Chapter 8

Cultural diversity and the arts: Contemporary challenges for copyright law

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The whole of human development is derivative. We stand on the shoulders of the scientists, artists and craftsmen who preceded us. We borrow and develop what they have done; not necessarily as parasites but simply as the next generation. (Laddie 1996, p. 259)

Human development is a cultural process. As a biological species, humans are defined in terms of our cultural participation. (Rogoff 2003, p. 3)

Introduction

This chapter examines the relationship between copyright protection and the encouragement of creative expression by individuals and communities. It begins by exploring concepts of culture and cultural diversity as promoted by international organizations including the United Nations Educational, Scientific and Cultural Organization (UNESCO). It poses the question as to whether copyright law, in its current formulations, adequately promotes a diversity of cultural expressions by persons and peoples of all backgrounds. It evaluates the conventional rhetoric that copyright incentivizes the arts by protecting the material and moral interests of creators. It does this by exploring trends in copyright protection and ownership, including corporate ownership, highlighting some notable differences in the experiences of creators in different sectors, world regions and local contexts. Does the copyright lacuna in some sectors and contexts suggest that other incentives and motivations might be at work in spurring creative activity? The example of contemporary art is discussed as a case study, to illustrate the ambiguities faced by creators in some sectors in relation to copyright protection for their works, along with their potential infringement of copyright over other works.

Since many creators are both copyright owners and active users of other persons’ protected works, a simple dichotomy cannot be drawn between rights owners and end users. Indeed, the line between ‘producer’ and ‘consumer’ of cultural works is increasingly blurred, with digital technology and the Internet making it ever easier for users to ‘cut and paste’ and ‘remix’ existing works. What challenges do such phenomena pose for copyright law? The second part of the chapter looks at ‘public access’ to cultural works under existing copyright frameworks. It investigates whether access is provided on terms that ultimately enhance the capabilities of individuals or communities for free, creative expression.

1. Some concepts and definitions

The term ‘culture’ holds different meanings for different persons and peoples. In UNESCO’s seminal publication Cultural Rights and Wrongs, Stavenhagen (1998, pp. 4–5) suggests at least three different conceptions of culture: (1) culture as the ‘process of artistic and scientific creation’, (2) culture as the ‘accumulated material heritage of humankind’ and (3) culture as the ‘sum total of the material and spiritual activities and products of a given social group which
distinguishes it from similar groups. These nuances are helpful in understanding the intersection between intellectual property (IP) and cultural diversity. Discussed in Section 3, the concept of ‘cultural diversity’ celebrates the creative endeavours and cultural heritage of individuals and peoples of different backgrounds, recognizing both intrinsic and developmental value in maintaining such diversity. While it has been argued that copyright protection goes hand in hand with the promotion of cultural diversity (Desurmont 2006), existing assumptions in copyright law may reveal particular preconceptions towards culture, and end up protecting or promoting certain creative activities or sectors more than others. This theme is explored throughout this chapter.

While ‘the arts’ as a phrase is also open to different interpretations, it is commonly associated with creative expressions such as literature, painting, sculpture, music and dance. These overlap to some extent with the so-called cultural industries. According to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted by UNESCO in 2005, cultural industries produce and distribute cultural goods or services (Article 4(5)) which ‘embody or convey cultural expressions, irrespective of the commercial value they may have’ (Article 4(4)). The term ‘cultural industries’ is said to embrace publishing, music, cinema, audiovisual production, multimedia, visual arts, performing arts, architecture, crafts and design (although not all of these are, strictly speaking, industries). While it is beyond the scope of this chapter to cover all these areas in detail, examples may be drawn from different sectors to illustrate particular copyright-related issues and potential areas for reform in the future. The case of ‘IP and contemporary art’, including both visual and multimedia works since the 1950s, is dealt with at length in Appendix E.

Commentators have meanwhile cautioned against strict demarcations which somehow separate ‘the arts’ from the realm of human experience (Dewey 1934, p. 1). In this vein, the Indira Gandhi National Centre for the Arts (IGNCA) in India, for example, seeks to understand ‘the arts’ in their ‘eco-cultural and socio-economic contexts’; it approaches the former as ‘a wide spectrum, encompassing subjects from archaeology to dance and anthropology to the photographic art, enveloping them in a complementary and non-demarcated vision’. This approach accords with the observation that ‘the idea of culture has over the years evolved from a narrow elitist concept, which mainly referred to the fine arts and literature, to a broader concept presenting culture as a process, including components such as language, religion and education’ (Donders 2007, p. 232). Such viewpoints emphasize that creative activities are not only the domain of those involved in the ‘cultural industries’, and that cultural development is equally about empowering individuals and communities towards their own creative endeavour and free expression (see Section 2). Consistent with the human development perspective highlighted in this book, this approach views the individual and collective actors within the public not merely as passive recipients of cultural goods produced by certain segments of society, but also as expressive and creative agents in their own right (see Sunder 2008).

There is meanwhile no agreement in IP law around the world on appropriate definitions for ‘art’. For example, within French jurisprudence from the 1930s, there seems no beginning and end to art – and hence anything can theoretically be art – whereas the German courts appear to frown on ‘frivolous’ art. Artists and art theorists have themselves grappled with the changing meaning of ‘art’ and its function in society. Tracing Walther Benjamin’s theory of art, Rochlitz...
(1996, p. 48) highlights a fundamental question of post-Kantian aesthetics: ‘How do we define the criterion allowing us to state accurately that a work of art is successful, that it is “beautiful”, which is not the same thing as simply saying we like it’? Through their works, many artists including Marcel Duchamp, John Latham and Ad Reinhardt have challenged prevalent notions of art and its role in the aesthetic experience. Adorno and Horkheimer (1944, pp. 120–167) emphasize that ‘art’ has to be further understood within the context of its increasing commodification by the cultural industries and the impact of new technologies of mass reproduction.8

It is not only new technology and artistic movements which challenge existing copyright concepts. Traditional cultural expressions (TCEs) pose many unanswered questions for copyright law and are clearly relevant in a discussion on cultural diversity and the arts. At the same time, the specific legal developments and issues relating to TCEs call for their treatment within a separate chapter (see Chapter 5) in this book, and repetition is avoided here. While distinctions are often made between the ‘traditional’ and the ‘contemporary’ realms, it has been suggested that the boundary between these may be more porous than it seems (Boateng 2005; Bowrey 2006; Oguamanam 2008). Constant innovations abound in these contexts, and some challenges faced by creators within the so-called traditional and contemporary realms may be similar. Analogies have been drawn between social networks in cyberspace communities and kinship relations within indigenous societies (Strathern 2005), and some writers have gleaned common issues and lessons for legal reform in relation to IP (Bowrey 2006; see Section 4.2).

2. Cultural rights and intellectual property rights

While this chapter focuses on the implications of copyright law for the arts, it is noted that other intellectual property rights (IPRs) do intersect with the cultural sector. Some examples include geographical indications, trademarks, collective marks, certification marks, trade secrets and design rights. Other areas of law including contracts and torts are also relevant to the topic.9 Meanwhile, a number of international conventions circumscribe copyright, moral rights and related rights. These include the TRIPS Agreement of 1994, the Berne Convention for the protection of Literary and Artistic Works of 1886 (as amended 1979),10 the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961 (‘Rome Convention’),11 and various other international conventions managed by WIPO and UNESCO. It is important to remember that provisions from such international agreements are absorbed and enforced within particular national systems and jurisdictions differently, and there is significant variation in the national protection of IPRs.

An area of law that is very dependent on jurisdiction concerns moral rights – a bundle of non-economic rights that authors and artists may receive in addition to the pecuniary benefits of copyright law. The two most prevalent rights in this bundle are the author’s right of paternity, under which he has the right to receive attribution for his work; and the right of integrity in the work, against distortion and/or destruction. The Berne Convention requires that these two benefits be folded into national copyright legislation and allows leeway for jurisdictions to go beyond these minimums. France, a strong proponent of moral rights, for example, also adds the rights of disclosure (an author decides when and where to publish his work) and the right to withdraw (an artist can purchase unsold copies of her works and prevent additional printing of
her work if she decides she no longer wants to be associated with the work). Under the French system, moral rights are perpetual and in some sense inalienable (Cornish & Llewelyn 2003, p. 453), in contrast to copyright which typically has a fixed term and is subject to assignment in most (though not all) jurisdictions.

Cultural rights are protected by a number of international instruments and are an integral part of human rights (Donders 2007, p. 232). None of these instruments ‘define cultural rights as such’ (ibid., p. 234). Prott (1998a, p. 165) observes that concepts of ‘cultural rights’ are still in evolution, and defy precise definition under international law. While an exhaustive study of the potential range of cultural rights is beyond the scope of this chapter, some aspects relevant to our discussion of copyright are highlighted here. To begin with, there is some acknowledgement in the relevant instruments that creators need to be recognized and compensated for their innovative efforts. Article 27(2) of the Universal Declaration of Human Rights of 1948 (UDHR) states that: ‘Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author’. This right is counterbalanced by the emphasis that ‘everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits’ (Article 27(1)). While the UDHR is not a legally binding instrument, many of its provisions have attained the status of international customary law.

The rights expressed in Article 27 of the UDHR are explicitly recognized in Article 15 of the binding International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted by UN General Assembly in 1966. The ICESCR recognizes ‘the right of everyone to take part in cultural life’ (Article 15(1)(a)), ‘to enjoy the benefits of scientific progress and its applications’ (Article 15(1)(b)), and ‘to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author’ (Article 15(1)(c)). It is provided in Article 15(2) of the ICESCR that ‘the steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture’. The States also ‘undertake to respect the freedom indispensable for scientific research and creative activity’ (Article 15(3)).

It is significant that in its General Comment No. 17 relating to Article 15(1)(c) of the ICESCR, the Committee on Economic, Social and Cultural Rights (CESCR) distinguishes the right to moral and material interests of authors from IPRs, clarifying that IPRs are not to be equated ‘with the human right recognized in article 15, paragraph 1 (c)’ (CESCR 2005, para. 3). The Committee emphasizes that ‘in contrast to human rights, intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else’ (ibid., para. 2). The Committee observes that: ‘While under most intellectual property systems, intellectual property rights, often with the exception of moral rights, may be allocated, limited in time and scope, traded, amended and even forfeited, human rights are timeless expressions of fundamental entitlements of the human person’ (ibid.). Of particular significance is the Committee’s qualification that:

Whereas the human right to benefit from the protection of the moral and material interests resulting from one’s scientific, literary and artistic productions safeguards the
personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living, intellectual property regimes primarily protect business and corporate interests and investments. Moreover, the scope of protection of the moral and material interests of the author provided for by article 15, paragraph 1 (c), does not necessarily coincide with what is referred to as intellectual property rights under national legislation or international agreements.18 (Ibid.; emphasis added)

It is furthermore emphasized in General Comment No. 17 that ‘the right of authors to benefit from the protection of the moral and material interests resulting from their scientific, literary and artistic productions cannot be isolated from the other rights recognized in the [ICESCR]’ (ibid., para. 35). According to the General Comment, States parties are ‘obliged to strike an adequate balance between their obligations’ under Article 15(1)(c) and the other provisions of the ICESCR, ‘with a view to promoting and protecting the full range of rights guaranteed in the [instrument]’ (ibid.). Of particular relevance is the qualification that ‘in striking this balance, the private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their productions should be given due consideration’ (ibid.).

The recent General Comment No. 21 of the CESCR explores what is meant by the right of everyone to ‘participate’ or ‘take part’ in cultural life (see CESCR 2009). As the CESCR recognizes, ‘the term “everyone” in the first line of article 15 may denote the individual or the collective; in other words, cultural rights may be exercised by a person (a) as an individual, (b) in association with others, or (c) within a community or group, as such’ (ibid., para. 9). These clarifications have important implications, for example, for indigenous peoples’ right to practise and revitalize their cultural traditions and customs. In its discussion of ‘persons and communities requiring special attention’ in implementing Article 15(1)(a),19 the CESCR emphasizes that: ‘States parties should take measures to guarantee that the exercise of the right to take part in cultural life takes due account of the values of cultural life, which may be strongly communal or which can only be expressed and enjoyed as a community by indigenous peoples’ (ibid., para. 36). Legal developments in relation to indigenous peoples’ TCEs are discussed in Chapter 5 of this book and are not repeated here. The idea that cultural rights can be enjoyed by individuals as well as ‘the collective’ also has implications for other communities in their cultural endeavours.

In General Comment No. 21, the CESCR suggests that ‘[t]here are, among others, three interrelated main components of the right to participate or take part in cultural life: (a) participation in, (b) access to, and (c) contribution to cultural life’ (ibid., para. 15). In relation to ‘participation’, the CESCR suggests that: ‘Everyone…has the right to seek and develop cultural knowledge and expressions and to share them with others, as well as to act creatively and take part in creative activity’ (ibid., para. 15(a); emphasis added). Among other things, ‘access’ covers the right of everyone to ‘follow a way of life associated with the use of cultural goods…and to benefit from the cultural heritage and the creation of other individuals and communities’ (ibid., para. 15(b)). ‘Contribution to cultural life’ includes the right of everyone to be involved in creating the spiritual, material, intellectual and emotional expressions of the community (ibid., para. 15(c)). Can these ideas help us to broaden our understanding, for example, of public access to copyright-protected goods?
While the CESCR does not explicitly mention IPRs in General Comment No. 21, Beutz Land has suggested that the right to take part in cultural life ought to extend not only to the right of access to cultural goods but also to the right to share and transform cultural works.\(^{20}\) This echoes Donder’s observation (2007, p. 233) that: ‘Culture is no longer seen as a consumer product, but as an expression of the identity of an individual or a community. Cultural rights should accordingly be considered as more than merely rights to enjoy a cultural product’. Revisited again in Section 5, these ideas can perhaps help us to rethink what public access to cultural works ought to entail. In particular, they may help us to calibrate exceptions and limitations to copyright in terms of enhancing the capability of individuals and communities to use or transform a copyright-protected work as an expressive tool.

