

IMAGINING A WORLD WITHOUT COPYRIGHT

The market and temporary protection a better alternative for artists and the public domain

An essay

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Hard to imagine

Some serious cracks are surfacing in the system of copyright, as we have known it in the Western world for a couple of centuries. The system is substantially more beneficial for cultural conglomerates than for the average artist; a situation that cannot last. Furthermore, it seems inescapable that digitisation is undermining the foundations of the copyright system. It must be acknowledged that several authors have recently presented analyses of the untenability of the contemporary system of copyright. Yet, most of their observations only allude to – but do not address – what we deem the most fundamental question of all: if copyright is inherently unjust, what could come in their place to guarantee artists – creative and performing – a fair compensation for their labours, and how can we prevent knowledge and creativity from being privatised (Bettig 1996; Bollier 2003: 119-134; Boyle 1996; Coombe 1998; Drahos 2002, 2002a; Frith 2004; Lessig 2002, 2004; Litman 2001; Perelman 2002; Vaidhyathan 2003). It is time to move beyond merely criticizing copyright. The pressing question is: which alternative can we offer artists and other cultural entrepreneurs in rich as well as poor countries that benefits *them*, and that brings the increasing privatisation of creativity and expertise to a halt? Our goal in this essay is to develop such an alternative, and to move beyond any notion centred on *private intellectual property* rights.

This text is an essay. We cannot erase the product of centuries of Western thought on intellectual property rights with a single stroke of the pen. It is hard to imagine for Western man that a world without copyright could still yield films, theatre productions, novels, music pieces, paintings, and multimedia spectacles; even though people born and living in non-Western cultures find this a lot less hard to believe (Boyle 1996: xiv)! In this essay we therefore present a thought-experiment. We begin by making a few observations, followed by a proposition, an alternative. Once we have arrived there, it becomes fruitful to put our ideas to the test. How would our alternative provide an income for artists,

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their patrons, and producers in various artistic industries and in various positions? It must be clear that we aspire only to sketch the contours of an approach that will require further development and study. Without any doubt, the analysis we present for copyright is transferable to other systems of intellectual property rights, such as patents and trademarks. These systems influence, as well, the creation, production, distribution and promotion of works of art of different ilk.

Some observations

A first observation must be that the present Western copyright system pays little attention to the average artist, especially those in non-Western societies. The system disproportionately benefits a few famous artists and especially a few major enterprises, but it has little to offer for most creators and performers (Boyle, 1996:xiii; Drahos 2002: 15; Kretschmer 1999; Kretschmer and Kawohl 2004: 44, Vaidhyathan 2003: 5). The copyright system does enable a handful of cultural enterprises to dominate the market, and to withdraw substantive diversity from the public eye (Bettig 1996: 34-42, 103; Boyle 1996: 121-5; Coombe 1998: 144; Drahos 2002:ix-x, 74-84; Litman 2001: 14; McChesney 1999). Copyright has thus become a mechanism for a few cultural conglomerates to control the broad terrain of cultural communication. Something that has been derailed to such a large extent, and that hurts the interests of most artists and the public domain, can no longer be cut back to normal proportions.

For most artists, the profits deriving from copyright do not form much of an incentive to create and perform artistic work, simply because they hardly receive the proceeds. This has been the case in the past, it still is the case in the present, and it holds for almost every culture. From an historical perspective, we may note that the concept of private intellectual property rights has traditionally been absent from most cultures. Yet, there have always been artists who created and performed works (Bettig 1996: 25, 44, 171; Boyle 1996: 38-39). The incentive argument – artists stop their labours if they stop receiving copyright payments – therefore does not hold: ‘Copyright today is less about incentives or compensation than it is about control.’ (Litman 2001: 80) ‘Firms in the creative industries are able to ‘free-ride’ on the willingness of artists to create and the structure of the artists’ labour markets, characterised by short term working practices and oversupply, make it hard for artists to appropriate awards.’ (Towse 2003: 10) One may add to this observation that ‘value of copyright royalty rates is decided in the market place and it is therefore artists’ bargaining power with firms in the creative industries determines copyright earnings. Artists’ bargaining power is, however, considerably weakened by the persistence of excess supply of creative workers to the creative industries... As with artists’ earnings from other art sources, the individuals distribution of copyright

earnings is highly skewed with a few top stars earning considerable sums but the medium or 'typical' author earning only small amounts from their various rights.' (Towse 2003: 11)

