist or democratic prisms. Encoding and enforcing these rights and obligations vary greatly, from informal taboo through to harsh repression for transgression. From demagoguery to participative democracy, information—its suppression or liberation—plays a central role.

From the late eighteenth century on—a key landmark being the French Revolution of 1789—people in the industrialized world fought for and won a primarily political role for these rights, relating to the core political institution of representative democracy.

Representative democracy is premised on the notion that individuals are morally sovereign because they are endowed with reason. Put simply, everyone can make individual moral judgements since each is capable of rationally assessing the affects of their actions on others, and therefore, within generally shared social norms, to judge the difference between right and wrong in a social context. This gives people an *a priori* capacity to make and accept laws that govern their actions.

In representative democracy a small number are chosen by everyone to take decisions on their behalf. The selection procedure, elections, must of course be transparent and fair. But the real test of liberal democracy is whether the public has *ongoing access to information on the rationale and circumstances of decisions taken by those vested with such power*, and the capacity to understand and articulate views and beliefs on them. In principle, liberal democracy is thus not an abrogation of power by the people to their leaders for a given period of time. It demands continuous renewal, through general affirmation that decisions are being taken rationally on behalf of the general good, and stands only as long as the leaders can rationally defend their actions. The more thorough the understanding of the populace concerning these decisions, the deeper and more robust the democracy, and ultimately the more cohesive the society. Thus information, the rules governing access to it and its quality, plays an absolutely critical role in the ‘contract’ between elected leaders and the people.

The *public sphere* is the arena in which human interactions and deliberations are debated, and information is the common coin. It is not a single forum, but a multiplicity of contexts and mechanisms in which people debate and interact, to gain an understanding of matters of general concern and to participate in the democratic process through formulating views and conveying them to political leaders. The public sphere can encompass newspapers, television, ‘soap-box’ gatherings, public demonstrations, discussion, e-mail lists and a myriad other forms; it may be pursued directly by people or vicariously through surrogates such as journalists, commentators or writers—the form or even the intermediary is not important. Intrusion of sectional interests, including, amongst others, those of politicians in maintaining power and of industry (including the media industry) in maximising accumulation, can significantly distort the public sphere. But full participation has other prerequisites, such as formal and informal educational structures and the general capacity for informed reasoning.

Critical to the operation of the public sphere is the availability of extensive factual and other information in the public domain. Copyright is just one means by which information can be restricted, and Freedom of Information laws, for instance, are vital instruments for bringing information into the public domain that is most relevant to the public sphere. But much information in the public sphere is also covered by copyright, including virtually all media content.

The essence of the public sphere, then, is that it is where people openly and transparently debate on the basis that they can be *convinced by reason*, by the rationality of argumentation, and not by rhetorical appeals, or through suppression or distortion of information. Thus the argument is that deepening democracy, and

seeking the democratic ideal, is possible *only where there is continuous support for and extension of the public sphere and of the central role of information and the media within it.*

Freedom of information and of the media (then mainly the press) were early goals and early victories of our current representative form of democracy, and rightly held to underpin all other political rights. And almost all societies, though with quite some variation, recognize the need for a diverse range of regulation and laws governing information and the media, to ensure their continued capacity to fulfil these critical political functions including diversity and plurality of content, ready access and freedom of speech.⁹

As for IPRs, there was a degree of internationalization of these regulations and laws. But the demands in the early days were different, and not nearly as pressing as for IPRs. Political jurisdictions were confined within the nation state (unlike the circulation of goods and services), and the national media that pertained to a national public sphere were largely confined to, and controllable within, sovereign national borders.

By the early part of the twentieth century, rights and responsibilities governing information and media for the public sphere in representative democracies had grown based on broadly similar principles, with some variations. Among the most important was first the larger role of the private sector in the US and countries under its influence in the public sphere, and the emphasis on public service media in Europe and its zone of influence; and second the more absolute right to individual freedoms in the US, as compared to a balancing against collective freedoms in Europe.¹⁰ Most of the rest of the world existed under a variety of repressive colonial regimes, others based on strict hierarchical forms of governance or traditional communal codes.

The codification of norms and laws around the public sphere and information rights proceeded in parallel with those of copyright and IPRs generally. The public domain, information freely available to all, was clearly a key element of the public sphere, and an extension of IPRs always implied a further restriction of access and dissemination. But the public sphere and information rights rested on several other domains of regulation and rights.

3 The information revolution

From roughly the middle of the twentieth century on, the relatively slow pace of development of the previous couple of hundred years accelerated. The Second World War played an indirect role in both, but the directly important factors were the revolution in information technology and the emergence of globalized political and economic spheres. The production and reproduction of information became ‘turbo-charged’ in the second half of the century, with one innovation after another sending ripples and sometimes tidal waves crashing against the pillars of IPRs and the political institutions and public sphere. But underlying these very noticeable changes was a deeper realignment in these areas, driven by a different force, that of the rediscovery of the ideology of the unfettered market and the dominance of global corporations.

The era of copyright industries and shift to a trade paradigm

Through the latter half of the twentieth century, successive generations of technology offered huge opportunities and posed challenges to the copyright system. Over a few decades, the scene changed dramatically.

Industries extracting profits from copyright and the exclusive monopoly it gave over content grew rapidly, creating an infrastructure with global reach. The media by which people could access and use content proliferated and rose in sophistication: publishing, cinema, music, radio, television, video, DVDs, the Internet; new technologies mixing with old and adding to the value of copyright from one to the next. In later years, the application of copyright to computer software – not the most obvious legal mechanism, since patents would be more familiar to the world of industry, but the most lucrative from the point of view of the software industry – greatly added to the portfolio and scope of copyright industries. With the ongoing digitalisation of all media, full integration between media became possible, creating seamless low-cost content flows between them. By 1999, the copyright industries of print, film, television, radio, music and software had become gigantic, adding US\$460 billion in 1999 to the GDP of its powerhouse, the US, and generating almost US\$80 billion in exports.¹¹

These industries were also globalizing. Facilitated by technologies such as satellite and telecommunication, building on economies of scope and of scale, and wielding marketing strategies with enormous budgets, they spread throughout the world. Through aggressive expansion and purchasing, the copyright giants grew and

the lion's share of the expanding industry went to a few global players mostly based in the United States. The copyright industries achieved truly global reach, and in some domains, such as television, completely transcended national boundaries.

Yet the microelectronics revolution at the same time posed a challenge. Reproduction technology, such as photocopiers, tape recorders, VCRs and now CD, DVD writers and peer-to-peer Internet gave rise to a parallel industry of unauthorized copying, especially in Asia where the regimes were typically looser. The industry in industrialized countries believed it was costing them dearly in lost revenues, by 1995 calculated at over US\$ 4.2 billion in film, music, for the United States alone, and a further US\$10.2 billion in entertainment and business software.¹² Reproduction of music and television for home use also raised a set of complex legal and practical issues.

Inevitably, the rules and regulations governing copyright were swept into this vortex of growth.

Throughout this period, the industries, led by the film industry in the United States, exerted huge pressure to extend copyright. The US Congress began with a total period of fourteen years (as did the United Kingdom), and only changed the terms of copyright once during the first hundred years of copyright, and once again in the next fifty years. However, it has extended the terms of copyright eleven times over the past forty years.¹³ The most recent change in 1998 determined that copyright due to run out in 1999 would hold until 2019—unless of course it is extended further in the interim. Current copyright in the United States lasts for 70 years after the death of the author—raising the issue of the economic incentive for people who have been dead for decades!

But the pressure was also on to standardize regimes. From its origins, considerable national leeway had by general consent always been a central characteristic of international agreements. Until the 1970s, and largely based on work by WIPO and the United Nations Conference on Trade and Development (UNCTAD), a diversity of IPR forms were deployed that were adapted to the needs of different levels and trajectories of development. The rising power of these industries, however, boosted their ambitions, ardently pursued by their governments. The imposition of a single regime, along the lines of that obtaining in the wealthier countries, would reap windfall benefits for them.