Meanwhile, ‘cultural development’ is now recognized as an important component of development alongside the socio-economic development of peoples. This is made explicit, for example, in Article 22 (1) of the African Charter on Human and Peoples’ Rights (1981) which asserts that: ‘All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind’.\(^{21}\) In a presentation paper called ‘Creative Communities: a Strategy for the 21st Century’ by the UNESCO Regional Bureau for Education in Asia and the Pacific, Shaeffer notes that ‘culture is now widely perceived to be an inalienable part of sustainable development’ and that ‘this changed perception constitutes a veritable paradigm shift in which cultural diversity and cultural industries have become linked as key elements in new development strategies’.\(^{22}\)

3. Emerging framework of protection for cultural diversity

As highlighted in the UNDP Human Development Report 2004 on ‘Cultural Liberty in Today’s Diverse World’, the pressures of globalization and standardization have exacerbated historical threats and issues relating to the preservation of diverse cultural identities and endeavours (UNDP 2004, p. 10).\(^{23}\) Concerns over the promotion of ‘cultural diversity’ not only have surfaced at local and national levels but also are increasingly reflected through multilateral frameworks.

There has been significant norm setting at international organizations, notably UNESCO, towards the protection and promotion of cultural diversity in recent years (see UNESCO 2004). The Universal Declaration on Cultural Diversity adopted by UNESCO in November 2001 states in its Article 7 that: ‘Creation draws on the roots of cultural tradition, but flourishes in contact with other cultures. For this reason, heritage in all its forms must be preserved, enhanced and handed on to future generations as a record of human experience and aspirations, so as to foster creativity in all its diversity…’.\(^{24}\) Article 6 of the Declaration elaborates that: ‘Freedom of expression, media pluralism, multilingualism, equal access to art and to scientific and technological knowledge, including in digital form, and the possibility for all cultures to have access to the means of expression and dissemination are the guarantees of cultural diversity’.

Notions of cultural diversity also underpin recent international instruments such as the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005 and the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage of 2003.\(^{25}\) The Preamble of the 2005 Convention affirms that ‘cultural diversity is a defining
characteristic of humanity’. It observes that ‘cultural diversity creates a rich and varied world, which increases the range of choices and nurtures human capacities and values, and therefore is a mainspring for sustainable development for communities, peoples and nations’. It further notes that ‘while the processes of globalization, which have been facilitated by the rapid development of information and communication technologies, afford unprecedented conditions for enhanced interaction between cultures, they also represent a challenge for cultural diversity, namely in view of risks of imbalances between rich and poor countries’. An example of such risks is provided in the 2004 UNDP Human Development Report, where it is suggested that ‘Hollywood’s powerful film industry, with access to enormous resources, can squeeze the Mexican film industry and other small competitors out of existence’ (UNDP 2004, p. 90). Discussing the impact of globalization on cultural choice, the report emphasizes that ‘asymmetries in flows of ideas and goods need to be addressed, so that some cultures do not dominate others because of their economic power’ (ibid.).

The Preamble of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage recognizes the ‘importance of the intangible cultural heritage as a mainspring of cultural diversity and a guarantee of sustainable development…’. For the present discussion, it is notable that Article 3 in the Convention qualifies that nothing in the instrument would affect state obligations under existing IP-related instruments. One presumption under the Convention would thus seem to be that cultural diversity and IP rights go hand in hand. This idea seems to be reinforced by the Preamble of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005), which emphasizes ‘the importance of intellectual property rights in sustaining those involved in cultural creativity’ (para. 17). Highlighting the latter emphasis by the framers of the convention, Desurmont (2006) asserts that ‘there is no justification for claiming that respect for authors’ rights is a barrier to the pursuit of cultural diversity when it is obvious that there can be no cultural development without protecting creators’.

Is there perhaps a need for better understanding of the relationship between cultural diversity and the protection of IPRs? At the regional level, the European Commission appears to be grappling with this relationship in its attempts to integrate ‘cultural diversity’ into its copyright policies. Presenting at a conference on the ‘Future of Intellectual Property’, a Commission representative suggested that cultural diversity implies a far wider spectrum of creative activity than currently incentivized by the copyright system. He stressed the role of ‘social policy’ in supporting such activities as independent film-making which may earn little by way of royalties from copyright if commercially unsuccessful.

The relationship between the protection of IPRs and the promotion of cultural diversity thus needs to be understood in relation to the types of creators and creations currently incentivized by the IP systems. In evaluating the effects of IPRs on cultural diversity, it is necessary to consider what other economic support (e.g. state subsidies and private grants) or non-pecuniary factors are at work to spur creative efforts. One might also consider whether IP systems accommodate different cultural attitudes to creativity and ‘property’. The UNDP Human Development Report 2004 emphasizes that ‘recognizing diversity means that different notions of property rights and the cultural significance of knowledge and art forms be accommodated within global regimes’ (UNDP 2004, p. 11). The report adds that international action is needed to
ensure this, and that the rules relating to IP will need to be revised if current standards cannot accommodate certain forms of knowledge and art (ibid.). In this case, the report is referring to the example of commonly known traditional knowledge (TK) and TCEs, and their attributes such as group ownership (ibid.). These elements are discussed in Chapters 4 and 5, which deal with TK and TCEs, respectively.

Are IP frameworks equally relevant in contemporary and traditional contexts, within both formal and informal sectors? The following sections consider the implications of copyright for cultural diversity, comparing the incentive theory of copyright with some emerging trends in the complex international environment in which IP laws must operate. Section 4 first contrasts notions of authorship under copyright with structures and realities of IP ownership in the cultural industries (see also Appendix E, which looks in detail at some challenges faced by contemporary artists in relation to copyright). This is followed by Section 5 which discusses access by the public to cultural goods, creative processes and free expression under the copyright regimes. As will be seen, cultural diversity embraces a freedom of culture, which is in turn closely linked in legal and policy terms to issues of freedom of expression.

4. Revisiting copyright as an economic incentive to create

Justifications for copyright, whether from ‘natural rights’ or utilitarian perspectives, have been explored in earlier chapters of this book. This section evaluates the often-emphasized idea of copyright as an economic incentive to creators in relation to current trends of copyright protection and ownership. This idea is central, for example, to utilitarian arguments for copyright in Anglo-American copyright systems (see Chapter 1). Examining the incentive function of copyright in terms of structures of copyright ownership, this section seeks to understand which are some of the main constituencies benefitting from copyright protection. It then explores whether some forms of creative activity are less covered by copyright protection than others (or not at all), so that the incentive function of copyright towards spurring creations might be seen as less operative, or even redundant, in those cases. While it is beyond the scope of one chapter to survey all creative sectors and world regions, some discernible patterns are highlighted here for further study.

4.1. Corporations and creators as copyright holders

Cornish and Llewelyn (2003, p. 371) observe that ‘while industrial property tends to establish bipolar linkages – between right-owner and user – copyright has, on the right-owner side, both creators and entrepreneurs’. Indeed, it is important to distinguish conceptually between creators and the industry that may represent the creators (e.g. the publisher and recording industries or the collecting societies). Some argue from a historical perspective that copyright regimes benefitted not only creators but also intermediaries and institutions from the start (Woodmansee 1984; Rose 1993).

Copyright assignment being commonplace today in the music industries, publishing and the arts, a question can be legitimately raised as to the extent to which economic benefits from copyright really go to creators in the cultural industries. A brand of critique of copyright protection has centred on the increasing control of the intermediaries (e.g. publishing houses,
recording companies and film corporations) over copyright through the creators’ assignment of these rights in their contractual relations with these entities. While in theory it is the creators who are protected by copyright, in reality many creators habitually assign away their copyright (or significant elements of that right) in contractual agreements with third parties. Statutory provisions may also render an employer the initial owner of any copyright work produced by an employee in the course of the employment and in the absence of contrary agreement (Cornish & Llewelyn 2003, p. 471). For example, while the contributors to a film production are numerous – as the endless credits that typically follow a film illustrate – through a web of contractual relationships copyright ownership in many cases (though not all) resides with the producer, often a film company.  

Gollin (2008, p. 39) suggests that: ‘By establishing assignable property rights, subject to recordation, intellectual property laws allow people to buy, sell, lease, or trade intangible property, or use it as collateral for loans, just as they would do with real or tangible property’. Among other questions, this calls attention to the valuation of IP. It is not uncommon for writers, for example, to assign away their copyright in particular works for the opportunity to publish, along with a ‘lump sum’ payment which may bear little correspondence to the extent of profits made eventually by a publisher on a successful work. Few creators have the ability to ‘valuate’ their copyright accurately, making projections well into the future. Should creators be locked into contractual arrangements without possibilities of revisiting and ‘re-evaluating’ the initial ‘bargain’, for example, taking into account the actual profits made by third parties in commercializing the work over time? Standard contracts used in a particular sector or company may need to be fine-tuned to reflect such long-term considerations. Some contracts may also prevent creators from dealing with their own works in certain ways.  

Contract is thus a fundamental issue shaping creators’ rights and livelihoods. There are significant differences between jurisdictions in how freedom of contract interacts with copyright law. Guibault (2002, p. 230) notes, for example, that ‘the American legal system does not generally regulate contractual relations dealing with the exploitation or the utilisation of copyrighted works’. In contrast, she emphasizes that:  

The regulation of contractual practices in the field of copyright is not unusual in continental Europe. In several countries, publisher’s agreements and contracts signed for the production of sound and audiovisual works are subject to specific rules of form and content. Where specific legislation has not been enacted, courts are often called in to alleviate the imbalance that could result from the strict application of the principle of freedom of contract. (Ibid., pp. 214–215)  

Likewise, von Lewinski (2008, pp. 59–61) highlights some notable differences between civil law ‘authors’ rights’ systems and common law systems (such as in the UK and the US) where freedom of contract is said to prevail. Discussing statutory provisions in some authors’ rights systems (e.g. Germany), she notes the existence of rules ‘restricting the freedom of contract in order to strengthen the weaker party to a contract’ (ibid., p. 59). Indeed, Dietz (2006) points out that the German authors’ rights system does not provide for ‘assignment’ of rights in the strict sense of the word. According to him: ‘German doctrine does not incorporate any notion equivalent to the English “assignments” or the French cession of copyright; rather it formulates
contractual transfers of copyright interests as “grants of rights of use” (ibid., sec. 4(2), p. GER-55; original emphasis).

While common law systems are usually associated with freedom of contract, it is notable that the US has a statutory provision which gives the author an opportunity to reassess a transfer in copyright after a certain number of years. Section 203 of the Copyright Act of 1976 provides that, in the case of grants of copyright interests made on or after 1 January 1978, authors and their statutory successors enjoy the right to terminate the grant after thirty-five years from the grant’s execution. The right of termination can be exercised at any time during a five-year period from the latter date and is non-waivable. The legislators determined that ‘a provision of this sort is needed because of the unequal bargaining position of authors resulting in part from the impossibility of determining a work’s value until it has been exploited’. Meanwhile, it is significant that the 1976 Act exempts works for hire from the operation of the termination of transfer provisions. Goldstein (2002, p. 262) comments that ‘in addition to circumventing the termination of transfer provisions, the work for hire rubric can obliterate the rights of contributors to collective works because it vests rights initially in the author’s employer’.

Assignment of copyright has to be distinguished from licensing. It has been said that an assignment is in essence a transfer of ownership (however partial), while a licence is in essence permission to do what would otherwise be an infringement (Cornish & Llewelyn 2003, p. 475). Under licensing, the owner of the copyright retains ownership of the IP but authorizes a third party to ‘carry out certain acts covered by his economic rights, generally for a specific period of time and for a specific purpose’ (ibid.). An example is where the author of a novel grants a licence to a publisher to make and distribute copies of the novel, or grants a licence to a film producer to make a film based on the novel. In some cases, there might be a grant of rights by exclusive licence to the publisher (ibid.).

Meanwhile, large corporations and independent artists often have unequal bargaining positions and access to legal support in negotiating contracts relating to copyright (see also Section 5 in relation to rethinking copyright exceptions). Observing that the increasing corporate concentration in the cultural industries has significant impact on the bargaining positions of individual creators, Towse (2007, pp. 760–761) suggests that:

[T]he economic organization of the cultural sector plays a more important role than does copyright law in the contracts between artists and firms in the cultural industries (Caves, 2000). The more powerful the firm is in the industry, the greater is its bargaining power and the relatively weaker the performer is when it comes to striking an individual bargain. Except in the rare case of the superstar, the business side has the upperhand.

Towse suggests that the market structure of the cultural industries is thus an important aspect of the economics of copyright (ibid.). The earnings and incentives to artists from copyright are said to be weakened by the prevalence of oligopolies in the cultural industries (Bettig, 1996; Towse 2007, pp. 760–761). Corporate concentration is a key feature, especially in the music and film industries. This market structure also has an effect on the diversity of works available to the public. In their seminal work Big Sounds from Small Peoples: The Music Industry in Small Countries, Wallis and Malm (1984) discuss how, using the strategy of vertical and horizontal integration, five major companies achieved unprecedented oligarchy in the world market for
music records and cassettes in the 1970s and 1980s. They note that as industry concentration increases, the diversity of phonograms decreases with more emphasis being placed on a few best sellers in the popular music market. Of relevance to our discussion of cultural diversity, the authors trace the responses of the local music scene in a series of small countries on four continents (including Africa, Asia, Latin America/Caribbean and Europe) to this global challenge in maintaining their individual identity and flavour.