For non-Western countries, the Western intellectual property rights system is nothing but a straight-out disaster. Their knowledge and creativity is obfuscated from them, and they have to pay dearly to receive the fruits of these sacrifices in return. This even explains the unfavourable debt position of these countries to some extent (Boyle 1996: 34, 125-130, 141-142; Chomsky in Smiers 2003: 77; Coombe 1998: 208-247; Correa 2000; Grosheide 2002; von Lewinski 2004; Mitsui 1993; Perelman 2002: 5-7; Rifkin 2000: 229-232, 248-253; Shiva 1997, 2001).

Let's face the reality that *digitisation* is axing the roots of the copyright system (Alderman 2001; Lessig 2002; Litman 2001: 89-100, 112-116, 151-170; Motavalli 2002; Rifkin 2000: 218-229; Schiller 2000; Vaidyanathan 2003: 149-184). By abolishing copyright, the process of creative adaptation will once again enjoy every imaginable opportunity. This is all the more interesting in the digital age. After all, digital sampling enables the production of creative works, much like those have always been produced. How? Indeed, by finding inspiration, themes, or certain forms of expression in works previously produced, long ago or yesterday. Digitisation enables this lending and borrowing of inspiration, and is helpful as well from another perspective. In the world of copyright there has always existed a bizarre distinction between an idea and the expression: however, in the digital age a work is no longer fixed and separating idea from expression is no longer possible. The artificial distinction and the endless discussions about it have become superfluous.

Another observation, linked to what creative sampling makes possible, is that the philosophical basis of the present system of copyright is founded on a misunderstanding, notably that of the sheer boundless originality of the artist, regardless of whether he or she is a creator or a performer. But let us keep a keen eye on reality. One always builds on the labours of predecessors and contemporaries. Subsequent artists add something to the existing corpus of work, nothing more and nothing less. We may highly respect and admire those additions, but it would be incorrect to provide a creative or performing artist, or his or her producers, with an exclusive, monopolistic claim to something that has largely sprung from knowledge and creativity in the public domain, and that is indebted in important respects to the labours of predecessors (Barthes 1968; Boyle 1996: 42; 53-59).

Of course, we are well aware that an artist receives a copyright for the *addition* he or she makes to what can be found in the public domain of knowledge and creativity. Again, this addition can be very impressive (or banal). But it is quite a stretch to extend him or her an exclusive, monopolistic property right for that addition, guaranteed until 70 years after his or her death, and which can on top of that be transferred to an individual or corporation that had nothing to do with the creative process in the first

place. The credibility of the system really starts to fall apart when we realize that the author and his or her rightful claimants can forbid almost anything that resembles the copying of “their” work (Coombe 1998: 92-98).

The development of the public domain of creativity and knowledge deserves a reappraisal. Besides, subsequent artists must be enabled to delve into that domain in order to find a supply of artistic materials that they can build on. That road will be closed when artistic materials from the present and past fall into private hands, something that is occurring to an increasing extent under the present system of copyright. This privatisation of our past and present cultural heritage is devastating for the further development of our cultural life (Locke in Boyle 1996: 9). In fact, an “author-centred regime can actually *slow down* scientific progress, *diminish* the opportunities for creativity, and *curtail* the availability of new products” (Boyle 1996: 119; also see: Perelman 2002: 7-9).