A second goal of copyright industries was to tighten up compliance and enforcement of sanctions for copyright breaches. Under the various Conventions, brought together in WIPO in 1970, rights are enforced through national law, including civil or criminal penalties for violations.¹⁴ These were often slow and difficult procedures, and of course subject to the variations of national law.

A new international legal context presented itself: the General Agreement on Tariffs and Trade (GATT). Although ostensibly concerned solely with lowering trade barriers, powerful countries already had experience of stretching this remit as it suited them beyond what was acceptable in common sense.¹⁵ In this case, the United States in particular, but supported by many European countries, pushed through the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement as part of the Uruguay Round, beginning in 1986 and concluding in 1995. In effect, although still active in various ways in IPRs and now the Internet, WIPO, like so much of the UN system, has been gradually but inexorably sidelined.

Thus for the Copyright Industries, several problems were solved at once. First, no longer would they face democratic opposition within WIPO, which had a majority of countries from the South; and they could operate within the more amenable contractual environment of GATT (later WTO) where more powerful countries can capitalize more easily on their overwhelming economic superiority.¹⁶ Second, they could start with a 'clean slate' on IPRs, and with its ratchet-like effect gradually impose a single regime at a relatively high level, exerting continual pressure upwards. Third, and most important, copyright holders would now have at their disposal new and hugely powerful international enforcement procedures, with the authority and power to impose very significant penalties.

A few further points are worthy of mention in relation to copyright developments in the digital era: the extension of copyright to software and to databases, and the challenge posed by the Internet.

Copyright was not the most obvious choice of protection for software owners. Software products are critical tools of the knowledge economy, not only in terms of accessing and using information in a traditional manner, but also in their being at the heart of the networking approach to economics and society. But they differ significantly to most other copyrighted material in being primarily a business tool. While not being the

obvious candidate, copyright offers the strongest of all protection instruments to owners. Under TRIPS, software qualifies not only for copyright protection but in some countries for patent protection too. In fact, software is now probably the most heavily protected of all knowledge-based products.¹⁷

Databases traditionally had very limited copyright protection, unless the content compiled itself was covered, on the basis that a compilation (such as a telephone directory, in a famous case in the United States) is not an original creative expression. This has changed in the European Union (EU),¹⁸ and there is pressure to include it under TRIPS, under *sui generis* legislation, and is being considered in WIPO. *Sui Generis* means ‘of its own kind’ or ‘unique’. In 1996, the EU granted databases protection for up to 15 years, with further extensions should substantial change be made. Since database owners need only show they have made a “substantial investment” in developing the database, it is clearly investment and not creativity that is being protected. WIPO notes that:

“Concerns have been raised that, if not carefully balanced, a few form of protection might result in a monopoly position of information providers or otherwise be detrimental to the scientific, research and education sectors.”¹⁹

Were such a principle to be applied in other areas of copyright, the effects would be devastating. No longer would the goal be to achieve the best equilibrium for society between rewarding creativity and allowing free use; it would be a matter of how best to protect investment—spelling the end of copyright as it has existed up to now.

The challenge of the Internet, as the ultimate tool for unauthorized copying and distribution of digital material, is still ongoing. In one sense, the migration of content to the Internet might be seen as simple, a matter of carrying existing rights to the new environment. But the journey to new technologies has often transformed the nature of IPRs, and the Internet, the “world’s biggest copy machine” as it has been described, is the most far-reaching technology of all.²⁰ Peer-to-peer technologies, such as the original but now defunct Napster and its more sophisticated and less traceable successors, have again posed a problem for the copyright industries, who respond as always with litigation.

Although attempts by the United States and Europe in the mid 1990s to introduce copyright even for browsing the Web (on the basis that it must make a temporary copy) into the TRIPS agreement were thwarted by a coalition of telecommunication and Internet companies and libraries,²¹ related issues remain around ‘linking’ in Websites. In the United States and elsewhere, even simple links to another website (which are ‘publicly’ on the Web anyhow) have been found guilty of copyright infringement if they facilitate unauthorized access to copyrighted material—though this would appear not to be the case in Germany.²² But what is described as ‘deep-linking’ or ‘embedded linking’ is even more problematic in that it bypasses the home pages, and links to secondary material. When systematically used to gather information on a sustained basis, they are probably contravening the database law in the European Union, and in the United States cases have been taken relying on copyright, trespass, breach of contract, and common law misappropriation. Similar cases are taken against ‘framing’ of content from another website. In this case copyright protected material which may be legitimately accessed from one website is ‘framed’ by a different website possibly with different logos and advertising (though only in the RAM of the computer). In Germany this has been found to transgress the national copyright law.²³ The Internet is becoming a place in which one must tread lightly.

But at the same time, the migration to the Internet is forcing a rethink in copyright and commercial distribution, and the reverberations are by no means over. Many argue that the Internet is also a hugely powerful tool for creativity and that these constraints threaten to destroy with wellspring of innovation.

A significant lobby has emerged around sustaining the creative potential of the Internet against efforts by corporate and government interests to maximize short term commercial gain and impose onerous copyright and other restrictions. As Laurence Lessig puts it with reference to attempts by the copyright industries to impose a tight regime:

“Those who have thought seriously about these issues—on both the Left and the Right—have come to find common cause in restricting the power of yesterday to control the potential of tomorrow.”²⁴

The era of mass media: Public sphere versus the global media corporation

The public sphere, underpinned by rights associated with information and communication, had been established in representative democracies as a legitimate and essential part of the political landscape by the early twentieth century. Elsewhere there were varying degrees of freedom and rights in public discourse. Distinct public-service models grew and flourished in many countries; in others private sector interests played a much stronger role. But in all, an accepted role of government was to regulate and govern media to serve the public interest.

Revulsion at the horrors of the Second World War engendered a climate conducive to the internationalization of human rights, including information rights. Article 19 of the Universal Declaration of Human Rights²⁵ was far-reaching and fundamental for freedom of expression, and along with others such as Article 27 (1)²⁶ implied an obligation to maintain literacy rates and information infrastructure adequate to their realization. Indeed the climate was such that for some time thereafter an array of rights encompassing economic, social and cultural areas, both individual and collective, were endorsed internationally in a series of declarations, conventions and charters. The post-war decades saw a general decline in political control of the public sphere and information rights, and a rise in individual and collective freedoms as many countries emerged from colonialism and formally moved to a representative democratic model, though this evolution was and remains uneven.

By the 1970s, forces similar to those driving the evolution of IPRs began to take hold. Technology again played a major role as an enabler and catalyst. Some media had always been international, or a component had, such as press and news agencies, publishing and film. But the electronic media broke through national boundaries in the latter part of the century, with short-wave radio, satellite television and the general globalization of the media industry. Ease of reproduction, which facilitated illegal copying, at the same time enabled rapid roll-out and delivery of media products.

Private sector media were best placed, and equipped with the mindset, to exploit opportunities quickly. This model spread, with varying degrees of government regulation to support the public interest. With the fall of the Soviet Union and of centrally controlled regimes elsewhere, the limited cost and immediate freedom offered by the private sector model made it for many the only realistic choice. Suspicion of government involvement in media was also a factor. But in many countries, including of the former Soviet Union, the government in effect colludes with private sector media to thwart criticism and prevent the growth of a healthy public sphere.

Immense pressure was also brought to bear by the media industry on countries with a public service model to liberalize and privatize. With a failure of this model to evolve in new directions, the EU in the 1980s liberalized and established a pattern of a dual private/public service model. Pressure continues on the public service media, with the imposition of commercial imperatives across the various media.