Three decades later in a world now of digital-dominated media, six firms are said to account for close to 80% of the world market in the cultural industries, with a vast number of small independent firms from all over the world sharing the remainder of the market (Caribbean Community [CARICOM] 2006, p. 29). These smaller firms generally face the problem of limited international market access and media exposure (ibid.). The study notes that the ‘independents’ are often taken over by large corporations or are required to establish production and distribution contracts with the large firms after they have a significant ‘hit’ (ibid.).

4.2. Uneven protection amongst regions and sectors

Creators in different world regions, sectors, and contexts experience significant differences in copyright protection and enforcement. In its watershed study Integrating IPRs and Development Policy, the Commission on Intellectual Property Rights (CIPR) notes unequal access to the benefits of copyright protection between creators in the first world and in developing countries (CIPR 2002, pp. 95–110). In a summary of the World Bank sponsored ‘Africa Music Project’, Penna, Thormann and Finger (2004, pp. 95–112) discuss, for example, the lack of infrastructure in the African region to support artists and their livelihoods, including a lack of effective collecting societies, organized interest groups, effective copyright enforcement and IP practitioners.43 In a section on ‘The Musician’s Dream’, the authors describe the aspirations of some African musicians to gain control over production processes in the future, and secure their IP. Some concerns discussed include the ‘education of musicians as to their existing rights and methods of securing these rights’, as well as ‘reforms in regulations, institutions, and procedures for policing rights’ (ibid., p. 99).

Creators from different sectors and within sectors also experience notable differences in copyright protection. Concerns of authors, composers, film-makers, performers and visual artists are obviously distinct, and interact in different ways with existing IP regimes. Although it is beyond the scope of this chapter to discuss all of these areas in detail, a brief mention might be made of performers’ rights. While a composer may have copyright in an original tune, for example, the performers’ rendition of the tune (which necessarily reproduces the work) does not give rise to a copyright in the performance even though it may involve significant creativity (see Towse 2007; Cornish & Llewelyn 2003, p. 521).44 Towse (2007, p. 745) notes that performers only ‘gradually acquired statutory protection of their economic and moral rights’ in certain jurisdictions over the last century. Tracing the evolution of performers’ rights, Weatherall (2006, pp. 174–175) observes that:

The first stage in the road to performers’ rights saw the enactment of laws against the obvious wrong of ‘bootlegging’ – that is, the practice of making and/or distributing, for commercial purposes, unauthorised sound or film recordings of live performances, either
at the actual concert or ‘off air’ (for example, recorded from live broadcasts). The UK outlawed this activity in 1925; a multilateral treaty followed in the form of the Rome Convention in 1961…The second stage of the performers’ journey is the recognition of copyright-like rights to control certain uses of authorised recordings of performances. Such rights have been an even longer time coming, at an international and a national level. (Original emphasis; footnotes omitted)

The rights currently enjoyed by performers are ‘not copyright in the legal sense’ but so-called ‘neighbouring rights’ or ‘related rights’ (ibid.; see Chapter 1, Box 1.1). These rights have been said to be ‘analogous to copyright’, although they are given for ‘somewhat shorter periods’ (Cornish & Llewelyn 2003, p. 8). The law is in much flux in this complex area, and Arnold (2008, p. 308) suggests a ‘wider trend towards treating holders of related rights, and in particular performers, more equally with owners of authors’ rights’. Nevertheless, protection of performers’ rights still varies significantly with jurisdiction. Whether a country is a signatory to one or several of the international conventions governing this realm will affect the rights of performers in that country. For example, under the Rome Convention, performers (including ‘actors, singers, musicians, dancers, and other persons who…perform literary or artistic works’) are protected against certain types of acts they have not consented to, including the fixation of their live performance without consent and the broadcasting and communication to the public of their live performance. Under the TRIPS Agreement, it is provided that performers ‘shall have the possibility of preventing…the fixation of their unfixed performance [on a phonogram] and the reproduction of such fixation’ without their authorization (Article 14(1)). Performers shall also have the possibility of preventing ‘the broadcasting by wireless means and the communication to the public of their live performance’ (Article 14(1)). These rights have been extended by the WIPO Performances and Phonograms Treaty (WPPT) which deals with, among other things, rights relating to storage and transmission of works/performances of phonograms in the digital environment (for detailed discussion see Towse 2007; Munoz Tellez & Waitara 2007, p. 22).

Weatherall (2007, pp. 177) notes that: ‘Due to the failure of the EU and US to agree on provisions relating to transfer of rights (and choice of law), the expansion of rights in the WPPT only applies to performances as they are fixed in sound recordings (phonograms). So far the international community has been unable to agree on a treaty relating to performances captured in audio-visual form’. This means different levels of protection for different kinds of performers depending on the medium of fixation. Noting that Australia has stuck strictly to the WPPT in not granting rights related to performances in audio-visual form in its recent reforms to its Copyright Act, Weatherall suggests that there are no obvious grounds for establishing separate regulatory regimes for audio and audio-visual material (ibid., citing Sherman & Bently 1995, p. 7).

Further studies would be useful in examining the pecuniary factors (e.g. public subsidies, returns from performances, royalties if applicable) as well as non-pecuniary ones in spurring and shaping creative expression in the performing arts (see further Morgan 2002; Towse 2007). These questions have come to the fore, for example, in recent public debates in Europe over the European Commission’s proposals to amend the EU Copyright Directive to provide a longer term of protection for music performers and phonogram producers. In discussing alternative models for incentivizing and compensating performers, it may also be interesting to consider the
network’ effects which copying by third parties may have in augmenting the popularity of particular performers (see Takeyama 1994; Watt 2004, pp. 164–165; cf. Arnold 2008, pp. 9–10). Watt (2008, pp. 164–165) gives the oft-cited example of ‘singer’s fan clubs’ where ‘the more copying that occurs, the more popular and “trendy” the singer becomes, and so the greater is the willingness to pay for concert tickets and original pre-recorded formats’. Case studies on the Brazilian technobrega music movement and the Nigerian film industry, for example, may be relevant to this line of enquiry.50

Some areas of creative activities fall largely outside the scope of copyright protection. As seen in Chapter 5, there is a lacuna in copyright protection for the cultural expressions of communities guided by customary practices. Many existing TCEs often do not meet the current requirements of ‘originality’ and/or ‘fixation’ in many jurisdictions. While new works based on TCEs might be deemed ‘original’ and subject to copyright, establishing communal claims to copyright ownership over such TCEs remains a challenge in many jurisdictions. In the Bulun Bulun case51 (see facts and discussion in Chapter 5), the Federal Court of Australia found the work in question by an Aboriginal artist to be ‘original’ and subject to the artist’s copyright. While the work was based on traditional motifs and concepts of the Aboriginal community to which the artist belonged, the court found it inconsistent with the Australian copyright statute, as well as common law, to accept ‘communal ownership’ by the Aboriginal community of the copyright over the innovative work.

There seems room for further exploration of ‘joint-authorship’ concepts in such instances. While ‘joint-authors’ may share the copyright in a work, the court in the Bulun Bulun case found there was no joint-authorship in the case. As cogently summarized by Bowrey (2006, pp. 78–79):

The precedent for joint authorship says that to come under this definition the coauthors’ contributions need be inseparable from each other. In Bulun Bulun, the court said that this means the contributions that count as authorship must relate to the physical condition of the material form of the work. Unless the community were actually all involved in the painting of the work, they have no copyright in it. Indigenous authority, community-based authority to paint particular imagery and circulate it more broadly, is not thus recognized as part of the necessary conditions of production of those works for copyright purposes. Oversight and authority over the production is treated as too ephemeral a contribution to be recognized in copyright…

While concern for legal integrity may limit a court’s ability to find communal ‘joint-authorship’ in the case of TCEs, Bowrey notes that Australian courts have demonstrated ‘no comparable incapacity in stretching the very same legal ideas to accommodate the collective authority and production of corporations’. Referring to Australian case law, she adds that:

Managerial supervision of production from afar, and contributions as ephemeral as identifying a potential market for a new product has been valued as a substantial original contribution that gives rise to the subsistence of copyright. The ‘directional’ visions for an interactive computer game that was communicated to the game programmers, but only brought into visual reality by the eventual player was sufficient to produce authorship of a cinematographic film. So why is it that all the concepts and categories that touch on the
indigenous involve impossible demands, and all those that relate to reinvigorating the rights to accommodate mainstream culture and economy show up the law as flexible, malleable and constantly able to be legally renewed? (Ibid., p. 79; original emphasis; footnotes excluded)

New media and technology tend to bring their own set of challenges to copyright law. For example, it was only after several years of legal uncertainty that the US Supreme Court decided in 1884 that a photograph reached the bar of originality under US copyright law so as to comprise copyrightable subject matter. Stokes (2003, p. 33) suggests that: ‘Photography is a problem area for copyright law as in a sense every photograph is a copy of something, and unlike drawing or painting the actual recording of the image can require no skill or labour beyond the mere mechanical operation of a “point and shoot” camera’. There remain ambiguities as to the extent photographs are covered by copyright, and the level of protection varies significantly among different jurisdictions. Cornish (1999, p. 390) notes, for example, that ‘the British have never scrupled to place every variety of photography within copyright however merely technical the procedure of pointing the camera at a subject and pressing the shutter may be in a particular instance’. In contrast, he observes that droit d’auteur (authors’ rights) systems ‘tend only to give copyright to “photographic works”, that is, the results of careful and distinctive arrangement (scene setting, lighting, angle, etc.), involving an element of aesthetic judgment which is personal to the photographer (and/or to some “director”, rather than the mere cameraman)’ (ibid).

Other examples of confusion regarding the law’s place in the domain of artistic subject matter abound. Internationally, the extent to which moral rights are applicable to a wide range of arts remains highly controversial (Adeney 2006; Pitrout 2006. The legitimacy of appropriation art – art which borrows from or ‘quotes’ other art without attribution – is the source of much contention, 53 with artists using appropriation in their work pointing out that they are ‘neither protected nor supported by the copyright laws that are meant to protect all artists’ 54 The lack of precision in the realm of copyright exceptions (fair use / fair dealing) is also a source of frustration for artists, art publishers, and producers of artistic productions, 55 and a source of confusion to others who need to access such works (see Section 5.1).

Indeed, contemporary art occupies a new niche in the context of IP law, and is given detailed treatment in Appendix E to illustrate some of the basic concepts and current ambiguities surrounding copyright law. 56 As seen in the discussion there, many of the assumptions upon which international copyright treaties are based do not necessarily hold true for contemporary artists who are experimenting with new concepts as well as technology and other media to create works that do not fit neatly within the concept of ‘art’ that was used even fifty years ago. Indeed, they often set out to deconstruct prevalent notions such as those surrounding ‘the artist’, aesthetics, originality and, indeed, property. 57

5. Public access to cultural works: Nurturing capabilities for creative expression

In his foreword to a study From Access to Participation: Cultural Policy and Civil Renewal 58 published by the Institute for Public Policy Research in the UK, Rogers (2006, p. 4) notes that:
Insofar as cultural policy has tried to increase and broaden popular engagement, it has made little distinction between increasing more passive forms of cultural engagement – that is, increasing the size and representativeness of ‘audiences’ – and promoting more active involvement. The tendency has been to homogenise both, in a drive to increase ‘access’.

An approach to human development focusing on building human capabilities as a means and measure of welfare advancement has been described in Chapter 1, drawing especially from the work of Amartya Sen, Marta Nussbaum and other development thinkers. Following this approach, it might be argued that what ultimately matters in public access to cultural works is whether the access is framed in a way which promotes the capabilities of individuals and communities. This approach sees members of the public not only as consumers of cultural works but also as potential or ongoing creators in their own right (see Sunder 2008).

In discussing capabilities essential to human welfare, Nussbaum (2000, p. 78) lists not only such basic elements as capabilities relating to ‘health’ and ‘food security’ but also other considerations quite invisible to utility-centred arguments for development. She emphasizes, for example, human capabilities relating to ‘senses, imagination and thought’ (ibid.). These relate to whether one is ultimately ‘able to use imagination and thought in connection with experiencing and producing self-expressive works and events of one’s own choice, religious, literary, musical, and so forth’ (ibid.).

The capability (or bundle of capabilities) for creative expression is inextricable from other capabilities such as those relating to education and freedom of expression, discussed earlier in Chapters 6 and 7. A myriad of copyright-related provisions contour these capabilities, including what elements of a work are subject to copyright, the duration of protection, how much copying is permitted under the exceptions or defences to infringement, and how user rights or capabilities might further be curtailed through licence provisions and technological measures. Many of these elements have been discussed elsewhere in this book (see especially Chapters 1, 6 and 7) and repetition is avoided here. In the following section, we focus on how copyright exceptions and limitations, such as the fair use defence in the US, circumscribe the ability of individuals and communities to reproduce or transform a copyright-protected work for purposes including self-expression. While few would deny the ‘transformative powers’ of a cultural work, for example, a work of literature, on individuals and communities, how far can a reader or an audience in turn use or transform a work for self-expression without first seeking permission from the rights owner or incurring concerns of copyright infringement?

5.1. Copyright exceptions and free expression

Exceptions and defences to copyright liability are an integral part of the mechanism built into national copyright laws to ensure a degree of access by the public to copyright protected works. Within a context of long and expanding copyright terms, the exceptions and limitations to copyright become even more important in determining the contours and nature of public access to cultural works (see Suthersanen 2008). Internationally, these exceptions are currently circumscribed by the so-called three-step test set out in Article 9(2) of the Berne Convention.
(Paris text 1971) and Article 13 of the TRIPS Agreement. Article 13 of the TRIPS Agreement reads:

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

The three-step test has come under substantial scrutiny by many commentators and is treated in detail in Chapter 7 (see further Gervais 2005; Koelman 2006, p. 407). While the general discussion is not repeated here, it is noted that Berne Article 9(2) addresses only exceptions to the reproduction right, whereas TRIPS Article 13 permits exceptions to any of the owner’s rights (see WIPO 2008, p. 21). Furthermore, it has been noted that:

Berne states the three-step test as a proviso to the exceptions. TRIPS declares the test in mandatory terms, requiring how countries ‘shall confine’ their statutory provisions. Berne refers to the interests of ‘authors’; TRIPS references the interests of ‘right holders’.