For cultural conglomerates, which control the bulk of the property rights worldwide, the possibility to forbid reproduction is exceptionally interesting: it enables them to dominate broad areas of artistic expression in which no contradiction, no counter-melody, no counter-image, in short no dialogic practice is tolerated (Coombe 1998: 42, 46). Yet, we have to realize that “culture is not embedded in abstract concepts that we internalise, but in the materiality of signs and texts over which we struggle and the imprint of those struggles in consciousness. This ongoing negotiation and struggle over meaning is the essence of dialogic practice. Many interpretations of intellectual property laws squash dialogue by affirming the power of corporate actors to monologically control meaning by appealing to an abstract concept of property. Laws of intellectual property privilege monologic forms against dialogic practice and create significant power differentials between social actors engaged in hegemonic struggle” (Coombe 1998: 86). It is prerequisite for any democratic society that a surplus of opinionating and emotion-evoking claims can be contradicted (Bettig 1996: 103-106). The broad copyright as we know and have it virtually renders that difficult and sometimes impossible.

Alternatives?

After this summation of the fundamental shortcomings of the copyright system, it may not come as a surprise that we feel the need to investigate alternative ways to protect the public domain of knowledge and creativity, and to assure many artists and other cultural entrepreneurs a fair income for their labours. As stated, this type of investigation only happens too sporadically. Recently a few scholars and policymakers have presented alternatives to the system. But their proposals have many disadvantages and they therefore do not constitute a real alternative to the copyright regime.

The most far-reaching reorientations have been systems like the General Public License and the Creative Commons (Bollier 2003: 27-30; 99-118; Boyle 1996: 132-133; Lessig 2002 and 2004: 282-6). The idea behind this approach is that A's work must be available for use by others, without them being obstructed by prevailing copyright. In turn, the other cannot appropriate the work. Why not? The Creative Commons entails that A supplies some kind of public license for his or her work: go ahead, do with the work as you please, as long as you do not bring the work under a regime of private ownership. The work is thus subjected to a form of "empty" copyright. This "hollow" copyright constitutes the most extreme option the author has under the Creative Commons regime. More often, however, the author opts for the choice "some rights reserved", for example that the usage of a work is restricted to not for profit activities. It is an uncertain form of contract law that will keep lawyers busy. The sympathetic aspect of Creative Commons-like constructions is that it becomes possible, to a certain extent, to withdraw oneself from the copyright jungle. It is of course always laudable to start a new world order on an island, and there is no scepticism in this statement. We hope that more and more artists will renounce the system of copyright that disadvantages them so badly, and begin hollowing it out by embracing the idea of a Creative Commons. Without any doubt this systems is helpful for museums and archives that wish to spread their stocks of cultural heritage to the public but also like to avoid it becoming copyrighted or used inappropriately by others.

As long as the system of copyright is still in place, the Creative Commons appears to be a useful solution that may even serve as an exemplar. But there are some strings attached. The Creative Commons does not paint a clear picture of how a diverse set of artists from all over the world, as well as their producers and patrons, might generate an income. But we have to prepare an answer to that question. Most artists will not dare to put the existing copyright regime to rest until they have been offered a clear view of a better alternative – even though the present regime only has smoke and mirrors to offer. That is easily understandable. A second drawback of Creative Commons-like approaches is that they do not fundamentally question and challenge the copyright system. The Creative Commons License suggests that the author wants to exercise some form of control, nonetheless. Another quite essential objection to the Creative Commons-like approaches is that they involve only those artists who are willing to adhere to this philosophy. Cultural conglomerates, which have the ownership of big chunks of our cultural heritage from past and present, however, will not. This downgrades and limits the sympathetic idea of the Creative Commons. Not free of contradictions is the fact that one of the most outspoken advocates of Creative Commons, Lawrence Lessig, is a strong adapt of the idea that knowledge and creativity can be owned as individual property (Lessig 2004: XIV, XVI, 10, 28, 83). Isn't the title of his 2004 book *Free Culture* a bit misleading? Below we will argue that there is much to say against this private property claim on knowledge and creativity.

A second alternative for copyright is connected to different forms of art created and produced in a collective manner (regardless whether it concerns more traditional or contemporary works) as is the case in most non-Western countries. In those societies the individual approach of the Western copyright system does not fit the more collective character of creation and performance. If one stays within the paradigm of the private ownership of knowledge and creativity, it is obvious that a concept like *collective* ownership comes to mind. Is it not possible to grant so-called “traditional” societies a tool that resembles copyright, but is in fact collectively owned? Would this not enable them to protect their artistic expressions from inappropriate use and/or guarantee their artists an income?