With major new opportunities opened for private sector media, rapid expansion accompanied by concentration of ownership and convergence of different media ensued. Economies of scale and scope for those already with large domestic markets—primarily the US—led to a tighter grip on the global industry. Since the 1950s, the number of independent newspapers has been in steady decline, as with television where the private sector was the dominant player. By the 1980s, Brazil, Argentina and Mexico exhibited even higher degrees of concentration of ownership than the United States, where three national networks controlled over 90 per cent of viewership. With convergence, concentration transcended the different media and national boundaries, such that now a huge proportion of all media activities are controlled by a small number of global multi-media corporations.²⁷

Regulation and governance also changed rapidly. At the national level, public interest regulation, beginning with the United States but following elsewhere, was relaxed or partially eliminated. Ownership limits within media sectors and cross-ownership between sectors were eroded.²⁸

At the international level, powerful governments cleared the way inside and outside global institutions for their national media industries. A number of key battles were won. By the late 1960s, direct satellite broadcasting had become an issue because of its immunity from national legislation and regulation. The fears were various, some legitimate, regarding for instance cultural, economic and political dominance and sovereignty; others, less so, regarding the undermining of censorship. In 1972 the United Nations Educational Scientific and Cultural Organization (UNESCO) adopted a Declaration²⁹ on the issue, stressing

free flow but also prior consent. The Declaration was non-binding, and major European countries and the US refused to ratify. By 1974, UNESCO and WIPO oversaw a further convention, this time to ensure copyright protection for satellite signals, which entered into force in 1979 with full support of the major world powers.³⁰ The shift from sovereignty, free flow and consent to property and copyright was indicative of a major shift in the balance of power.

In effect, satellite television was left without national or international regulation, which has proven to be a Trojan Force for the liberalization of all television and for other media. The global satellite television giants of today are at the forefront of peddling the commercial model of media, and of hampering the emergence of a healthy public sphere.

An even larger issue was coming into view at the same time, what became known as “trade in cultural products” and in particular in the audio-visual sector. Both regional agreements, such as the North American Free Trade Agreement (NAFTA) and the EU, and the GATT/WTO covered cultural products like newspapers and magazines. In the WTO, a famous case taken by the US against Canada ruled that regulation or tax regimes that favoured national magazines could not be defended in the WTO on the grounds of supporting national culture.³¹ But the larger target of the United States media industries was the audio-visual sector, including television, radio and film. Only a clash with the EU, led by France, prevented their inclusion in the final Uruguay Round in the mid 1990s. This has come up again in respect of the WTO’s Doha Round, although with resistance from France and the EU. The inclusion of audio-visual services would not only open the door wide for global corporations to swallow up more and more national and regional media. It could also leave governments defenceless, with the threat of huge fines, against a final assault on the public sphere and its transformation into a shopping mall of bland—but highly profitable—media products.

Behind all these pressures is an issue that has yet to be confronted, the imbalance of sanctions available to trade agreements as compared to rights-based agreements. The battery of enforcement instruments available to the WTO is the strongest of any non-military international organization. It can, in theory and practice, reduce national economic sectors to penury, harnessing enormous sanctions against transgressors. By contrast, international human rights are usually non-binding. Where they are binding, they are virtually unenforceable. Where they are enforceable, the highest sanction is usually a public airing of the conclusions.

Article 19 of the Universal Declaration of Human Rights (UDHR) offers a perfect example.³² The UDHR is non-binding, but a very similar provision is included as Article 19 of the later International Covenant on Civil and Political Rights, which is binding on ratifying countries. But derogation from this article itself is permissible, and the means for enforcement are contained in an optional protocol. If a country has voluntarily acceded to all of these, a United Nations Economic and Social Council (ECOSOC) commission of eighteen experts can receive communications directly from citizens regarding alleged transgressions, and at the end of a slow and confidential procedure, the evidence may be published and the view of the commission made known. In practice, this has yet to be fully exercised.

The point, of course, is when these two bodies of law enter into conflict—one based on contract law and the other on international agreement—there is no contest. Although in theory WTO legislation should respect UN obligations, in practice there is no means to judge whether it does, and if it does not, nothing can be done about it. Thus in the case of the public sphere and information rights, there need be no great confrontation, no showdown, just a gradual undermining of human rights in international law through their inability to respond, a slow hollowing out of meaning until merely a shell remains.

All the while, the Internet was emerging, offering huge scope for supporting an open public sphere. Its early years in particular saw a flowering of interaction and activity in civil society and between NGOs—or at least amongst those who had access. The Internet can probably be credited as one of the major factors that has seen the emergence of an as yet nascent international civil society, concerned with global issues as well as local, and the links between the two.³³ The need to invent *ab initio* a governance structure for the Internet, during such a period of rapid change and instability and given its origins and nature, was bound to be contentious. Now this freedom of the Internet is under threat. On the one side is the growing commercialization of the Internet and the Web, including the power of search engines to include and exclude. Of greater concern are attempts by major Internet service providers such as AOL Time Warner and Microsoft to delineate and control access to various levels of the Internet,³⁴ and the surveillance and privacy issues emerging around the design of the new technical protocol IPv6.³⁵ On the other is the governance of the

Internet, which is spread across several diverse technical and on-technical organizations, the Internet Corporation for Assigned Names and Numbers (ICANN) being the most important. Registered as a non-profit Californian corporation under the ultimate control of the United States Commerce Department, the recent elimination of ‘at-large’ members from the board does not auger well for the future. Internet governance is ever in flux, still a contested territory in which the major industry and government powers are likely to have the strongest influence on the eventual outcome.

In sum, the second half of the twentieth century began well with the institution for the first time of significant and far-reaching international information rights at international level, and the emergence of public service models of media in explicit support of the public sphere and its role in representative democracy. But the environment shifted rapidly and drastically.

In global terms, the media became larger as a sector, more centralized and interrelated in terms of ownership, predominantly private-sector owned and market-oriented, more closely integrated in content. Direct government control fell in many places, but indirect control rose too, sometimes through unholy alliances with private media. Governance as a whole has moved from UN organizations towards trade-based and commercial regimes, or in some cases the absence of formal regulation leaving the field open to the most powerful players. The Internet remains challenging and fluid as a vibrant platform for creativity and freedom, and in terms of attempts at control by government and industry, but with recent shifts in the balance towards control.

By the end of the century the net effect on national media regimes was:

- Those countries traditionally with the US model have seen further concentration of ownership and cross-ownership, and lower levels of regulation in the public interest;
- The European model displaced in Europe by a mixed model, but still sliding in the direction of a market-based unregulated model;
- In many countries of the South, early aspirations of a public service model dropped in favour of a predominantly private sector model, with slight public interest regulation, and often with huge direct government control of both public and private media enterprises.

4 Threats and challenges

The last few decades have thus wrought huge changes in how society strives to achieve a balance between rewarding creativity and dissemination of ideas and information, and to build and sustain a space for public understanding and discourse on the political and social institutions by which we live. There have been positive and negative changes.

The dangers currently may be summarized as follows.

Copyright and that elusive balance

The monopoly given to copyright owners has been extended well beyond what might reasonably be regarded as offering an incentive to further intellectual creativity.³⁶ Under TRIPS, while patents expire twenty years after they are filed, copyright is enforced for fifty years after the death of the author, and for a total of fifty years in the case of a corporate owner—though a Commission set up by the UK Government noted that there is no clear economic rationale for copyright protection being so much longer than for patents.³⁷ Indeed, the very basis of such a rationale is persuasively disputed by both left³⁸ and right,³⁹ though obviously proposing different solutions.

Yet there is strong and sustained pressure to extend it. The United States and the EU who set the pace for copyright now give seventy years protection to owners, after death. It is only a slight exaggeration that the term of copyright (always retrospectively) is extended in the US every time Disney’s hold on Mickey Mouse is about to expire.⁴⁰

What is the practical result of these rolling extensions of copyright, apart from securing ever greater profits for the copyright holders, primarily multi-media corporations?