The interpretation of the three-step test under TRIPS Article 13 was the subject of a World Trade Organization (WTO) dispute concerning US copyright provisions which exempted a broad range of retail and restaurant establishments from liability for the public performance of musical works (under copyright) by means of communication of radio and television transmissions. Marking the first time an international adjudicative body has interpreted either Article 13 of the TRIPS Agreement, or Article 9(2) of the Berne Convention, the dispute resolution panel of the WTO in June 2000 held the US in contravention of its obligation under Article 13 of the TRIPS Agreement.62 Ginsburg (2001) notes of the decision that:

The § 110(5) controversy, it bears emphasis, concerned a pork barrel exemption purely for the benefit of certain business consumers of copyrighted works; it did not implicate any of the free speech or scholarship interests that underlie many other copyright exceptions. As a result, the Panel decision does not purport to offer guidance toward analyzing the ‘legitimacy’ of right holder interests when they are confronted with the creative interests of other authors. (Emphasis added)

It is the ‘creative interests of other authors’, closely intertwined with freedom of expression, which concern us here. Freedom of expression is a human right guaranteed under international and regional instruments. This right extends to the ‘freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media’ of one’s choice.63 Guibault and Hugenholtz (2003, p. 6) suggest that the principle of protecting expressions, not ideas, inherently limits the possible impact of copyright protection on freedom of expression, because in theory anyone may publish or reproduce the ideas of another contained in copyrighted material provided the form in which they are expressed is not reproduced. Nevertheless, they qualify that:
While the idea/expression dichotomy contributes substantially to the freedom of public debate and news reporting, there may be circumstances where it is important to be able to use not merely a person’s idea, but also his or her form of expression in order to have effective reporting or criticism of her thoughts. For example, it may be important for a news reporter or a critic to capture the mood, the tone or the nuances of an address, which may not be possible without reproducing part of the speaker’s form of expression. Historians, biographers, and scientists also need to be able to portray reality in a truthful manner in their own work, by relying on prior writings. (Ibid.)

There is significant variation in the exceptions and limitations to copyright under domestic laws. Going beyond exceptions for news reporting, criticism and teaching, some regimes provide exceptions for ‘parody’ and other transformative uses. Defining parody as a ‘humorous exaggerated imitation of an author, literary work, style’, Guibault and Hugenholtz suggest that parodies conflict with the rights owners’ copyright in their work almost by definition (ibid., p. 6). In relation to the critical function served by parody, they observe that:

Parodies are considered not only to have entertainment value, but also to serve a critical function, pointing out human imperfections and the ironies of our existence. Encouraging the production of parodies is thus one of society’s values since they constitute an important artistic vehicle, through which creators and critics exercise their freedom of expression, guaranteed under article 10 [European Convention on Human Rights].64 (Ibid., p. 9)

While not a copyright case, a high-profile South African case involving a parody of a trademark illustrates potentials for the assertion of IPRs to limit free expression. In *Laugh It Off Promotions CC v. South African Breweries*, the parodist used a trademark for beer in a display on T-shirts which some might consider an anti-apartheid message.65 The plaintiffs held trademark rights over a logo with the words ‘America’s lusty, lively beer – Carling Beer, Black Label’. The Constitutional Court of South Africa decided there was no trademark infringement through the defendant’s use (on T-shirts it sold) of a logo with the words ‘Africa’s lusty, lively exploitation since 1652: White Guilt, Black Labour, No regard given worldwide’. The Constitutional Court of South Africa found the use of the trademark to be non-infringing on the basis that there was no likelihood of economic detriment to the plaintiffs.66 Moseneke J. came to the conclusion: ‘[T]he claim of infringement of the respondent’s marks stands to be dismissed because no likelihood of economic prejudice has been established. Secondly, where no economic harm has been shown, the fairness of parody or satire or lampooning does not fall for consideration’.67 Concurring with the decision, Sachs J. was nevertheless of the view that the appeal should be upheld on more substantial grounds.68 He suggested that: ‘In our consumerist society where branding occupies a prominent space in public culture…there is a legitimate place for criticism of a particular trademark, or of the influence of branding in general or of the overzealous use of trademark law to stifle public debate’.69 In his view, the expression of humour is not only permissible, but necessary for the health of democracy.70 As he observed: ‘Humour is one of the great solvents of democracy. It permits the ambiguities and contradictions of public life to be articulated in non-violent forms. It promotes diversity…It is an elixir of constitutional health’.71
The Berne Convention makes no specific reference to parodies. Guibault and Hugenholtz (2003, p. 9) suggest, nevertheless, that the making of a reproduction for the purposes of parody would probably fall under Article 9(2) of the Convention, or under the right to quote in Article 10(1) of the Convention. It is notable that, under the Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society (‘EC Information Society Directive’), members may provide copyright exceptions and limitations for ‘the purposes of caricature, parody or pastiche’ (article 5(3)(k)). These terms are not defined in the EC Information Society Directive, and provisions for such exceptions within national laws vary significantly. Under French law, for example, after a work has been disclosed the author may not prohibit the making of parodies, pastiches or caricatures which observe the rules of the genre. In contrast, there is no parody exception to copyright under UK ‘fair dealing’ provisions. Indeed, the UK Gowers Review recommends that an exception for the purpose of caricature, parody or pastiche be created in the UK, as allowed for under the EC Information Society Directive (Gowers 2006, recommendation 12, p. 68). However, a recent consultation paper on Taking Forward the Gowers Review of Intellectual Property, issued by the UK Intellectual Property Office (IPO), indicates that there is no proposal to change the current approach to parody, caricature and pastiche in the UK (see IPO 2009, pp. 34, 46).

It is interesting to note, meanwhile, that a defence has been enacted by statutory amendment to the Copyright Act (Cth) 1968 in Australia to cover not only parody but also satire. McCutcheon (2008, p. 178) suggests that ‘Australia appears to be the first country to expressly permit fair dealing of a copyright work for a satirical purpose, thus affording broader protection than other jurisdictions, in particular the US fair use defence’. She points to a number of cases in the US, where courts have sought to make a distinction between satire and parody. For example, in Sun Trust Bank v. Houghton Mifflin, the Court of Appeal said that: ‘Parody, which is directed toward a particular literary artistic work, is distinguishable from satire, which more broadly addresses the institutions and mores of a slice of society’. In that case, the estate of Margaret Mitchell (author of Gone with the Wind) sought to enjoin publication of Alice Randall’s The Wind Done Gone, where Mitchell’s classic story is retold from a slave perspective. The Court of Appeal classified Randall’s work as a parody of Mitchell’s (even though, arguably, the work could be seen as directed at institutions and more than a slice of society). In the Campbell case, the court said that:

It is not enough that the parody use the original in a humorous fashion, however creative that humour may be. The parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole (although if it targets the original, it may target those features as well).

The court added in the Campbell case that: ‘Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing’. It is true that satiric works could be achieved without use of a copyright-protected work. Thus, many satires would not infringe copyright in the first place (see Guibault & Hugenholtz 2003, p. 9). It would seem ironic, nevertheless, that a work verging on ‘satire’ and serving the function of broader social commentary should not be able to avail the fair use defence when not targeting the copyright-protected work itself. In the case of Roger v. Koons,
the fair use defence was denied for a satirical critique of society, rather than a parody of the copied work (McCutcheon 2008, p. 170; see Appendix E).

It is still open to interpretation in US law whether ‘satire’ might fall within fair use. Noting that ‘parody and satire often blur’, McCutcheon comments that ‘ultimately it seems incongruous that so much rests on analysis and argument over a relatively elusive conception of what a parody or a satire is, when what the stakeholders are really concerned about are the broader reasons why we isolate parody or satire as tolerable infringements’ (ibid., p. 187). She adds that:

It is not really the magic of something falling into a box marked ’parody’ or ‘satire’ that justifies the exemption – rather it is the relatively benign effect on the copyright owner’s interests of the fair dealing for that purpose. That being said, provided the dealing is fair, why do we confine protection to these two particular forms of transformative work, and not others? What does it matter what form the infringing work takes? What matters is its effects…The reasons why we accord protection to parodies and satires…apply equally to other forms of creative output. (Ibid.)

McCutcheon suggests that the Australian defence of fair dealing ought to apply to other arguably ‘transformative’ works, regardless of whether they fall within ‘parody or satire’ (ibid.). She highlights the examples of appropriation art; remixing, ‘mash-ups’ and sampling of music or other media – including, making an ‘unofficial’ music video by remixing existing video footage or ‘recasting a novel from a different cultural or character’s perspective’ (ibid., pp. 187–188).

Reforms to the law to allow for certain forms of ‘transformative use’ are being considered in other jurisdictions. In a 2008 Green Paper on ‘Copyright in the Knowledge Economy’, the Commission of the European Communities (EC Commission) considers whether there ought to be an exception to copyright for ‘transformative, user-created content’ in European Union (EU) law. It cites an Organisation for Economic Co-operation and Development (OECD) study (2007, p. 9) in defining user-created content as ‘content made publicly available over the Internet, which reflects a certain amount of creative effort, and which is created outside of professional routines and practices’. The EC Commission (2008, p. 19) notes that:

The Directive does not currently contain an exception which would allow the use of existing copyright protected content for creating new or derivative works. The obligation to clear rights before any transformative content can be made available can be perceived as a barrier to innovation in that it blocks new, potentially valuable works from being disseminated. However, before any exception for transformative works can be introduced, one would need to carefully determine the conditions under which a transformative use would be allowed, so as not to conflict with the economic interests of the rightsholders of the original work.

In the context of the UK, the Gowers Review has recommended that an exception be created for ‘creative, transformative or derivative works, within the parameters of the Berne Three-Step Test’ (see Gowers 2006, recommendation 11, p. 68). The Review referred to the treatment of transformative use within US copyright law, and the example of sampling in the Hip
Hop music industry (ibid., p. 67). Transformative use alone is not, however, a defence to copyright infringement in US law, but one of the conditions required for a use to qualify for the fair use defence under Section 107 of the U.S. Copyright Act (see the Harry Potter Lexicon case in Box 8.1; see also EC Commission 2008, p. 19).

**Box 8.1. Harry Potter and the ‘fair use’ wand**

The intricate and somewhat unpredictable balancing act under US fair use is illustrated by the recent Harry Potter Lexicon case, before the US District Court for the Southern District of New York (‘the Court’). The plaintiff in that case was J.K. Rowling, author and copyright owner of the phenomenally successful Harry Potter novels and of two companion books that expand on the events in the novels. Warner Brothers Entertainment, Rowling’s co-plaintiff, owns the copyright in the film versions of the novels. The defendant, RDR Books, sought to publish The Harry Potter Lexicon, a 400-page A-to-Z encyclopaedia describing the events and details – characters, places, magic spells and imaginary games – featured in the Harry Potter novels, companion books and films (see Clayton 2008). Finding that the latter work infringed Rowling’s copyright, the Court awarded injunctive relief as well as statutory damages. Contemplating the statutory factors that must be considered when assessing fair use under Section 107 of the Copyright Act of 1976, the Court (Judge Patterson) stated that:

The evaluation of these factors is an open-ended and context-sensitive inquiry, and the examples listed in the statute (i.e., criticism, comment, news reporting, and teaching) are illustrative rather than limiting. The four statutory factors may not be treated in isolation, one from another; instead they all must be explored, and the results weighed together, in light of the purposes of copyright. The ultimate test of fair use, therefore, is whether the copyright law’s goal of promoting the Progress of Science and useful Arts would be better served by allowing the use than by preventing it.

Citing the US Supreme Court’s decision in Campbell v. Acuff-Rose Music, the Court observed that ‘most critical to the inquiry under the first fair-use factor is “whether and to what extent the new work is transformative”’. On the one hand, the Court found that the purpose of the Lexicon’s use of the Harry Potter series was transformative, the best evidence of this transformative purpose being ‘its demonstrated value as a reference source’. On the other hand, the Court also found that:

The transformative character of the Lexicon is diminished, however, because the Lexicon’s use of the original Harry Potter works is not consistently transformative. The Lexicon’s use lacks transformative character where the Lexicon entries fail to ‘minimize the expressive value’ of the original expression.

While the commercial nature of a secondary work does not itself bar a finding of fair use, it was emphasized in the Harry Potter Lexicon case that ‘courts will not find fair use when the secondary use “can fairly be characterized as a form of commercial exploitation”, but “are more willing to find a secondary use fair when it produces a value that benefits the broader public interest”’. This led to the finding in the Harry Potter Lexicon case that:

Seeking to capitalize on a market niche does not necessarily make Defendant’s use non-transformative, but to the extent that Defendant seeks to ‘profit at least in part from the inherent entertainment value’ of the original works, the commercial nature of the use weighs against a finding of fair use. To the extent that Defendant seeks to provide a useful
reference guide to the Harry Potter novels that benefits the public, the use is fair, and its commercial nature only weighs slightly against a finding of fair use.\textsuperscript{94}

On the facts, the Court found that this was a not a case of fair use while recognizing that the infringers had not acted in bad faith. Steps by RDR Books to appeal the decision were soon discontinued, and RDR Books published an edited version of the \textit{Lexicon} in January 2009. The defendants claim that the edited version was written to conform to the Court’s guidelines on what is fair use (Roberts 2009). The case has invited many commentaries, including those relating to non-commercial fan-generated content on the Internet. Steve Vander Ark, the creator of the popular fan website ‘The Harry Potter Lexicon’, was the same individual responsible for putting together the \textit{Lexicon} book. While much of the material in the book is the same as the material made available online, the website was not challenged by the plaintiffs (see Clayton 2008). Rowling is even said to have praised the website as a source of information about the Harry Potter series prior to the appearance of the \textit{Lexicon} book; however, she testified at trial that she was concerned that publication of a book version of the \textit{Lexicon} website would diminish the market for the Harry Potter encyclopaedia that she planned to write (ibid.).