The problems for effectively introducing a system of collective intellectual ownership rights are abundant. For instance, one may wonder who represents the community and is able to speak on behalf of the community. It is not by definition the case that everybody agrees on how to deal with artistic creations of the past and present. Copyright is about the exploitation of works, but many people in those societies may consider this a blasphemy, or would not like to see their works being used in specific contexts. The appropriation of knowledge and creativity is something that even pinches in the Western world, and it all the more does so in countries where this strange system has never existed, and where artists use each other works, and so on and so forth, like what was the case in the Western world before the introduction of the copyright system. There is, thus, even without considering the position of Western cultural conglomerates reason to understand why the polite, weak and bleak trials of elaborating a collective intellectual property system have failed thus far.

Is the tweaking of the current system a solution for the problems as we have described them? Several scholars, critical to the present copyright system, propose optimising it. Their contributions vary. Some argue for the reestablishment of the fair use principle, which has suffered enormously over the last decade, or making copyright solely applicable to real authors, creators and performers. Others favour a much shorter period of protection, for instance fourteen years. Again, others believe there is no real problem in the European context, because in those countries the collecting societies put aside a portion of the copyright earnings for cultural projects and their distribution scheme favours individual artists in comparison to the Anglo-Saxon copyright system. Unfortunately, it is unthinkable to bring the current system back to normal proportions, because it is not in the interest of the main partners of the system, the cultural conglomerates, to assist in this quest. On the contrary, they have been very eager and highly successful in extending and broadening the copyright system. Moreover, digitisation is greatly impacting the functioning of the system. At what point must a society decide that when almost everybody is participating in an “illegal” practice – like P2P music or film exchange – it can no longer be considered illegal (Litman 2001)? And even if the European collecting societies have a higher moral ground than those in the Anglo-Saxon world, even then the problem of the individual

appropriation of knowledge and creativity, which is the basis of our critique of the system, continues to exist. In the next sections we address this issue more thoroughly.

Artists, producers and patrons: entrepreneurs

Before presenting our proposal we must observe that artists are inclined to sell their work on the market and – if it all works out – make a living for themselves. Artists have always been merchants and small shopkeepers. They live off an acquisitive audience that wants to admire, enjoy, and buy their produce. To that audience also belong institutional buyers like kings, churches, Maecenases, labour unions, banks, hospitals, and other societal institutions (Hauser 1972). This conclusion, as will be demonstrated further on in this essay, will provide us with something to go by while developing an alternative for copyright.

Artists, as well as their producers and patrons, thus apparently are entrepreneurs. This requires a risk-prone mentality, and it involves competition, under the condition that real competition exists indeed, as much as possible for many artistic expressions and their artists. The observation that artists, and their producers and patrons are entrepreneurs makes one wonder what the decisive reason is for reducing the entrepreneurial risks of cultural producers, because this is precisely what copyright does. Copyright renders a product exclusive, and provides the entrepreneur with a *de facto* monopoly. This system of institutionally protected gifts is seemingly bizarre in an era in which even cultural conglomerates themselves herald the blessings of free market competition. Major entrepreneurs in cultural sectors bargain for ever-stricter intellectual property rights in the form of extensions and expansions of existing copyright legislation, but this is completely at odds with the so-called rule of the free market! We also observe the exact same phenomenon in the area of patent law and other intellectual property laws such as trademarks, database rights, plant breeder rights and design rights (Drahos 2002; Perelman 2002; Rifkin 1998, 2000; Shiva 1997, 2001; Shulman, 1999).

Before we try our luck by presenting a new system, we must first identify the locus of the impulse to create. That brings us to the following summation, a three-pronged road. One possibility is that a work is being commissioned. The second option is that the artist him- or herself takes the initiative to make an artistic work, possibly in collaboration with multiple, differentially endowed creators and performers. Thirdly, a producer can be a binding factor and bear the responsibility and risk involved in an artistic venture.