One issue is around the balance of trade, and the enormous sums flowing from developing countries—the copyright industries are, as indicated, hugely dominated by the US and Europe. But coupled with this is the impact on efforts to develop copyright industries. Some developing countries, such as India, have made

huge strides in the software—in 2001-02 worth over US\$10 billion of which US\$7.8 billion was exported⁴¹—and a copyright regime equivalent to that of their major markets in developed countries is, apart from the economics of it, politically essential. Similarly, Uruguay and Brazil in 1998 had respectively 6 per cent and 6.7 per cent of their value-added in copyright industries.⁴² But these are the exceptions and for the most part, developing countries lack the national infrastructure that is an essential prerequisite to developing a copyright industry. Thus, although a strong copyright regime may improve the prospects for a local industry, in the absence of other requirements the effect may simply be to channel more copyright payments to foreign industries. There is also the issue that most smaller countries would have to look outside anyhow to build an industry since their domestic markets would be too small to sustain one. In short, most developing countries are likely to end up considerably worse off with the imposition of an onerous copyright regime⁴³—which is of course why so many have opposed it.

A second related outcome is that the fruits of intellectual endeavour are more expensive than they need be. This is not just a matter of having to pay more for books, to see a video or film, or to listen to music—though for billions of poor people, this is the case.⁴⁴ Scientific and research information is also covered. There have been enormous rises in the costs of scientific journals, including online subscriptions, as these niche producers are swallowed up by the publishing giants.⁴⁵ A UNESCO report noted that universities in Africa, under severe financial strain due to the general economic problems, are struggling:

“Most of them can no longer afford to buy new books, and large proportions of periodical subscriptions have been cancelled. With a corresponding inability to switch to the new information technologies, African university libraries in particular, and African academics in general, face a dim future indeed.”⁴⁶

Further serious obstacles are presented, even to better funded universities, by having to obtain copyright clearance and pay royalties for materials needed by teachers and students integrated into their work. Education is a huge and growing business, and having monopoly control over key resources represents a major asset. TRIPS has effectively eliminated much of the flexibility that hitherto had existed in copyright and in IPRs generally,⁴⁷ thereby extending the value of these assets globally.

A further effect of the electronics revolution has been to exacerbate the tension between copyright owners and reproduction for ‘fair dealing’ and ‘fair use’, such as education, an issue carefully circumscribed under the Berne Treaty and balanced as an integral part of the copyright balance. These allow small scale, partial copying for non-commercial, research, educational and archival use. These by no means fulfil the needs of poorer countries, being far too restrictive,⁴⁸ but what is there hangs under a future threat in the digital era.

Precisely because digitization permits perfect unauthorized copying at low cost, the copyright industry is increasingly using encryption technology and other means to restrict access—but without preserving the ‘fair use’ in the move. In particular, ‘fair use’ includes rights to browse, share and make private copies without infringing copyright, though they require access to an authorized copy in the first place. Especially where Internet access is poor and on-line subscriptions unaffordable, the absence of specific measures to enable fair use can represent a serious practical obstacle. The WIPO Copyright Treaty (WCT) is also relevant here, which has been ratified by 39 countries and entered into force in 2002.⁴⁹ Article 11 spells out obligations to prevent the circumvention of encryption and other measures employed by copyright owners “in connection with the exercise of their rights under this Treaty or the Berne Convention... which are not authorized by the authors concerned or permitted in law”. Though the general principle of ‘fair use’ is carried into the Treaty, no explicit mention is made of facilitating ‘fair use’ in practice.

WIPO raises a related concern in this area, which is the tendency in digital content to establish a contractual basis for access:

“... increasingly, copyright works are not sold, in the way that a book or videocassette was sold in the past, but are licensed under certain terms and conditions of use. Our access to copyright works is increasingly governed by contract, which may impact on the applications of exceptions and limitations, the traditional checks and balances of the copyright system, aimed at preserving the rights of consumers and the public interest.”⁵⁰

The obstacles to establishing fair use in practice, in the context of encryption and narrow contractual access terms, could thus be insurmountable.

The UK Commission on IPRs notes:

“An important concern here is that developing countries will come under pressure, for instance in the context of bilateral agreements with developed countries, to accede to the WIPO Copyright treaty, or even to adopt stricter prohibitions against circumvention of technological protection systems and effectively thereby reducing the scope of traditional ‘fair use’ in digital media.”⁵¹

Whilst the Treaty permits countries to extend existing exceptions and limitations into the digital environment, or even to add new ones that “are appropriate in the digital network environment”,⁵² it is not automatic. It is in that gap between what is permissible and what is acted upon by governments, that bilateral pressures are most persuasive.

The 1998 US Digital Millennium Act, setting a powerful trend, goes even further. Under the WCT, thwarting encryption is outlawed only where copyright is concerned. In the United States, it is illegal even where copyright is not infringed. It is also worth noting that ‘technological protection’ is indefinite, with no stipulated time limit.

The EU’s database *sui generis* and copyright protection also has implications for such fair use. In both wealthy and poor countries, accessing databases—on everything from economic performance to meteorological trends to demographics statistics to research listings—are a standard part of the research process of almost every discipline. A strengthening of copyright on databases affects the cost, and this in turn has disproportionate impact on research activities in poorer countries—especially where commercial database developers believe they can maximize profits through high-priced low-volume packages. Although there are exceptions for educational and scientific use, these do not extend to other countries unless they reciprocate in legislation—which opens the door to database companies from outside and could even restrict even nationally generated information.

Then there is software. The software products for which copyright is most valuable are standard business and institutional software packages such as word-processing, spreadsheets, databases, web-browsers and the like, since these are most easily copied and have mass markets. Unauthorized copying is barely an issue in bespoke software applications. These are also the packages of most use to the less developed world, with smaller businesses, more limited availability of advanced ICT skills, and less sophisticated use of ICTs. The problem of unauthorized copying is, in fact greater in absolute terms, in developed countries where ICTs are virtually ubiquitous. But in poorer countries, unauthorized copying is probably the only option available to many users, and weak enforcement of limited copyright laws has undoubtedly been a major factor in disseminating these technologies. Inevitably, stronger protection and enforcement as in TRIPS would reduce access and use of these, limiting participation in the ‘knowledge economy’.

More recently an affordable alternative has arisen, in the form of free and open source software.⁵³ In light of this challenge, major software firms no doubt factor in the potential of unauthorized copying and sales to create a captive market for their products for the future. Given the alternative, they may be satisfied to see the use of their software by those who can ill afford to pay, since at some time in the future, many will be able to pay. Software companies already offer special pricing and dissemination policies to bring these into the paying net, even if at a very low level, in part for fear of a widespread move to open source.

Overall, it seems that the practice of copyright has deviated far from its stated intentions and origins in various conventions, treaties and national constitutions. The founding idea was to temporarily grant a monopoly right, tolerated by the public in order to reward and so sustain creativity and innovation, but with the promise of imminent return to the public sphere without excessive delay. In the meantime ‘fair use’ and ‘fair trading’ provide the basic minimum for scientific, educational and cultural use, essential if these areas are not to be impeded. The mood today is that copyright is an asset held in virtual perpetuity, with exceptions made in special cases as long as they do not unreasonably prejudice owners’ interests.⁵⁴

WIPO is a case in point, all the more unfortunate for being a UN organization. Its authoritative report quoted several times here on IPRs on the Internet avoids entirely discussion of the central principle of copyright to enter the public domain even where it explicitly raises the issue of the scope of copyright in the digital environment.⁵⁵ This probably does no more than face the facts: in practice, the length of copyright protection is so extensive that it is irrelevant to the digital environment. Throughout the report, rights seem to be

associated with owners, with the general public to gain access only by exception; and supporting trade seems to be the main goal. Consider the following statement on the WCT:

“... the goal of policy makers is to achieve an appropriate balance in the law, providing strong and effective rights, but within reasonable limits and with fair exceptions. If this effort is successful, the result should be a positive impact from all perspectives. Trade in copyrighted works, performances, phonograms and other protected objects will become a major element of global e-commerce, which will grow and thrive along with the value of the material that is traded. If rightsholders are secure in their ability to sell and license their property over the Internet, they will exploit this market fully and make more valuable works available through this medium. Appropriate limitations and exceptions will continue to safeguard public interest uses. The result will be a benefit to consumers, a benefit to rightsholders, a benefit to service providers, and a benefit to national cultures and economies—a true ‘win-win’ situation.”