The \textit{Harry Potter Lexicon} case provides a glimpse into the ambiguities connected with applying the ‘open-ended’ approach under US fair use doctrine, and the unpredictability of litigation outcomes. The Court used the ‘open-ended’ approach to conclude that the \textit{Lexicon} was not a fair use because it borrowed too closely from Rowling’s original works.\textsuperscript{95} Yet, the Court also made it clear that there is nothing inherently wrong with publishing a fiction-related reference work.\textsuperscript{96} At present, the revised (and presumably legal) \textit{Lexicon} sits on the market as an emblem of the sometimes fine line between what is and what is not legal fair use.

Discussing transformation of copyright-protected works in the context of non-commercial, community-based practices such as fan-generated content, Tushnet argues (2008, pp. 109–110) that ‘using a work as a building block for an argument, or an expression of the creator’s imagination, should be understood as a transformative purpose, in contrast to consuming a work for its entertainment value’ (see also Reese 2008, p. 118). She adds that:

Unauthorized, unplanned creativity has immense value even at the most instrumental level: beginning with popular sources gives young creators a place to start, heightens their enthusiasm for writing, and provides them with an eager and helpful audience. The social value of hundreds of thousands of unauthorized \textit{Harry Potter}-inspired stories rests not merely in the stories’ critical potential in challenging the sexual, racial and political assumptions of the original, but also in the skills that fans learn while writing, editing, and discussing them. The benefits of other forms of fan-based creativity, including video editing and music production, are similar. The transformation here is mainly of the creators and the audiences, and it should be recognized as a legitimate type of transformation.\textsuperscript{97} (Tushnet 2008, pp. 109–110; footnotes omitted)

Chander and Sunder (2007, p. 612) suggest, moreover, that the use of cultural icons to ‘re-imagine the world by reworking the most powerful elements of popular culture’ is particularly important where the popular culture is ‘widely discriminatory and non-inclusive’. Discussing feminist elements in Mary Sue fan fiction, as well as racial undertones in \textit{Gone with the Wind}, they assert:
Theorists, both traditional and postmodern, affirm the discursive nature of creativity: all creators borrow from earlier masters. Contemporary cultural theorists recognize as an important discursive tactic the reworking of a discriminatory narrative to retell history and empower oneself. Rewriting the popular narrative becomes an act of not only trying to change popular understandings, but also an act of self-empowerment.\(^9^8\) (Ibid.)

Lessig (2007) furthermore points out that the ‘cut and paste’ or ‘remix’ possibilities offered by digital technology present forms of expression by which the contemporary public engage in acts of creativity and free speech. Fitzgerald and O’Brien (2007) note the legal boundaries in cases where images protected by copyright and trademarks are appropriated by groups in social commentary and political activism in a process known as ‘culture jamming’.\(^9^9\) As seen earlier in relation to ‘parody’ and copyright infringement, free expression and ‘fair use’ issues are often intertwined.

Meanwhile, confusion about the legal limits for fair use may itself have a chilling effect on creativity.\(^1^0^0\) Some creators may ‘play safe’, for example, in the face of personal and legal uncertainties over fair use.\(^1^0^1\) In their policy paper ‘Will Fair Use Survive?’ for the Brennan Center for Justice, Heins and Beckles (2005) found that the ‘fair use’ exception is underutilized by the US public given its unpredictability, the high cost of defending it in court,\(^1^0^2\) and the crushing liability that may result if ‘one guesses wrong’.\(^1^0^3\) Their study suggests that artists and scholars have significant interest in the ‘fair use’ exception, but find little clarity about its operation. This is especially the case in ‘appropriation art’, where the boundaries of what is fair use are blurred (see Appendix E). Highlighting the further ‘chilling effects’ of ‘cease and desist’ letters from corporate rights owners on free expression and independent media, as well as the problems of a ‘clearance culture’ in the arts,\(^1^0^4\) the study emphasizes the need for community support and accessible legal assistance to help artists strengthen their knowledge in their dealings with publishers, distributors and other cultural gatekeepers.

### 6. Changing notions of authorship

Transformations have meanwhile been taking place in relation to how creators and creative activities are perceived. In the scholarship relating to IP, there is a shift of focus from the individual inventors, and so-called ‘discrete’ innovation, to ‘participatory processes’ which recognize the incremental nature of innovation (Ghosh & Soete 2006; Suthersanen 2008; see Chapter 1). While the potentials of the Internet to accelerate the speed and extent of such participation has called attention to the role of social networks in creative activities (Benkler 2006), the ‘deconstruction’ of authors and authorship has, of course, taken place over a much longer period.

Within literary and social commentaries, there has been a self-reflecting search for the meaning of ‘What is an author?’.\(^1^0^5\) Some theories in literary criticism view the created written work as constantly re-contextualized and given new meanings by the reader. Indeed, in ‘Death of the Author’, Barthes (1967) suggests provocatively that:

\[
\text{[A] text consists of multiple writings, issuing from several cultures and entering into dialogue with each other, into parody, into contestation; but there is one place where this} \quad \text{\textasciitilde IP resources the right size, at the right time, in the right place\textasciitilde www.piipa.org}
\]

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multiplicity is collected, united, and this place is not the author…but the reader…the unity of a text is not in its origin, it is in its destination…to restore to writing its future, we must reverse its myth: the birth of the reader must be ransomed by the death of the Author. (Ibid.)

Barthes adds that ‘literature is that neuter, that composite…into which every subject escapes, the trap where all identity is lost, beginning with the very identity of the body that writes’ (ibid.). This contrasts with notions of authorship in mainstream IP theories, where the individual ‘author’ has been a central figure both in the ‘natural rights’ and ‘economic incentive’ arguments relating to copyright. Studying the early development of copyright law in Europe, some commentators have suggested that the notion of the individual ‘author’ was constructed with the rise of the book trade and the need to justify proprietary claims for the control of printed material (Rose 1992; Woodmansee 1984, 1993).

Art theories have also dwelled critically on notions surrounding the ‘artist’ and ‘originality’. For example, Adorno traces how the Western concept of the ‘genius’ artist or inventor was itself a historical product which ‘came in vogue in the late eighteenth century’ (1997 translation, p. 171). He adds that ‘prior to the age of genius the idea of originality bore no authority’ (ibid.). He observes that ‘in their works composers of the seventeenth and early eighteenth centuries made use of whole sections of their own earlier works and those of others’; ‘painters and architects entrusted their designs to students for completion’ (ibid.). As seen in Appendix E in relation to contemporary art, some artists themselves have actively challenged notions of the ‘artist’ and of ‘originality’ in their own works. It has been said that ‘with a critical eye to art-historical perspective’ some contemporary artists ‘actively mine fine art and popular culture for their subject matter, questioning originality and at times effacing or disrupting the presence of the artist’s hand’.

Legislators and law courts dealing with copyright have generally not kept up with such philosophical searching on authorship and originality. It has been said that ‘when a judge interprets the copyright law, he or she is likely to be much more concerned with legal coherence and continuity – with the presentation of the law as a logical whole – than with literary theory’ (see Bently 1994, p. 980). At the same time, copyright law is able to ‘imply and invent authors’ where there is no corresponding cultural or other ‘reality’, including in circumstances which may not fit within conceptions of authorship in Romantic literary theory (ibid., p. 981). Indeed, Bently provocatively suggests that ‘the author is a notion which only needs to be sustainable for an instance’ in law, since ‘copyright serves paradoxically to vest authors with property only to enable them to divest that property’ (ibid.). He adds that:

At the same time as the law can invent authors where romantic literary theory would deny them, law can deny authorship where literary theory might recognise it. Thus, copyright law denies authorship to the contributor of ideas and, in cases of collaborative works, frequently refuses to recognise contributors as authors in an attempt to simplify ownership. Because a single property owner means that assignments and licences of copyright are easier and cheaper to effect, copyright law prefers to minimize the number of authorial contributions it is prepared to acknowledge rather than reflect the ‘realities’ of collaborative authorship. (Ibid.)
This interpretation suggests limitations in copyright law especially in assimilating notions of collective or incremental creativity (see also Chapters 1 and 5). In reality, many participants in collaborative projects are probably quite invisible to the copyright compass. Increasing corporate ownership of IP, as discussed earlier, also challenges the romantic notions of the isolated ‘author’ or ‘creator’ as the prime beneficiaries of copyright protection. As will be seen in the following section, new technology is further altering conceptions of creators and creative processes.

7. Technology as a driving force for change

Halbert (1996) notes how electronic communication is providing new avenues for incremental, collective authorship which are undermining traditional concepts of ‘authorship’ under copyright law. She also discusses new challenges posed by ‘machine authorship’, and how boundaries are blurred as to whether computer programs can be said to create ‘art’.112 Other implications of new technology on copyright have already been explored in Chapters 6 and 7 of this book, particularly in terms of their effects in altering the power relations among creators, intermediaries and end users. As discussed in Chapter 7, new technology can bring production processes closer to the artists, for example, in the music industry, rendering them less dependent on producers with capital. This had been witnessed to some extent when music cassette technology was introduced decades ago. Wallis and Malm (1984, p. 270) studied, for example, how music cassette technology replacing phonograms in the 1970s and 1980s helped some musicians record their works cheaply and overcome certain production and distribution barriers.113 In a similar vein, the World Bank ‘Africa Music Project’ has been focusing on how information technology could provide a solution to improving the livelihoods of African musicians by passing existing barriers in their access to recording technology and world markets (Penna et al. 2004, pp. 96–97).114 This technological euphoria may have to be qualified, of course, by what some perceive as a persistent digital divide not only between the North and the South but also within regions (Gomez 2005, p. 41).

Meanwhile, new technology has visibly multiplied the possibilities for reproduction and handling of cultural content by third parties other than the content providers in a variety of contexts, whether for personal use, ‘peer-to-peer’ (P2P) file-sharing, commercial ends, public service or other purposes. Reproduction of cultural material occurs at a greater speed and magnitude with digital technology. Digitization also provides unprecedented possibilities for the preservation of cultural and other works. With digitization come both opportunities for increased public access to cultural works and new legal grey areas (see Chapter 7, Box 7.5). While libraries, for example, play a crucial role in digitizing and making works more accessible to the public, domestic laws differ significantly and are often ambiguous regarding the limits for library digitization and other treatment of copyright-protected materials (see WIPO 2008).

The phenomenon of Google Books encapsulates the far-reaching consequences of digital technology and public-private arrangements, as well as the rising role of collecting societies in regulating public access to cultural works (see Chapter 9). Over recent years, Google has been digitizing millions of books, including many covered by copyright, from the collections of major research libraries, and making the texts searchable online; it has been said that of the 7 million books that Google reportedly had digitized by November 2008, 1 million are works in the public
domain; 1 million are in copyright and in print; and 5 million are in copyright but out of print (Darnton 2008). A class action brought by authors and publishers in the US (claiming that digitizing constituted a violation of their copyrights) has resulted in a complex settlement (and recent resettlement) pending court review of validity (ibid., 2008; see the discussion in Chapter 9). While awestruck that ‘here is a proposal that could result in the world’s largest library’, Darnton observes of the Google case that ‘we are allowing a question of public policy – the control of access to information – to be determined by private lawsuit’. In discussing public access to works covered by the US settlement, one should further note the different position of the US users to users outside the US (see Chapter 9).

As the Google case also illustrates, digital and Internet technology is adding new stakeholders to the copyright matrix. Suthersanen (2007, p. 134) suggests that: ‘The latest stakeholders in the copyright game are not the large contents providers but merely large organizations who were peripheral to the Internet and digitization phenomena twenty years ago. They are online stakeholders such as corporations who own or manage digital search engines like Yahoo and Google, software and content producers like Microsoft, and online retailers like Amazon…’. She adds that:

These new stakeholders will join the existing world of stakeholders such as librarians (our traditional guardians of access to knowledge and learning), the publishing industry, the film and recording industries and the broadcasting industry (which is currently pushing for a new international treaty on broadcasting)… And, of course, the authors. (Ibid.)

Suthersanen argues that irrespective of the various theoretical justifications, the fundamental role of copyright law ‘has always been to balance the competing interests of the main stakeholders that each new technology inevitably disrupts and then recalibrates’ (ibid., pp. 133–134; see further Chapter 9). Indeed, just as high technology has yielded increased possibilities for production as well as mass copying of content, it is providing the controls to limit access to content. Restrictive digital rights management (DRM) schemes and technological restrictions such as encryption have notably been engaged by content providers to create barriers to users’ access and control of digital content. Can such restrictive practices, pushed to an extreme, amount to a ‘Technology Lock-Down’ scenario, as discussed among the five scenarios on digital media in a paper by the Berkman Center for Internet & Society (see Chapter 9)? Some suggest technological restrictions may extend to prevention of access otherwise allowed by the law within fair use or fair dealing exceptions. As discussed in several chapters and not repeated here, these technological restrictions are increasingly given the force of law through international treaties and domestic provisions (see especially Chapter 7).

7.1. Movements supporting ‘incremental’ modes of creation

Hybrid licensing arrangements have evolved through movements such as Creative Commons and Copyleft, and are particularly visible within the context of the Internet. Creative Commons’ goal is to ‘build a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules’. It provides a licensing mechanism that functions within the ambit of copyright law. Whereas the standard language for a copyright notice is ‘all rights reserved’, Creative Commons
licences offer the alternative of reserving just some rights. As such, an artist might make a digital copy of her painting and upload it to her personal website. If she uses, for example, an ‘Attribution-No Derivative Works 3.0 United States License’, she is allowing others to download her work and upload it to their own websites, whether for commercial or non-commercial purposes, so long as her work is not modified and she receives attribution as the artist. This is one of many licences that Creative Commons offers. The licences tend to ensure that the author or artist retains her right of attribution. Other factors, such as whether third parties can modify the work, whether the work can be used in a commercial environment and what jurisdiction the licence is to be used in are options that the potential licensor can choose.