In all three cases – the initiative coming from a patron, someone who commissions; from one or several artists themselves; or from a producer – there is a person or an institution that intentionally

makes itself responsible and accountable for creating or performing a certain artistic work. To be responsible and accountable not only implies undertaking a broad range of activities to give the artistic project momentum, but also to bear, amongst other things, the financial risks involved. The initiator then becomes an entrepreneur and bears the risk that unavoidably comes with entrepreneurship. In our alternative for copyright it is not the artist who takes centre stage, but the entrepreneur, regardless of whether he or she is an artist, a patron, or a producer.

The solution: the market and temporary protected usufruct

While recognizing the fact that artists, patrons and producers are cultural entrepreneurs, we find that they can be confronted with three types of situation, each of which grants a specific reaction or option. What are those three options in our proposed solution? First, cultural entrepreneurs experience a competitive advantage, for example by being the first to market a product. Ancillary forms of protection are then rendered unnecessary. Secondly, in some cases high risk and high investment are involved in the realization of certain creative works. Temporary protected usufruct is granted to offset market failure. Third, the market as of yet lacks the resilience to finance a product and there are many reasons making it desirable for it to flourish. Subsidies are then distributed. In all three cases or options the works fall immediately in the public domain. This is the key principle of our proposed solution.

Let's take a closer look at those three options. What are the contours of the system that we find worth exploring? The core of the matter is that we distance ourselves from the present system of copyright, as was probably clear by now. What does that yield? As stated, the protective corral of property rights that is artificially erected around a creative work will disappear. The consequence, thus, is that the work – regardless of whether it involves a (new) creation or a performance – will have to be marketed from the moment of its announcement onwards. We will nuance this position further on in the essay when we discuss the second option. What is essential is that the entrepreneurial patron, artist, or producer obtains a competitive advantage by creating or performing a work (Picciotto 2002: 225). This renders additional protection unnecessary. This is the first option.

What we have in this first option is a first-mover advantage. The first person to bring a work to market can use the advantage to reap revenues. The entrepreneur thus has “lead-time.” What we propose is not completely new. In 1934 Plant stated ‘that copyright encourages moral hazard in publishers (firms in the creative industries) without sufficiently rewarding authors (creators) who supply the creative input. He believed that publishers should rely on the temporary monopoly of lead time to establish new products in the market.’ (in Towse 2003: 19) This time gives the first mover a lead over possible

competitors, the opportunity to skim the market for the new cultural product, ask a good price for it, and thus earn a return on investment. After all, it will take several months before, say, the same play or music piece will see its opening night elsewhere or the same chair is eligible for production in another location. It should be understood that the work falls immediately in the public domain; thus can be used by others as well, and everybody is free to adapt this work creatively. The competitive advantage that most artists possess in one form or other is put at the very core of our new system. If such advantages are allowed and able to do their work, ancillary forms of protection, like copyright, will be unnecessary.

The counter argument, however, might be that, with an eye on digitisation, reality is that lead-time is only a couple of minutes or perhaps hours (Towse 2003: 19)! Does this mean that there are almost no works that can benefit from a competitive advantage? We do not believe so. Apart from the first-mover advantage, many artists are able to add value or create advantages in other ways. In order to understand this, we should keep in mind, that cultural production and distribution will reshuffle considerably after the abolishment of copyright. For instance, in the field of music concerts and performances will become much more important, also as a source of income for the artists. Live, direct contact with an audience generates inimitable value. Performing qualities are even now, in the present era, of decisive importance for long and lasting careers of musicians. This is what gives them a good reputation. Reputation creates value. Reputation has a signalling effect. It indicates guaranteed quality. Customers are more loyal and are willing to pay higher prices for cultural products from artists with a good reputation and it makes them aficionados (Fombrun 1996). In the part of this essay where we test our proposals in the different fields of the arts – see below – we will come back to how cultural production and distribution will change in a world without copyright. But let us at this point stress that service qualities of artistic works will become much more important than the individual product.