Thus, the public interest is to be secured by appropriate limitations and exceptions, and presumably by trade, but not by entry into the public domain. Concern for a genuine balance is entirely lacking, replaced by a sense of almost generous sacrifice on the part of copyright owners regarding control of their assets in tightly controlled circumstances. Later on, in the context e-commerce, the report speaks of the need “to reassure intellectual property owners and commercial enterprises that their assets will be protected in an online environment”⁵⁶ and the importance in this regard of establishing an appropriate framework of intellectual property. But no mention is made of reassuring the general public that the copyrighted material will not be withheld from the public domain in perpetuity.

The last word goes to a UNESCO report, which summed up the situation overall:

“Copyright emerged as one of the most important means of regulating the international flow of ideas and knowledge-based products, and will be a central instrument for the knowledge industries of the twenty-first century. Those who control copyright have a significant advantage in the emerging, knowledge based global economy. The fact is that copyright is in the hands of the major industrialised nations and of the major multimedia corporations placing lower per capita income countries as well as smaller economies at a significant disadvantage.”⁵⁷

A threatened public sphere

In relation to the public sphere and information rights, current trends give rise in some respects to even more serious concerns since they are at the very foundation of representative democracy.

Above we noted that the end of the twentieth century saw the growing intrusion into the public sphere of information rendered into commodities and interactions mediated by the market, and the closure of opportunities to build a renewed and vibrant public sphere. We also saw the diminishing role of governments and UN organizations in the governance of media and communication. The rise of organizations such as WTO and ICANN can only point further in this direction.

What does this mean in practice? There are a number of areas of critical concern.

Concentration and centralization of ownership does offer the advantage of enabling economies of scale. However, such economies are not deployed in a manner that might optimise news and current affairs, educational or generally challenging content. Rather it is used to target the most lucrative audiences with programmes that can most easily be repackaged and disseminated to global markets – mainly entertainment of limited cultural specificity or interest. The key danger, however, is the reduction in diversity of programmes and of views available. The subjugation of content to commercial imperatives removes any incentive to challenge the status quo or to take risks. Rather it introduces a strong bias towards the entertainment value of all content, leading to the downgrading of news quality so evident in recent years. And this applies across the board in media. Cross-ownership of media, whereby different media are owned by a single corporate entity, tends to further reduce diversity and plurality, through further reducing the number of genuinely independent outlets and the greater sharing of content.

Private sector media also put an emphasis on advertising. Its thinly veiled but deeply ideological message of consumerism in itself has a corrosive cultural impact. Equally serious, the pressure of advertisers engenders a strong bias towards audiences with disposable income, largely ignoring those without. Especially in developing countries, this leads to a media for the wealthy.

Beyond these a further danger is in sight, quite a frightening prospect that hopefully will not proceed too far. This is the emergence in some countries of a more intimate convergence between the media and political and economic power. Already mentioned is apparent collusion between some government and private sector media, for instance in some former Soviet countries, often accompanied by intimidation. More worrying in some ways is the case of Italy, where the political leader is also the biggest media owner, and where despite assurances many believe he has used his media interests to gain power and deflect criticism. Another variation is seen in Venezuela where even the conservative *Economist* magazine has criticised media interests there for colluding with business in trying to overthrow the democratically elected government.⁵⁸ More subtle is the situation in the United Kingdom where the Labour Government is regularly accused by all sides of implementing a regulatory regime favouring News Corporation because of the enormous power it wields to affect public opinion there. This may be an example of where the media attains a certain threshold of power and influence at which the government can no longer regulate effectively for fear of the negative consequences on its electoral performance.

These point beyond cases of media or business influence, or even of a tacit alliance or coalescing of strategic interests. They are a much closer merging of media with political and economic interests. All are cases of an undermining of the public sphere, and of the partial or complete breakdown of the 'compact' between people and government, in the sense that serious and deliberate distortions are introduced by sectional interests into public discourse.

A most tragic demonstration in recent history of the influence of the media and its hijacking by political power—through in this case the medium in question was simply an arm of political power—was *Radio Milles Collines*. This was the station that incited genocide in Rwanda, and is regarded as having played a significant role in spreading the killing rapidly and widely. These were exceptional circumstances in which all checks and balances were absent. But the question might nevertheless be asked how different this is, in its impact, to media—ultimately for commercial reasons—which in a rich and powerful country incites or supports the government to go war with another. Is the only difference that the blood is shed on another soil? This too is a question of ensuring a healthy public sphere.

In terms of information and communication rights in the digital era, the situation is also precarious and getting worse. The attacks on New York and Washington in September 2001 and the response of the United States in declaring war on a globalized terrorist threat has set in train a series of efforts at both national and international levels to enact laws claiming to defend against terrorist attacks. They include curtailing hard won information and communication rights and greatly increasing digital surveillance. Little public debate has been the hallmark of many of these, rushed through in the context of a climate of fear, intolerance of dissent and polarisation of positions.

Growing antagonism between copyright and public sphere

There is a further characteristic emerging in the current era, one that casts the issues in a new light and which may have major consequences for the future. It also justifies the inclusion in the one paper of these two key social sets of rules around information.

What characterises the current era is that these two pillars of social norms on information—copyright and the public sphere—are *more and more coming into conflict*.

Whilst there has always been tension between the two, now they are reaching a point where one is directly pitted against the other. Specifically, the depth and breadth of the copyright regime, backed up by the power of the copyright industries, their governments and the WTO enforcement procedures, has reached the point where further expansion is not only highly questionable from an economic and development perspective, *it is also in danger of undermining the public sphere, and hence the system of representative democracy*. What is needed, if we are to serve the needs of less developed countries and to build further on democratic principles, is the restoration of a reasonable balance.

Up until now, they rarely directly confronted each other. Human rights and the public sphere were slowly carving out their domain, built on the struggles of people nationally and a deep desire for freedom of expression and social equity, and were given a major boost in the wake of the Second World War. Copyright has continually built outwards from its initial core concern with protecting authors and publishers of books, has broadened in scope to new media even including software, and extended to claim neighbouring rights and ever longer monopoly periods. At this point, copyright and the power of industry is such that it is eating not only into the potential future public domain in general, *but into that especially sensitive and important area of the public sphere and information rights.*

Put another way, a central requirement of the public sphere is that all people have equal and ready access to impartial information and analysis. This part of information, partly in the public domain but also partly within the restricted sphere of copyright information, is critical to the operation of a representative democracy and to social equity. However, copyright works in the other direction, restricting information. What is now happening is that, with the increasing commercialization of the media and the weakening of regulation in the public interest, more and more information that is critical to grease the wheels of the public sphere is copyrighted. And the copyright industries are not slow to maximise the value to be obtained from their rights to this information. This in turn means that access to information is more and more determined *by who can afford it; and the nature of the information itself is transformed to maximise the value and the profits to the producers.*

There is both a general point here and some specific clashes. The general point is that much of the raw material for the public sphere in the form of media content is being driven by its copyright value. But the specific skirmishes are also important. A few examples, from the United States which offers the largest case history portfolio in copyright, make the point:

- In 2001, Alice Randall went to publish a book called “The Wind Done Gone”. It was a parody of “Gone with the Wind” written from a slave’s perspective, and intended as a response to a book she feels has harmed generations of Americans. The storyline continues after the years covered in the book. The Mitchell’s trust, which owns the copyright, petitioned the court to prevent publication of Randall’s book. It claims that Randall’s book is an infringement of copyright since it would hinder their efforts to license more sequels to *Gone With the Wind*, despite the obvious parody.⁵⁹ Parody works via ridicule and is the classic speech of protest for oppressed peoples. The goal of the book, as well as being literary (it has been highly praised by many established writers who objected to the case being taken), was also political. The case was settled in October 2002, and publication continued—but the legal issue was not resolved.
- A second case related to music.⁶⁰ Roy Orbison’s song “Oh Pretty Woman” was parodied by a rap group called “2 Live Crew”, ridiculing racially the “whit-bred original” and the social implications of the lyrics. Before recording it they sought permission to use it but were refused. They went ahead anyhow, and were sued for copyright infringement. The group had the resources to fight it all the way to the Supreme Court. The issue again came to whether the social value of the parody, which is derived from shedding light on the earlier work in a creative manner, outweighs the loss of income to the copyright holder. The Supreme Court ruled that parody was not fair use, and the case was settled by the band agreeing a licence with the copyright owners.
- The third case demonstrates what happens in real life, to people lacking the resources to take legal action. A Professor at Michigan State University used various cartoons from a jazz magazine published in the 1940s to demonstrate an argument he was developing concerning sexism and racism of big band politics at that time. The magazine, *Down Beat*, however, declined to grant permission for their use. The reason given was that the drawings made the magazine “look bad”. Not having the resources to fight the case, he was forced to drop the research topic.
- The Irish band U2 sued a 1991 ‘audio-collage’ single of San Francisco band, *Negativland*. An obvious parody (the cover had a picture of a U2 spy plane, and the letters U2), it included 35 seconds of a U2 song, and samples of radio DJ Casey Kasem making disparaging comments about the band. Described in *Wired Magazine* as “innocuous and very funny”, you cannot judge for yourself as U2 sued on grounds of copyright and trademark violation. Faced with a massive bill, and under pressure from their minor label, the band settled and withdrew the single.⁶¹

The principle in all was whether ‘fair use’ would entitle the use of the material without the need for permission. In all, such ‘fair use’ was argued as contributing to artistic work and social or political commentary, and in none was ‘fair use’ accepted. The implication, though it is still being tested, is that copyright owners can withhold copyright to prevent political parody—a small but critical victory that if writ large would have major implications. Similar cases have also been successfully taken against the use of company logos by political activists, on the basis of breach of trademark law—again raising the question of the suppression of free speech and of dissenting opinions.

The other lesson, of course, is that taking a legal action against those without the resources to defend it is just as effective a form of censorship. It is not necessary to have the law on your side, only the lawyers.

The larger issue here for the public sphere is who defines culture and controls what it is. As Naomi Klein puts it:

“The underlying message is that culture is something that happens to you. You buy it in Virgin Megastore and Toys ‘R’ Us and rent it at Blockbuster Video. It is not something in which you participate, or to which you have a right to respond...

...the prevailing formula for copyright and trademark enforcement is a turf war over who is going to get to make art with the new technologies. And it seems that if you’re not on the team of a company large enough to control a significant part of the playing field, and can’t afford your very own team of lawyers, you don’t get to play”⁶²

Culture, and popular culture in particular, is a key driver of society’s creativity. It is the sphere in which we implicitly learn the parameters of who controls and what is acceptable. When that lesson is taken to the public sphere, its consequences are predictable. People, and especially young people, do not expect to participate, they do not feel they have a right to participate, and they do not participate.

5 Conclusion and proposals

This paper does not pretend to cover all the issues arising in building an equitable and sustainable information society. We are silent on the ‘digital divide’, and ICT technology has been introduced only as a catalyst, with no calls for ubiquitous dissemination. Rather we focus here on two major issues that we feel are neglected, sometimes even deliberately downplayed, but nevertheless go to the core of any information society.

Sometimes we hear that the biggest challenge facing the World Summit on the Information Society is the general downturn in the ICT sector that has led to a dearth of investment capital required to make a real difference. We dispute this. A huge difference can be made with very limited investment in the areas that concern us here. The real challenge is to confront the interests of the multinational corporations, and their powerful supporting governments, and somehow to convince them that these issues must be addressed for the future of all of us.

How can we develop a system that ensures a steady flow of creativity and innovation, and that maximizes the benefits for all of society?

How can we sustain and build ever stronger a public sphere with true freedom of information; where the powerful in society elected or otherwise can be held accountable for what they do; where a great diversity of ideas can circulate freely and without political or commercial bias; and be considered by people well-equipped to weigh them up and make rationale and equitable choices?

First steps to long-term goals

A growing number of people, NGOs and alliances believe that the very concept of copyright desperately needs fundamental transformation. This must be the long-term goal. But a first step can be taken.

1. **A review and realignment of copyright:** A thorough review is required to determine how to realign copyright with its intended purpose – not to protect assets of corporations but to strike a balance between rewarding and thus sustaining creativity, and getting information and knowledge out where it can be used to best effect, by everyone in society. Given the extraordinarily powerful vested interests in

government and in industry, this will face stiff opposition. In the long-term it must rely on the emergence of a movement in civil society allied with governments and certain sections of industry. The TRIPS agreements and WIPO Conventions are of central relevance here, and issues requiring consideration include the following:

- Whether development can be best encouraged through tailoring a diversity of copyright regimes to the different circumstances, rather than through uniformity;
- The duration of copyright owners' monopoly, including the possibility of variable lengths in different contexts;
- The extent and nature of 'fair-use' in the context of development needs and the public sphere;
- The special circumstances of the digital era, whose potential for creativity should be maximized, rather than restricted in the interests of copyright holders;
- Specific recognition and support for alternatives to copyright, with more open and collective ownership structures.

2. **A declaration on the public sphere and information and communication rights.** A key problem for the public sphere, as described here, is that the concept is not currently widely understood and recognized. It is clearly embedded, under various names and headings, in Constitutions and international agreements, and such notions as 'freedom of the press' and 'freedom of expression' are widely accepted. But the underlying rationale has dissipated, slowly eroded by the power of media, industry and governments. Individual rights may be left standing, but under current trends the overall right of the public to hold governments and the powerful accountable risks falling into disuse. In re-establishing the relevance of the public sphere, its protection against both political power and economic power must be clearly asserted.

The goal would be to bring some coherence to these matters in relation to their role in our democratic institutions and international cooperation.

But a declaration only lays the path for more definitive action. For these rights and the public sphere are coming under threat globally as part of the confrontation between contract based trade agreements with powerful instruments for enforcement, and UN agreement, largely unenforceable. An intergovernmental **UN treaty** might be one means to address this in the future. What must be achieved is a means to defend information and communication rights, and the public sphere, as more fundamental than those of trade and commerce.

The Protocol to the EU Treaty of Amsterdam protecting subsidies to public service media from accusations of market distortion is a small example of the kind of protection that could be afforded within free trade agreements.⁶³ Many more measures could be taken, including in communication and information rights

Practical actions

Much can also be done immediately at the practical level. The following is a list of possible measures. Many more would emerge if the environment seemed conducive to their acceptance and implementation.