Copyleft is a similar concept to Creative Commons except that its licences require that any work derived from any copyleft work also be copyleft-licensed. Described as ‘viral’, this kind of licence is perhaps best demonstrated by Creative Commons’ ShareAlike licences, which allows others to distribute derivative works only under a licence identical to the licence that governs (the original) work. For example, if a photograph is licensed under the ‘Non-Commercial and Share Alike Terms’ and is posted to that photographer’s website, a collage artist could use that photograph in her work so long as she offers her work to the public on the same terms as the photographer; that is, they may use and modify her collage. Another example is Artlibre’s ‘Free Art License’, which operates similarly by authorizing the public to copy, distribute and freely transform the work of art while respecting the rights of the originator.119

Coates (2007, p. 94) notes that ‘while there are only limited statistical evidence currently available about Creative Commons licence use, based on general observations and anecdotal evidence it is possible to see trends emerging in how and why individuals and institutions alike are choosing to make their copyright material available under the open content licensing system’.120 According to her: ‘Creative Commons provides a valuable resource for the modern “cut and paste” culture that has been neglected by traditional copyright law. The need for content management tools that are both easy to use and free, and material that can be legally utilized by private individuals for creative purposes without the need to obtain additional permissions, will only increase as user-generated content grows in importance and popularity’ (ibid.).

The extent to which creators, including copyright owners, are likely to consent to ‘remixing’ and other ‘transformations’ by the public of their works will, however, vary with context and between sectors. To begin with, creators are unlikely to authorize or license reproductions or transformations which may be critical or derogatory of the work in question (see Chander & Sunder 2007, p. 621). There are also worries by some creators that ‘remixing’ or ‘cut and paste’ may strip away the context relevant to the creation of a work. The TCEs of indigenous peoples or other local communities are an example where the expressions are closely bound up with the cultural identity and spiritual beliefs of the creators, rendering third-party access to and use of such expressions a complex and debated topic (see Chapter 5).

In the case of documentary film-making, the Australian independent film-maker Richard Jones (2007, p. 105) observes, moreover, that film-making involves a whole chain of players/participants beyond the film-maker, whereas models such as The Creative Commons model seem ‘to be geared for a sole author, not for the complex network of creators that contribute their images, stories and creative work’ to a film. He emphasizes that the ‘context’ in
which a part of a film is reused or remixed affects not only the copyright and moral rights of the film-maker but also the interests of other participants in the film (ibid. p. 101). He gives the separate examples of indigenous communities featured in a film and that of prison inmates who have consented to participating in a film documentary. In his opinion, there is a risk of the Creative Commons movement stripping away the ‘politics of context’, and further thought is required to resolve issues including how the movement can better qualify the ‘context of use’ (ibid. pp. 103–105). Indeed, it remains to be seen how the Creative Commons and Copyleft movements will in future address jurisdictional issues over the ‘moral rights’ of creators in relation to their works. Creative Commons licences (with exceptions in some jurisdictions such as Canada) tend to leave moral rights untouched, and potential issues between copyright-related licences and moral rights retention may be foreseen in some jurisdictions.  

8. Some scenarios and reflections for the future

In her article ‘Intellectual Property Law, Technology and Our Probable Future’, Halbert (1996) discusses three future scenarios relating to copyright law, digital technology and changing patterns of creation. The first is a ‘Business as Usual’ scenario under which:

The division between professionals who created for money and nonprofessionals who created for pleasure remained quite clearly drawn. The copyright law continued to be unreflective of the motivations behind creation and instead continued to rely upon the assertion that providing protection of expressions and providing the opportunity for making money facilitates creation.…(Ibid., p. 152)

In contrast, under a second ‘Hackers and the Future’ scenario:

Authorship did not serve as a clear marker for the text in this world because ownership was so fleeting. Copies and appropriations appeared almost as fast as the ‘original’. In such a world, authorship lost its meaning, because it became difficult to tell the duplicate from the original and most people gave up the notion of the romantic author completely. (Ibid., pp. 154–155)

In a third scenario called ‘Sharing as Utopia’, Halbert (1996, p. 156) suggests that competition would be tempered by an ‘overriding aura of cooperation’. She notes that:

This type of sharing was especially appropriate for intellectual property. Sharing ideas is different from sharing tangible goods, because ideas can reside in more than one mind simultaneously…Authorship in the sharer future was not a ‘profession’. Everyone participated in the creation of art and ‘texts’. Many people utilized their creative capacity by linking and developing already existing works. Because creation was premised on facilitating cultural development and not on monetary rewards, the possibilities opened up. It was recognized that ‘originality’ is always culturally dependent, and great ideas did not appear from nowhere as the romantics had believed. Rather, everything was connected in the sharer world, including creation. (Ibid., pp. 156–157)
Movements such as Creative Commons suggest a glimpse of the ‘Sharing as Utopia’ scenario discussed by Halbert (1996). Creative Commons falls short of ‘undoing’ the relevance of the IP regime as they promote a ‘compromise’ solution relying finally on a system of licensing IP-related rights. The pervasive reach of contractual relationships in shaping creative endeavours and arrangements for the dissemination and transformation of cultural works is also seen in the Copyleft movement.

As discussed earlier, contract is a fundamental consideration for future reforms relating to creators’ rights and livelihoods in most jurisdictions.122 Alongside questions of often unequal bargaining positions at the time of contract, few creators can foresee all uses of their work (and the value of their copyright) in the future. The attitudes of creators over the sharing of their works with members of the public, including other creators, may also change over time and with different contexts. In some cases, creators who assign away their copyright to a work by contract may find themselves powerless to effect such farther-reaching decisions in relation to their works. There is significant room for law reforms to better govern the interaction between copyright law and contract law. Indeed, contracts may currently provide for exclusive rights in controlling reproduction or distribution of a work well beyond stipulations under copyright statutes, and standard contractual terms require closer scrutiny.123 As Guibault (2002, p. 111) notes:

In principle, any use of copyrighted material carried out in compliance with the provisions of copyright law preserves the balance established by the legislator…To what extent are the parties to a copyright license obliged to respect the legislator’s balance of interests? For years, rights owners and users have been negotiating licenses for the production and distribution of copyrighted works. On occasion, these contractual arrangements have purported to restrict the user’s actions with respect to protected material, sometimes even beyond the bounds normally set by copyright law. More recently, the balance set by the copyright regime has come under greater strain than before in view of the increased use of standard form contracts that aim to regulate the end-users’ permitted actions with respect to copyrighted material. Besides the provisions of copyright law, end-users of copyright material must often comply with contractual restrictions imposed by the rights owners.

Another key consideration for the future pertains to how evolving concepts of ‘creation’ and ‘creators’ may further strain some basic assumptions of ‘authorship’ under conventional copyright law. As discussed in this and other chapters, opportunities from digital technology and the Internet are blurring the lines between ‘producer’ and ‘consumer’ of cultural works, even though the observed phenomenon of incremental, participatory creative processes is not itself a new one – ‘communal’ concepts of creation behind the TCEs of indigenous peoples have long challenged assumptions of individual creators under conventional copyright law (see Chapter 5). Tracing some trends in contemporary art, Dufrenne (1979, p. 203) notes, moreover, how many contemporary artists are establishing a relationship with the ‘public’ which is more ‘fraternal’, rather than one emphasizing the divide between ‘creators’ and their ‘audience’:

They offer the public (if it still wants it) the dignity of co-creator, for they have come to realize that the act of creation is not complete until a work is received, with the necessary
perception, in a manifestation of sensibility. And sometimes, they go farther still. Just as certain musical compositions leave it to the interpreter to choose the order of the pieces, or allow him to improvise in accordance with his ‘reflexes’, so certain kinetic works look to the audience to ‘perform’ them. The creator then stands aside, delegating to other partners, delegating to his audience the task of pulling the strings. But he may also give way to other partners, when he works as part of a team, more democratically than formerly in the studies of the masters and in medieval corporations. (Ibid.)

Is the comment that ‘all art is, to some degree, appropriation art’ entirely spurious? To the extent that creative endeavours are seen as a result of social networks (see Chapter 1), this calls for a fresh look especially at the economic incentive theories for copyright which focus on individual creators, as well as a rethinking of the prevalent concepts of ‘copying’ and transformation of copyright protected works by users. There is room, for example, for the ‘rights of users’ under the IP system to be better articulated. Sun (2007) suggests that more attention should be paid towards rethinking the ‘legal status’ of users. Can one, for example, rethink the exceptions to copyright in terms of a user’s right of access not only to cultural goods but also to cultural participation (see Sunder 2008; Beutz Land 2009)?

A number of commentators have explored the relevance of human rights in grounding reforms to IP law at the international and national levels (Afori 2004; Ovett 2006; Beutz Land 2009). Discussing the possibility of an international instrument ‘codifying user freedoms expressed not in the language of copyright, but in terms of fundamental (human) rights and freedoms proper’, Hugenholtz and Okediji (2008, pp. 30–31) note that:

The norms of such a freedoms-based international instrument – say, a ‘Treaty on User Freedoms’ – might include user freedoms reflecting the ‘hard core’ of fundamental rights and freedoms (notably freedom of expression and information and protection of privacy) as well as softer ‘welfare rights’, such as cultural freedoms, right to education, etc. A major advantage of such a human rights-based instrument would be that it could define user freedoms not as (negative) ‘exceptions’ to property rights, but in terms of positive ‘rights’ or freedoms.

Hugenholtz and Okediji point out that ‘this approach would keep more or less intact a coherent framework of international IP law, while making intellectual property “subservient” to (the higher objectives of) human rights’ (ibid.). They add that: ‘In doing so, the law of international copyright would immediately reflect the general public interest – as an overriding norm, not as an afterthought in the final part of a three-step test’ (ibid., p. 30). Suggesting some limitations to the human rights approach, however, the authors call for an international instrument ‘grounded in the law of copyright’ to codify exceptions and limitations across the board (ibid., pp. 31–32; see Chapter 7).

Some commentaries look at pushing flexibilities within domestic copyright exceptions, rethinking underlying ‘fair use’ doctrines (Fisher 1988), or better calibrating the three-step test on the basis of notions of ‘balance’. Others have called for a more fundamental rethinking of copyright law. In a lecture in 1996 entitled ‘Copyright: Over Strength, Over-Regulated, Over-Rated?’, then UK High Court judge Sir Hugh Laddie (1996, p. 259) invited the audience to
‘stand back and imagine that we were not building our copyright law on a foundation of accumulated rights, commercial interests and monetary expectations’:

Imagine that we have just a blank sheet of paper and are being invited to create a copyright law now from scratch for the new millennium and that the purpose is to give some reasonable measure of protection to those who write books or computer programmes or make films for television. Would we really choose to construct a monopoly which might last a century and a half? Would we really make it a crime to copy even quite small parts of the copyright work throughout those many decades?…I think not. But, if we are going to start with a fresh piece of paper, let us do a proper job and really start from first principles.…(Ibid.)

This gauntlet seems to be taken up by an interesting initiative underway called ‘Copyright 2010’. This project seeks ‘to rethink the basic principles of copyright law from scratch, putting the public interest first and taking into account the interests of both developed and developing countries’. More radical are some of the future scenarios developed by Halbert (1996), as discussed earlier, where IPRs including copyright no longer play a role in cultural creation (see further Halbert 2001, discussed in Chapter 9).

Meanwhile, political and economic forces continue to drive the future alongside ideological shifts. Conventional justifications for copyright may be based on rewarding the individual creator’s efforts, but rampant copyright assignment and a marked presence of corporate ownership of IP assets in major sectors of the cultural industries drive a lot of the agenda for copyright and other IP reforms at the national and international levels. Several chapters of this book have noted how continued trade pressures on developing countries from certain developed countries, at the behest of industrial lobbyists, have shaped the negotiation and impact of FTAs. Some of these agreements transplant US normative standards into other legal regimes without necessarily exporting the accompanying exceptions and limitations in US law that seek to provide a crucial balance between private and public interests. Pressures on developing countries for copyright enforcement, and the increasing tendency in both developed and developing countries to ‘criminalize’ forms of copyright infringement, also have immediate consequences on human well-being and the informal sectors within societies. What unintended consequences might result from those measures lobbied for by the US, the EU and the transnational music, film and publishing industries, along with countermeasures advocated by oppositionists? Is the adoption by developing countries of an ‘Access to Knowledge’ (A2K) treaty a plausible future scenario?

As highlighted in this chapter, there is significant scope for examining more closely the relationship between copyright (and IPRs in general) and cultural diversity. The emerging ideas of cultural diversity are complex, and may in some ways be seen as a reaction to some of the perceived ‘homogenizing’ influences of globalization (UNDP 2004; see Section 3). Lundberg, Malm and Ronström (2003) suggest, moreover, that the discourse of ‘cultural diversity’ itself needs to be approached within the dynamics of how globalization has also accentuated the appreciation of the ‘local’.
driving force for further human creativity? Studying ‘transcultural’ music, Wallis and Malm (1984, p. xiv) remind us that:

[H]uman beings have incredible qualities of resilience which can be called on when things dear to their hearts are threatened. The threat of being flooded by a nationless transnational music culture leads to counter-actions in the form of local sub-cultures.  