5.1.1 Democratising copyright

Measures can be taken to democratise copyright, to reassert its accountability as a mechanism to serve society as a whole

1. **Promoting alternatives to copyright.** The Tokyo WSIS Declaration called for open source software to be "encouraged, as appropriate", watering down an earlier proposal in deference to the software giants. Given the huge economic and political resources that actively promote copyrighted software, unavailable to alternatives, and the strong evidence of their development benefits, they deserve at least active promotion by WSIS. A series of practical programmes to promote these alternatives, through education and information dissemination as well as practical and technical support, could have a major impact. They might also contribute to a rethink on the current concept of copyright, and the monopoly rights they confer on a tiny minority.
2. **Enhanced transparency and accountability of global copyright institutions.** The WTO and WIPO as the major copyright institutions should be more transparent and accountable. Very specific actions can

be designed in relation to this, without delay. This can be set alongside other calls for enhancing accountability of global governance structures, many emanating from within the institutions themselves.

5.1.2 Sustaining and expanding the public sphere

Given the many facets to the public sphere, a diverse set of proposals could be supported here.

3. **Monitor and tackle media concentration.** Effective international measures are needed to combat concentration of media ownership at a global level, for media with a global scope. Of special relevance are those media that escape national regulation, such as satellite television. At national level, too, the trend must also be addressed. A start would be to agree to systematically monitor developments, and their impact, especially in developing countries, perhaps in the form of an ‘index of the public sphere’. This could regularly examine and report on the health and vitality of the public sphere, using a composite index derived from data analysis and civil society consultative mechanisms.
4. **Support community and independent media:** Non-profit media, genuinely independent of government and of commercial interests already play a role, if a small one, in relation to enhancing diversity and plurality in the public sphere. Community media enable greater participation in and understanding of media, a critical aspect of the public sphere. Community and independent media faces regulatory obstacles in many countries as well as internationally. Support could be in the form of set-aside allocations of radio spectrum globally, regionally, nationally for television radio and other applications; or attaching conditions for commercial licences that would direct resources towards these media. Global public service media should be included here.⁶⁴
5. **An investment fund for the public sphere.** Several of the above could be funded through a tax collected on the use of the digital commons, in particular commercial satellite use of radio spectrum. This and analogous ideas have been suggested by various international commissions over the years.⁶⁵
6. **Tackling information surveillance, censorship and infringement of privacy.** Growing surveillance and censorship from government and industry is of concern, especially in relation to the Internet under the term ‘Internet Security’. The indications are that some countries see WSIS as an opportunity to further agendas that would curtail current rights, and institute new regimes of control. But others see WSIS as an opportunity to move forward: to reiterate the centrality of information rights, to scrutinise all proposed measures with a view to whether they might affect these rights, and to develop proposals for strengthening these rights. The latter tendency should be supported.

Is any of this likely to happen?

A sceptic might be forgiven for concluding that a few elements may be nudged forward here and there, some laudable aspirations may be found clothing token or pilot action—but that the potential for the Summit to do harm is currently greater. Though most of the above do not cost much money, they do take courage and commitment. In the end, proposals such as these will test the resolve of governments, and of civil society, in terms of whether we want to defend and build on our democratic structures, and leave a world to our children in which they can partake and benefit from the diversity of human creativity.

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- ¹ See: <http://www.itu.int/wsis/> for further information on the Summit.
- ² The secret of Chinese porcelain is a classic example of this.
- ³ Subtitled "An Act for the Encouragement of Learning", the Statute of Anne formally recognized certain rights of authors and publishers, but its real intention was to break the almost complete monopoly of the English book trade that has been exercised by the Stationers' Company of London for over 150 years. The law's most important contribution was to limit the length of time copyright could be exercised before the works entered the public domain. The law also restricted copyright holders' rights to printing, publishing and selling, thus preventing them from controlling the use of a work once published. The complete text of the Statute is at <http://www.copyrighthistory.com/anne.html>.
- ⁴ By stressing that the public domain was a necessary construct or adjunct of copyright is not to suggest that the principle of public access is unique to ideas or dependent on their unique characteristics. It has much in common with the idea of 'the commons', as applied to land and other public goods, which is driven by similar normative and economic principles. It should also be noted that the language used for copyright emphasised the moral right of authors to be compensated.
- ⁵ When devising the US Constitution, the authors had plenty of experience of IPRs to work with, and thus included the copyright and patent clause which permits Congress to secure authors a monopoly "for limited times".
- ⁶ Lawrence Lessig (2002) *The Future of Ideas* (New York: Vintage Books) page 106. It was only later that copyright came into force from the moment of creation, and unlike patents do not have to be filed.
- ⁷ UK Commission on Intellectual Property Rights (2002) *Integrating Intellectual Property Rights and Development Policy* (London) page 22. This Commission was set up by the UK Secretary of State for International Development in May 2001.
- ⁸ It was not until 1970 that WIPO was formed – as a framework for twenty-one different Conventions. WIPO became part of the UN System in 1974.
- ⁹ Seán Ó Siochrú, Bruce Girard & Amy Mahan (2002) *Global Media Governance: A Beginner's Guide* (Rowman & Littlefield).
- ¹⁰ Of course, this form of national representative democracy was not extended to the colonies, where quite different standards, often tortuously reasoned, were imposed.
- ¹¹ UK Commission on IPRs, *op. cit.* note 6, page 105.
- ¹² Mansell, Robin & Uta Wehn (1998) *Knowledge Societies: Information Technology for Sustainable Development* (Oxford University Press) page 213. There are problems of measurements that probably lead to overestimation. < <http://www.sussex.ac.uk/spru/ink/knowledge.html>>
- ¹³ Lessig, *op. cit.* note 4, page 197.
- ¹⁴ When a dispute arises between states, there is a provision in some cases for settlement in the International Court of Justice – a long and often inconclusive process.
- ¹⁵ Strictly speaking, the role for a trade organization to IPRs could be construed as very limited. Until the mid-1980s, GATT was concerned almost exclusively with lowering trade barriers to manufactured goods. The sole provisions relating to IPRs were designed to ensure that they could not be used illegitimately as non-tariff barriers to trade – for instance in terms of onerous or expensive 'marking requirements' for foreign goods. WIPO, on the other hand, was explicitly created to promote IPRs, and so was the natural terrain for further strengthening of IPRs sought by the copyright industries and their governments. The question arises, therefore, as to how IPRs ended up on the agenda of the GATT Uruguay Round.

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- ¹⁶ The 1967 Stockholm conference of the Berne Convention was an interesting case. A Protocol was produced there that would reduce the term of monopoly to 25 years with compulsory licensing for translations into local languages, and most controversially, for any protected use for educational, scientific or research purposes. But this was never ratified because developed and developing countries failed to reach a consensus. While developed countries could frustrate efforts of developing countries within the Berne Convention, the reverse could also happen, making GATT all the more attractive (UK Commission on IPRs, *op. cit.* note 6, page 110).
- ¹⁷ UK Commission on IPRs, *op. cit.* note 6, page 116.
- ¹⁸ EC Directive 96/9/EC, 11 March 1996 on the Legal Protection of Databases. The EU extends such protection to other countries only on a reciprocal basis. <<http://europa.eu.int/ISPO/infosoc/legreg/docs/969ec.html>>
- ¹⁹ WIPO (2002) *Intellectual Property Rights on the Internet: A Survey of Issues* (Geneva) page 54, note 157. WIPO commissioned five studies to assess the economic impact in developing countries and countries in transition. <<http://ecommerce.wipo.int/survey/index.html>>
- ²⁰ WIPO, *op. cit.* note 17, page 30.
- ²¹ Ó Siochrú, Girard & Mahan, *op. cit.* note 7, page 94.
- ²² WIPO, *op. cit.* note 17, page 51, note 140.
- ²³ These cases in WIPO, *op. cit.* note 17, page 52-3.
- ²⁴ Lessig, *op. cit.* note 4, page xvii.
- ²⁵ “Everyone has the right to freedom of opinion and expression: this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”
- ²⁶ “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in the scientific advancement of its benefits.”
- ²⁷ For details on ownership of US media, see the Colombia Journalism Review's *Who Owns What* website at <http://www.cjr.org/owners/index.asp>; for global concentration, see *Media Ownership Chart* at <<http://www.mediachannel.org/ownership/>>.
- ²⁸ The current situation of non-profit and community media differs according to the pre-existing model. In the private sector dominated model, support for non-profit and community media as exemplified by the PEG television model in the USA, was a key concession during the 1970s in the expansion of the industry. However, since the 1980s regulatory support has been chipped away. In Europe, such community-based media were slower in coming partly because of the public service media ethos, but have been slowly growing since the 1980s when liberalization began.
- ²⁹ Declaration on the Use of Satellite Broadcasting for the Free Flow of Information, the Spread of Education and Greater Cultural Exchange, adopted by the General Conference of UNESCO in 1972. See Ó Siochrú, Girard & Mahan, *op. cit.* note 7, page 75.
- ³⁰ Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974) administered by UNESCO jointly with ITO and WIPO.
- ³¹ WTO (1997) World Trade WT/DS31/R (Dispute Settlement – WTO Panel Cases to which Canada is a Party Canada - Certain Measures Concerning Periodicals) <http://www.dfait-maeci.gc.ca/tna-nac/wto_a-en.asp>.
- ³² Cees Hamelink (1994) *The Politics of World Communication* (London: Sage).
- ³³ See for instance Osvaldo León, Sally Burch & Eduardo Tamayo (2001) *Social Movements on the Net*, Agencia Latino Americana de Información (ALAI), Quito <<http://alainet.org>>.

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- ³⁴ For a discussion of potential constraints on the Internet see Lessig, *op. cit.* note 4.
- ³⁵ IPv6 is short for *Internet Protocol Version 6*, the next generation protocol designed by the IETF (Internet Engineering Task Force) to replace the current version Internet Protocol, IP Version 4. Initially conceived to tackle the huge growth of domain names and to improve technical efficiency, there are serious concerns that the huge volume of additional information IPv6 can carry on each message could be used to increase surveillance, enable commercial mining, and other uses.
- ³⁶ Greg Palast's reworking of a famous remark is apt: "As Isaac Newton would say now, 'If I see further, it is because I stand on the shoulders of giants too dumb to patent their discoveries'" – (2002) *The Best Democracy Money can Buy* (London: Pluto Press) page 66.
- ³⁷ UK Commission on IPRs, *op. cit.* note 6, page 19.
- ³⁸ See for instance: Eben Mogeln, 1999, 'Anarchism Triumphant: Free Software and the Death of Copyright' in *First Monday*, <http://emoglen.law.columbia.edu/my_pubs/anarchism.html> or Yochi Benkler 'Coase's Penguin, or Linux and the Nature of the Firm' <<http://www.benkler.org/CoasesPenguin.html>>
- ³⁹ For a recent review of pro-market arguments see Douglas Clement "Creation Myths: Does innovation require intellectual property rights?" in *Reason Online: Free Minds and Free Markets*, March 2003 <<http://reason.com/0303/fe.dc.creation.shtml>> or for a different approach William Landes and Richard A. Posner, 2002 *Indefinitely Renewable Copyright*, University of Chicago Law and Economics, Working Paper No. 154 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=319321>
- ⁴⁰ Lessig, *op. cit.* note 4, page 107.
- ⁴¹ UK Commission on IPRs, *op. cit.* note 6, page 107.
- ⁴² WIPO, *op. cit.* note 17, page 31.
- ⁴³ The UK Commission on IPRs (*op. cit.* note 6), concludes: "Many developing countries have had copyright protection for a long time but it has not proved sufficient to stimulate the growth of copyright-protected industries. Because most developing countries, particularly smaller ones, are overwhelmingly importers of copyrighted materials, and the main beneficiaries are therefore foreign rights holders, the operation of the copyright system as a whole may impose more costs than benefits for them" (page 13, Executive Summary).
- ⁴⁴ On film, it is not only copyright on the film itself, which tends to get its greatest use within a few years or even months. It is also the additional cost of copyright that filmmakers must pay for the use of very copyrighted image appearing anywhere in the film.
- ⁴⁵ UK Commission on IPRs, *op. cit.* note 6, page 122.
- ⁴⁶ UNESCO (1998) *World Information Report 1997/98*. (Paris: UNESCO), Chapter 3.
- ⁴⁷ "The Paris and Berne Conventions... allowed considerable flexibility in the design of IP regimes. With the advent of TRIPS, a large part of this flexibility has been removed. Countries can no longer follow the path adopted by Switzerland, Korea or Taiwan in their own development" (UK Commission on IPRs, *op. cit.* note 6, page 23).
- ⁴⁸ UK Commission on IPRs, *op. cit.* note 6, page 111. See also S. Ricketson (1987) *The Berne Convention for the Protection of Literary and Artistic Works: 1886 – 1986* (London: Kluwer) page 591, cited in UK Commission on IPRs.
- ⁴⁹ In December 1996, after the WIPO Diplomatic Conference, a new treaty was adopted: CRNR/DC/94 – WIPO Copyright Treaty <<http://www.wipo.org/eng/diplconf/distrib/94dc.htm>>. The 39 countries had become party to the agreement by January 15th 2003.
- ⁵⁰ WIPO, *op. cit.* note 17, page 41.
- ⁵¹ UK Commission on IPRs, *op. cit.* note 6, page 118.

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- ⁵² WIPO *op.cit.* note 44, Article 10.
- ⁵³ See for instance <<http://www.opensource.org/>> and <<http://www.fsf.org/>>. Open Source is not ‘cost-free’, but many believe that in the long-term its significantly lower costs, can be tailored to suit local needs, and raises the IT capacity nationally.
- ⁵⁴ The language is from the Berne Convention and TRIPS Agreement, Articles 9(2) and 13 respectively. The point is that this form of access was never intended as the primary means to secure the public interest, as it appears to have become. (See WIPO site, Intellectual Property Protection Treaties <<http://www.wipo.org/treaties/ip/berne/>>).
- ⁵⁵ WIPO, *op. cit.* note 17, pages 41-42.
- ⁵⁶ UNESCO, *op.cit.* note 41, page 164.
- ⁵⁷ UNESCO, *op.cit.* note 41, page 320, Chapter 23.
- ⁵⁸ In an editorial, the Economist wrote: “Devoid of a coherent programme beyond anti-Chavismo, the opposition relies too much on the newspapers and TV stations it owns to take the place of political parties.” Venezuela's Conflict: No end to the pain, The Economist, Feb 6 2003. Venezuela's media is dominated by the Cisneros family, one of Latin America's richest.
- ⁵⁹ <http://www.houghtonmifflinbooks.com/features/randall_url/>
- ⁶⁰ This and the next are taken from: Lydia Pallas Loren (2000) ‘The Purpose of Copyright’, *Open Spaces Quarterly*, February 7th. <<http://www.public.asu.edu/~dkarjala/publicdomain/Loren2-7-00.html>>
- ⁶¹ Colin Berry (1995) “The Letter U and the Numeral 2”, *Wired*, January. <http://www.wired.com/wired/archive/3.01/negativland_pr.html>.
- ⁶² Naomi Klein (2000) *No Logo* (London: Flamingo), pages 178 and 180.
- ⁶³ Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts: Protocol on the System of public broadcasting in the Member States. October 1997. <<http://www.europarl.eu.int/topics/treaty/pdf/amst-en.pdf>>
- ⁶⁴ See for instance three proposals for global public service television summarised in Reinhard Keune, “Towards a Global Public Sphere – A Future Role of International Television”, *The Global South* http://www.globalsouth.org/communication_information.htm
- ⁶⁵ For a review of the various funding options, see: Marie Thorndahl, (2003) *Financements alternatifs et société de l'Information*. (Pain pour le Prochain), Switzerland.