Without undermining the importance for professional creators to be able to maintain their livelihoods, there is a need to open up the discussion to embrace different cultural interpretations and motivations for creative activities. Spiritual pursuits, for example, marked the artistic and architectural endeavours in both the East and the West for centuries, and these dimensions continue to shape the cultural expressions of many peoples. Individuals in both secular and non-secular contexts continue to express themselves through art and other creative pursuits. Through its current focus on economic incentives for creative activities, copyright law misses out on (or implicitly plays down) the many dynamics and motivations which drive creative endeavours by individuals and communities. What reforms to copyright law are needed to accommodate such diverse values and how can we think beyond copyright?

If copyright is indeed about validating and incentivizing creative endeavours, then a better understanding of its relation to other economic rewards (such as subsidies to artists) and non-monetary incentives is needed. In particular, there is a strong case for copyright protection to be coordinated with the broader policy goals of cultural development as part of human development. Can we imagine, for example, a future scenario where domestic copyright policies are situated more properly within the sphere of cultural policy and development? As Towse (2007, p. 759) suggests:

[C]opyright policy must be thought of as part of cultural policy (as it already is in some countries and the trend is increasing); logically, therefore, the objectives of cultural policy – fostering creativity, cultural diversity, freedom of information and expression, broadening audiences for cultural events, etc. – should be used to judge whether a reform to copyright law is a welfare improvement or not.

9. Conclusion

In this paper, we explored the role and effectiveness of copyright in incentivizing cultural works. We looked at how copyright thresholds and ownership structures relate to the cultural right of creators to the protection of their ‘moral and material interests’. We noted that commonplace copyright assignment by creators to corporations in several sectors presents a contractual phenomenon that ultimately shifts the long-term benefits and interim control over many copyright-protected works away from individual creators. The interaction between contract law and copyright law is an area requiring further scrutiny. In some cases, the profits eventually made by intermediaries may bear little proportion to any benefits provided to the creator under a contract of copyright assignment or licence – few creators have the ability to ‘valuate’ their copyright accurately by making projections well into the future.
In examining whether copyright can incentivize a diversity of cultural creations, we also looked at the uneven protection for creators in different regions and sectors. There are still some significant lacunae in copyright protection, for example, for individuals working in the contemporary or performing arts, and communities evolving TCEs. That creative expressions continue to thrive in these sectors suggest that other incentives and modes of validation beyond those considered in the copyright paradigm are actively at work. Returning to the various definitions of ‘culture’ put forward at the beginning of this chapter, it could be said that copyright, in fact, intersects with only a limited segment of cultural life and creative processes. The lack of relevance of copyright to the promotion of TCEs, for example, is recognized in Chapter 5, where other forms of IPRs, sui generis laws and non-legal options are explored.

To answer the question whether a diversity of cultural works is currently being incentivized by the copyright system, we also need to look at how individuals and communities make use of copyright works to improve their capabilities. Indeed, as the case study on contemporary art in Appendix E suggests, the line between creators and users is by no means clear in relation to cultural works. All creators, professional or amateur, need adequate access to the raw materials for their creations, in many cases building on the works of others. With creators on both sides in the trade-off between private and public interests in copyright law, it is not easy to find the appropriate balance. Linking copyright law and exceptions to the promotion of capabilities, including those for free expression, may provide new perspectives for reform.

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To See also the evolving literature on the ‘creative economy’ (Howkins 2001; United Nations 2008).

The Indira Gandhi National Centre for the Arts (IGNCA) was established in 1987 as an autonomous institution affiliated with the Department of Culture in India, and envisioned as a centre for research, academic pursuit and dissemination in the field of the arts. See the IGNCA website, available at: http://ignca.nic.in/ (accessed 12 February 2009).

Comment received from Uma Suthersanen. One example of Germany’s more circumscribed approach to what constitutes art is its treatment of photographs. Moving snapshots, the result of holding a camera and capturing what passes in front of it, does not give rise to authorial protection. A photograph must reflect personal expression or be a visual statement by a photographer. See Vogel 1998, p. 123.

Adorno and Horkheimer (1944, pp. 120–167) note how the ‘achievement of standardization and mass production’ through the ‘technology of the culture industry’ removes the work of art from the realm of aesthetic experience. Tortious rights of relevance include the common law tort of ‘passing off’ (applicable in the UK, Australia, New Zealand, India, Ireland, Nigeria, Singapore, Malaysia and various other common law jurisdictions). There may also be overlap with other laws including media laws, obscenity laws, defamation laws and racial hatred laws, as well as specific legislation such as US trade dress law. Comment received from Uma Suthersanen.


Notes

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2 Connected to the third conception is the conception of culture as a ‘system of values, and symbols as well as a set of practices that a specific cultural group reproduces over time and which provides individuals with the required signposts and meanings for behaviour and social relationships in everyday life’ (see Stavenhagen 1998, pp. 4–5).


5 See also the evolving literature on the ‘creative economy’ (Howkins 2001; United Nations 2008).


7 The Intellectual Property Code, Dernier texte modificateur Loi 2003–706 du 01/08/03 (JO 02/08/03), Articles L-121(1) – (4).

8 Donders argues that ‘different concepts of culture may lead to different approaches to cultural rights’ (2007, pp. 234–235).
14 Prott (1998a, p. 165) points out that certain international instruments seem to refer to ‘culture’ as the highest intellectual and artistic achievements of a group (which she calls ‘Culture’ with a capital C), while others approach culture in the anthropological sense, as shared skills, beliefs and traditions.

15 For further discussion of the different types of rights potentially falling within ‘cultural rights’ under international instruments, see Prott 1998b, pp. 93–106; Donders 2007, pp. 232–236.


18 See also paragraph 1. The Committee’s General Comment No. 17 has been critiqued, for example, by Ovett (2006, p. 6) for ‘repeatedly emphasizing IP protection as a way of implementing this part of Art 15’. She argues that such an emphasis is ‘problematic, as it does not make explicit enough that there may be instances where IP protection is not appropriate and other sui generis systems should take over, or indicate when these instances might arise’ (ibid.).

19 Along with indigenous peoples, other categories specially mentioned as warranting special protection include women, children (i.e. ‘the bearers and transmitters of cultural values from generation to generation’), older persons, persons with disabilities, minorities, migrants and persons living in poverty (CESCR 2009, Section E, paras. 25–39).


23 In discussing socially divisive debates on cultural identity and diversity, the report adds: ‘Globalization adds yet another dimension, as ethnic groups, indigenous people and nation-states challenge international agreements on trade and investment on the ground that they diminish cultural diversity’ (ibid., p. 27). It stresses that: ‘Globalization can threaten national and local identities. The solution is not to retreat to conservatism and isolationist nationalism – it is to design multicultural policies to promote diversity and pluralism’ (ibid., p. 10).


25 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (Paris, 17 October 2003) 2368 U.N.T.S. 3, U.N. Doc. MISC/2003/CLT/CH/14 (entered into force 20 April 2006), available at: http://unesdoc.unesco.org/images/0013/001325/132540e.pdf (accessed 3 February 2010). The Convention states that the intangible cultural heritage is manifested ‘in the following domains [among others]: oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; performing arts; social practices, rituals and festive events; knowledge and practices concerning nature and the universe; and traditional craftsmanship’ (Article 2(2)).

26 Article 3 of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, on the ‘Relationship to other international instruments’, specifies that: ‘Nothing in this Convention may be interpreted as:...(b) affecting the rights and obligations of States Parties deriving from any international instrument relating to intellectual property rights or to the use of biological and ecological resources to which they are parties’. See also Article 20(2) of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural
Expressions which provides that: ‘Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties’.

Despite this qualification, there are aspects of UNESCO’s work under this convention, such as the creation of inventories of intangible cultural heritage, which potentially raise some IP-related concerns, for example, in relation to documentation of TK and TCEs (see Chapter 4). For information on WIPO’s work in relation to the development of ‘IP Guidelines for Documenting, Recording and Digitizing Intangible Cultural Heritage’, see the WIPO website, ‘Creative Heritage Project: Strategic Management of IP Rights and Interests’, available at: http://www.wipo.int/tk/en/folklere/culturalheritage/index.html (accessed 24 March 2010).

See Desurmont 2006, pp. 2–3, who writes of a ‘fundamental neutrality’ of authors’ rights in relation to cultural diversity.


The need to promote a spectrum of independent film-making activities has been emphasized in other regions. This is seen, for example, in the mission of the Asian Film Archive, which is ‘to save, explore and share the art of Asian Cinema’ in supporting not only renowned gems of the cinematic world but also local film communities in Asia. See Asian Film Archive, ‘About Us’, available at: www.asianfilmarchive.org/About (accessed 29 March 2010).

In relation to moral rights, some jurisdictions ascribe inalienable moral rights to authors (e.g. France); others allow authors to assign, transfer or forfeit all or part of their moral rights.


See Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, OJ No. L 290 (1993), replaced by Council Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights (codified version), OJ No. L 372 (2006) [hereinafter ‘Copyright Duration Directive’]. While the EC Copyright Duration Directive (Articles 2(1) and 10(4)) now requires the principal director of a film (made from 1994 onwards) to be considered one of its authors, Cornish and Llewelyn argue (2003, p. 400) that the director’s copyright ‘may be of greater ideological than practical consequence’. The work might be one produced in the course of employment (making it the property of the employer), and ‘even directors who are commissioned rather than employed must normally expect to assign copyright to their producers’ (ibid.). If directors have an ‘extraordinary reputation’, they may contract to do this on royalty-sharing or other special terms (ibid.).

Especially at an early point in their career, writers may have few other options for having their work published in terms of the traditional channels (pers. comm. Melissa Sones, writer, 10 December 2008).

The laws in different jurisdictions vary on this issue. Cornish and Llewelyn (2003, p. 474) highlight that: ‘Under s.90(2)(b) of the U.K. Copyright, Designs and Patent Act 1988, for example, it is possible to assign for a limited term within the copyright period, but things are changing under EC rules’.

Towse (2007, p. 761) notes within the context of performers’ rights in the UK that: ‘Once economic rights have been assigned, the performer has little residual control over their exploitation (unless moral rights are infringed). When the record label decides to delete their works from the catalogue, performers can rarely do anything to stop them: the copyright may last 50 years but the shelf life of the recording is more likely to be 5 years or less’.

Von Lewinski notes, for example, that ‘provisions may voluntarily limit the duration of assignment, so that the author has a second chance to seek better return for an assignment’ (ibid., p. 59).


Ibid.

H.R. Rep. No. 94–1476, at 124 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5740. At the same time, Goldstein (2004, p. 262) ventures that ‘these regulations may require authors to forgo a present economic benefit – the added value a publisher would be willing to pay to be free of the threat of termination – that may be worth much more to authors than some future, and possibly dubious, benefit arising from contract renegotiation 35 years hence’. See also Cornish 2002.

In some countries assignment of copyright is not legally possible and only licensing is allowed (WIPO 2005, p. 15).

Ibid. Cornish and Llewelyn (2003, p. 474) note that the most lucrative works are often exploited in a number of ways: in the case of the popular novel, there are the volume rights, the serial rights (in newspapers and magazines), the translation rights, the film rights, the dramatization rights and the electronic rights.
Particular challenges in the case of TCEs are dealt with separately in Chapter 5.

43 Penna et al. (2004, p. 101) note that: ‘Rampant piracy combined with weak collection societies makes the collection of royalties problematic; hence, African artists and composers often sell their songs to a publisher or recording company for an upfront payment’.

44 Cornish and Llewelyn (2003, p. 521) suggest that: ‘Performers engage in activities which are more immediately artistic and creative than those of entrepreneurs who enjoy copyrights in sound recordings, films, broadcasts and cable-casts. The greatest and the most charismatic interpreters of drama, film scripts and music are deeply treasured…Yet, there has been considerable reluctance to give performers an equivalent property right, which has been largely sustained by objections from these very entrepreneurs.’

45 As generally understood, ‘there are three kinds of related rights: the rights of performing artists in their performances, the rights of producers of phonograms in their phonograms and the rights of broadcasting organizations in their radio and television programs’ (WIPO 2004, p. 46, sec. 2.2.03). It is said that ‘protection of those who assist intellectual creators to communicate their message and to disseminate their works to the public at large, is attempted by means of related rights’ (ibid.).

46 Rome Convention, Article 3(a) (definition of ‘performers’), Article 7 (setting ‘minimum protection for performers’). Other prohibited acts include the reproduction of a fixation of a performance if the original fixation was made without the performers’ consent or if the reproduction is made for purposes different from those for which they gave their consent (Article 7(1)). See also the WIPO website, ‘Summary of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations’, available at: http://www.wipo.int/treaties/en/ip/rome/summary_rome.html (accessed 12 February 2009). Article 14 of the Rome Convention set a minimum term for the protection of performers’ rights of twenty years from the end of the year in which the performance was made; the TRIPS Agreement (Art. 14.5) has extended this to fifty years.

47 WIPO Performances and Phonograms Treaty (Geneva, 20 December 1996), 36 I.L.M. 76 (entered into force 20 May 2002), available at: http://www.wipo.int/export/sites/www/treaties/en/ip/wppt/pdf/trtdocs_w034.pdf (accessed 3 February 2010). For a summary and comparison of the different international conventions as well as examples of protection in particular jurisdictions, see Arnold 2008, pp. 308–352. Arnold sets out in a table which countries have acceded to each of the three instruments discussed here and the dates of their accession. It would appear from that table that some countries, such as Bhutan, Laos, Libya and Samoa, among others, are not yet signatories to any of the relevant conventions pertaining to performers’ rights (ibid., pp. 314–327).


49 See also the discussion on the ‘piracy paradox’ by Raustiala and Sprigman 2007. See Bullard 2005.

50 On Brazilian technobrega, see Mizukami & Lemos 2008; see also the case studies on ‘network effects’ at the PIIPA website, ‘IP and Human Development’, available at http://www.piipa.org/IP_and_Human_Development/.


54 See the website of the Appropriation Art Coalition (a coalition of art professionals in Canada), available at: http://www.appropriationart.ca/?page_id=13 (accessed 12 February 2009). The Coalition is calling for government support towards related legal reforms.


56 Particular challenges in the case of TCEs are dealt with separately in Chapter 5.
The ‘property’ question is an interesting one as new forms of art emerge, including ‘born-digital’ content as well as ‘land art’. James Turrell, for example, is both the author of an artistic work that comprises a volcano and the owner of the land mass that is the volcano. See Walravens 2005, p. 132.

See Keaney 2006. In the book, Keaney sets out to explore patterns of cultural participation in the UK, looking at the contribution that participation in arts and heritage activity makes to civic life. She suggests ways in which this contribution could be increased, focusing particularly on marginalized communities.

This approach sees inherent limitations in models of evaluating human welfare based solely on ideas of ‘utility’ (i.e. happiness or desire fulfilment) or commodity access. While the economic incentive theory for copyright assumes that the public ‘benefits’ simply by the sheer expansion of works incentivised by copyright, a human development perspective would go further in examining the types of works incentivized by market dynamics and how they impact human capabilities (see Chapter 1). Looking at access to commodities alone also does not tell us enough about how individuals are able to function with (or without) those commodities (see Sen 1985, pp. 18–20). As Sen clarifies: ‘Commodity command is a means to the end of well-being, but can scarcely be the end itself’ (ibid., p. 19). Citing Marx, he adds that to think otherwise is to fall into the trap of ‘commodity fetishism – to regard goods as valuable in themselves and not for (and to the extent that) they help the person’ (ibid.).


See the discussion in Chapter 1. There is an arbitrary element to the length of copyright protection. Cornish and Llewelyn (2003) note that ‘it is the cultural value attaching to authorship which provides such copious moral legitimacy for legal protection’ and provides authors with ‘a longer-lasting right than could possibly be needed by way of economic incentive’ (ibid., p. 371).


See also the First Amendment to the US Constitution, which states that: ‘Congress shall make no law…abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.’ US Const. amend. I.


Laugh It Off Promotions CC, Case No. CCT 42/04, para. 66 (2005). Judge Moseneke observes: ‘[I]t is important to keep in mind the purpose for which the marks have been appropriated. What is being sold is not another beer or other product under the guise or on the back of the registered marks. What is being sold is rather an abstract brand criticism’ (ibid., para. 62).


Laugh It Off Promotions CC, Case No. CCT 42/04, para. 86. Judge Sachs also asks: ‘Does the law have a sense of humour? This question is raised whenever the irresistible force of free expression, in the form of parody, meets the immovable object of property rights, in the form of trademark protection’ (ibid., para. 70).


Laugh It Off Promotions CC, Case No. CCT 42/04, para. 109.


A 2007 Commission/Council follow-up document suggests that: ‘Some national laws expressly provide for a parody exception (for example France, Belgium), or cover parodies under the umbrella of a transformative use (Nordic countries) or of a “free use” defence (Germany and Portugal for example). However, the scope of the German “free use” rule appears rather narrow’. See European Parliament Legislative Observatory website (Document COD/1997/0359: 30/11/2007), available at: http://www.europarl.europa.eu/oeil/resume.jsp?id=93762&noticeType=null&eventId=1035933&backToCaller=N O&language=en (accessed 24 April 2009).


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They quote Rosemary Coombe’s powerful question: ‘What meaning does dialogue have when we are bombarded
with messages to which we cannot respond, signs and images whose significations cannot be challenged, and
connotations we cannot contest?’ (Coombe 1991, p. 1879).

Specific exceptions or limitations to copyright for ‘fair dealing’ are listed in Chapter 3 of the UK Copyright,
statutory limitations, British copyright law differs both from United States law, where the concept of “fair use”
has a scope that is both general and central, and authors’ rights systems, which tend to have a general defence of
private use deriving from what are now human rights criteria.’

For some common definitions of these terms, see Intellectual Property Office (IPO) 2009, p. 94.

Copyright Amendment Act (Cth) 2006.

Neither parody nor satire is defined under the Australian Copyright Act (Cth) 1968, as amended by the Copyright
Amendment Act (Cth) 2006.

329 F.2d 541 (2d Cir. 1964) where it was held that ‘parody and satire are deserving of substantial freedom – both
as entertainment and as a form of social and literary criticism’ (ibid., p. 545). In Elsmere Music, Inc. v. National
Broadcasting Co., 482 F. Supp. 741 (S.D.N.Y. 1980), the District Court held that: ‘…the issue to be resolved by a
court is whether the use in question is a valid satire or parody, and not whether it is a parody of the copied song
itself” (ibid., p. 746).


case is that even given that “String of Puppies” [defendant Koon’s photograph] is a satirical critique of our
materialistic society, it is difficult to discern any parody of the photograph “Puppies” itself.’ Ibid., p. 310.

A footnote in Campbell provides that in certain circumstances: ‘…looser forms of parody may be found to be fair
use, as may satire with lesser justification for the borrowing than would otherwise be required’. Acuff-Rose Music

On cultural adaptation for a novel, see the interesting discussion on Harry Potter in Kolkata (‘Harry Potter
onto his Nimbus 2000 broom and zooms across to Calcutta’ at the invitation of a boy named Junto, and
apparently meets famous fictional characters from Bengali literature (ibid., citing text from the book). The
unofficial Harry Potter book was withdrawn following a ‘cease and desist’ letter to the book publisher referring to
the ‘pirate’ work (ibid., p. 611).


Ibid. (quoting Campbell, 510 U.S. at 579).

Ibid. at 541.

Ibid. at 542. The Court added that: ‘The Lexicon, however, does not purport to be a work of literary criticism or to
constitute a fair use on that basis; and its lack of critical analysis, linguistic understanding, or clever humor is not
determinative of whether or not its purpose is transformative.’ Ibid. at 543.

Ibid. at 544 (citing Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 611 (2d Cir. 2006).

Ibid. at 545 (quoting Blanch, 467 F.3d at 253).

Ibid. (quoting Elvis Presley Enters. v. Passport Video, 349 F.3d 622, 628 (9th Cir. 2003)).

Ibid.

See the Court’s statement that ‘reference works that share the Lexicon’s purpose of aiding readers of literature
generally should be encouraged rather than stifled’. Ibid. at 553.

It has been said that, in assessing ‘transformativeness’, the courts generally emphasize the ‘transformativeness’
of the defendant’s purpose in using the underlying work, rather than ‘any transformation (or lack thereof) by the
defendant of the content of the underlying work’ (Reese 2008, p. 118; see Tushnet 2008, p. 110).

They quote Rosemary Coombe’s powerful question: ‘What meaning does dialogue have when we are bombarded
with messages to which we cannot respond, signs and images whose significations cannot be challenged, and
connotations we cannot contest?’ (Coombe 1991, p. 1879).
According to Fitzgeral and O’Brien, ‘the term culture jamming refers to a form of social and political activism, a resistance movement to the hegemony of popular culture which utilizes the mass media to criticize and satirize those very institutions that control and dominate the mass media’ (ibid., p. 173). An example is the use of billboard images resembling those for ‘iPod’ advertisements, with the words ‘Iraq’ and spotting images of persons carrying weaponry instead of audio devices. For an illustration, see ‘Blood for Oil’, available at: http://www.bloodforoil.org/iraq-posters/ (accessed 15 February 2009).

There is perhaps confusion to a lesser extent among the public over the ‘fair dealing’ exception under many common law systems (including the Commonwealth systems), where ‘fair dealing’ is circumscribed by an enumerated set of defences to copyright infringement. Judges may, however, have less discretion in deciding whether the circumstances of a case fall within ‘fair dealing’ (see Laddie 1996, pp. 258–259).

Or ‘re-mixing’ amid the uncertainties is accompanied by a sense of ‘guilt’ (personal interview with visual art students in New Jersey, preferring to be anonymous, working on re-mix and re-mash).

The legal defence of the Harry Potter Lexicon case was apparently assumed on a pro bono basis. See Crace 2008.

The study was part of the ‘Free Expression Policy Project’ which sought to examine, among other things, how IP enforcement circumscribes free expression among artists, scholars, and others who make critical contributions to culture and democratic discourse. It involved focus group discussions, telephone interviews, an online survey, and an analysis of more than 300 ‘cease and desist’ and take-down letters.

Heins and Beckles note that threatening ‘cease and desist’ letters cause many people to forego their fair use rights; additional hurdles to fair use come from the ‘clearance culture’ in many creative industries, which assumes that almost no quote can be used without permission from the owner (ibid., p. ii).

In his seminal essay of the title, Foucault (1979) studies the discursive function of ‘authorship’ in maintaining existing power structures in society. He observes that: ‘The author…is a certain functional principle by which in our culture, one limit, excludes, and chooses; in short, by which one impedes the free circulation, decomposition, and recomposition of fiction. In fact, if we are accustomed to presenting the author as a genius, as a perpetual surging of invention, it is because, in reality, we make him function in exactly the opposite fashion. One can say that the author is an ideological product, since we represent him as the opposite of his historically real function’ (ibid., pp. 118–119). As Bently (1994, p. 973) observes: ‘Foucault drew attention to the fact that the notion of the “author” is socially constructed’ (see also Oderbeck 2008, p. 14).

Some defend authorship (see Hirsch 1967, pp. 1–23) or the validity of the author as narrator (see Wood 2008, pp. 3–4). Bently (1994, p. 973) notes that ‘the notion of authorship has come increasingly to dominate other discourses, such as film, where the idea of the film director as author (“auteurism”) has taken a firm hold’.

Bently (1994, pp. 977–978) suggests, on the other hand, that authorship concepts predate the genesis of copyright law, and that ‘authorship also operated as a category within law prior to the literary property debate of 1760–1775 in England’. For an excellent commentary on the debate on authorship and the emergence of copyright law which is also sceptical about the ‘Woodmansee-Rose thesis’, see Long 2001, pp. 7–12.

He says that: ‘The concept of genius represents the attempt…to bestow the individual within the limited sphere of art with the immediate power of overarching authenticity’ (1997 translation; p. 170).

He qualifies that what such practice ‘demonstrates is that originality had yet to become the object of critical reflection, by no means that there was no originality in artworks’ (ibid., p. 172).


For example, under the UK Copyright, Designs and Patents Act 1988, investments of capital and administrative organization are recognized as constituting authorship of films and sound recordings (Bently 1994, p. 981).


Noting how cassettes can be used by local musicians in the countries studied to record their own musical sounds, Wallis and Malm (1984, p. 270) state that: ‘The very accessibility of music industry technology has brought about another common pattern of change, particularly noticeable in smaller cultures. It has provided the prerequisite for a counter-reaction against the transnationalization of music’.

According to Penna et al. (2004, pp. 96–97), the ‘dream’ of the Africa Music Project is one involving ‘African musicians recording in African studies, with computerized equipment recording the song and making the created

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While Lundberg et al. (2003, p. 410) note that: ‘A clear example from our cases studies of the close interaction between the way children and adults play and the creative processes used by innovators in science and creativity. See the Smithsonian website, ‘Invention at Play’, a ‘traveling exhibit that focuses on the similarities and the US Department of Justice, the parties negotiated an amended settlement agreement, which had been granted preliminary approval by the court at the time of this writing. See the discussion on both the original settlement and the amended settlement agreement in Band 2009; Samuelson (forthcoming). The terms of the settlement are reflected in the discussion in this chapter.

Given that the litigation was structured as a class action, the settlement required the court’s approval. In response to objections made by rights holders and the US Department of Justice, the parties negotiated an amended settlement agreement, which had been granted preliminary approval by the court at the time of this writing. See the discussion on both the original settlement and the amended settlement agreement in Band 2009; Samuelson (forthcoming). The terms of the settlement are reflected in the discussion in this chapter.

See Berkman Center for Internet & Society and Gartner 2005.


For the history of Creative Commons, see http://wiki.creativecommons.org/History (accessed 15 February 2009).


For further discussions on trends and visions relating to the Creative Commons movement, see Fitzgerald et al. (eds.) 2007.


As discussed earlier, the laws in different countries treat this issue differently: German law insists, for example, that ‘rights of natural authors’ cannot be assigned or undermined by contract.

The Association of Photographers in the United Kingdom, for example, actively provides guidance to its members to deal collectively with issues relating to contracts.


Citing Drahos 1999.


John Howkins (pers. comm.). This initiative, which involves proponents of the Adelphi Charter (http://www.adelphicharter.org), the Queensland Technological University (www.law.qut.edu.au), and others, is expected to culminate in an international conference to coincide with the 300th anniversary of the world’s first copyright law, the Statute of Queen Anne (1710). See Fitzgerald 2008.


Comment received from Graham Dutfield.

In Music, Media, Multiculture: Changing Musicscapes, Lundberg et al. assert that: ‘[T]he amplification of local identities during recent decades, is in itself a global phenomenon. The ideas about local identity as something important and desirable are globalised, like so many of the forms that are used to shape such local identities’ (ibid.).

Lundberg et al. (2003, p. 410) note that: ‘A clear example from our cases studies of the close interaction between the global and the local is how the rapid concentration of the music industry to a few global conglomerates has created a growing space for small local companies that exploit the areas and niches that are too small for the big companies’.

While there are arguments of the ‘Romantic genius pursuing art for art’s sake at all costs’ (Towse 2007, p. 759), one might perhaps look at the creative endeavours of young children for both intrinsic and social factors shaping creativity. See the Smithsonian website, ‘Invention at Play’, a ‘traveling exhibit that focuses on the similarities between the way children and adults play and the creative processes used by innovators in science and technology’, available at: http://invention smithsonian.org/CENTERPIECES/iap/resources.html (accessed 29 March 2010). This approach ‘departs from traditional representations of inventors as extraordinary geniuses who...
are “not like us”, to celebrate the creative skills and processes that are familiar and accessible to all people’ (ibid.).

Some potential principles for copyright reform are discussed, for example, in Geller 2008; see also Fitzgerald 2008.