From what we have stated before about the philosophically doubtful concept of the originality of the author, it is clear that we claim that any artistic creation or performance belongs to the public domain. It is derived from the commons, based on the works of predecessors and contemporaries, and therefore, from its moment of conception onwards it takes its place in the public domain. We use the concepts public domain and commons without distinction. However, we know that in legal traditions there may be differences between the two concepts. We define the public domain or the commons as the space in any society that *belongs* to all of us and can be *used* by all of us. It is a misunderstanding to think that the commons, or the public domain, is an unregulated space. Of course not: always in history and in all societies those common spaces have been regulated one way or another, for example on the conditions of its usage. In our alternative we return to the commons what has always belonged to it – no more and no less. We give back to all of us what has been privatised in the fields of creativity and knowledge in the Western world over the last centuries (Hemmungs Wirtén 2004: 133,4).

The second option takes into consideration that sometimes the realization of a certain work requires a rather substantial up front investment. Think of movie productions, for example, which can easily rake up several million euros in costs. Another example is writing a book; an author has to work on such a large project for a considerable period of time, but the revenues will not begin flowing until (much) later. It could also be that the risk of an undertaking is too great to be borne privately. Often high investments, high risks and uncertainty go hand in hand. This can lead to what economists call ‘market failure’ (Towse 2004: 56). This is an economic condition under which competitive markets have difficulty developing. State intervention is then granted. In these special cases, in which the process of selling is time consuming, or must consist of multiple transactions before an agreeable income has been reached, one can think of a *temporary protected usufruct* for the person taking the entrepreneurial risk. The cultural entrepreneur is offered temporal protection to harvest the fruits of his or her work. However, no private property emerges, as was the case under a copyright regime.

The concept of usufruct is better known in societies under civil law than in those that are governed by common law, like the Anglo-Saxon parts of the world. Characteristic for usufruct is that one does not have the ownership of an item; however, one is entitled to the usage of the fruits of the item. If the item is, say, a house, the entitlement could be, for instance, the usage of the house without owning it. The person that holds usufruct is, for example, allowed to live there for free or to receive the proceeds of any rental activity. In our case, the item might be a book; from the moment of its publication it belongs to the public domain and the holder of the usufruct is entitled to the takings and receipts of the book. Under the present system of law, *usufruct* can only emerge when it is derived from an ownership title. What we envision is that the creative work, as we will argue below, exists only in the public domain, its ownership is shared amongst all, and thus belongs to the commons. Whoever enjoys the temporary usufruct of a certain artistic work, has thus received it from the public domain. The usufruct keeps unimpeded the freedom of everybody to adapt works of art – creations and performances – in a creative manner. The technical details concerning the implementation of this matter still will have to be worked out.

De facto, the temporary usufruct implies that the costs of preparing the work, including the artist’s wage, are spread out over a number of customers. But we will have to apply strict boundaries to the timeframe over which this applies. Hence, we speak of a temporary usufruct. In terms of its scope and duration, protection will be less than under present copyright regimes. In our approach an artistic work, whether creation or performance, immediately enters the public domain from its moment of conception onwards, as has been stated before; or better yet remains in it, because it derives from it to a large extent. Only, it may happen that the usufruct is protected for a certain period of time, to make the work profitable for the creator, performer, producer, or patron. At present, we do think of a period

not extending beyond a year. A lot of economic research is required to possibly refine this period of temporarily protected usufruct, depending on the specific artistic discipline. However, this term of one year is not picked randomly. ‘Of all the creative work produced by humans anywhere, a tiny fraction has continuing commercial value.’ For instance, ‘most books go out of print within one year.’ (Lessig 2004: 134 and 225) This market reality supports our proposal of a strict time frame for protection.

Of course, it might happen that even this temporary usufruct does not provide enough perspective on the ability to break even on certain artistic creations and performances. And with this we arrive at our final and third option: subsidies. It may happen that the market as of yet lacks the resilience to finance a certain type of artistic work but that there are various reasons making it socially desirable for this work to bloom and become available (for the sake of cultural diversity or because the public is still developing a taste for certain forms of expression, for example). In that case it is important that governments use *subsidies* and other *facilities* to enable the creation, performance, and diffusion of such works, for shorter or longer periods of time. In case of financing by the government, the work immediately becomes part of the public domain. After all, it appears absurd that publicly financed productions can become the exclusive property of a person or organization, as is presently the case in many countries with programs developed by their public broadcasting corporations.

Commenting upon our alternative

Is what we propose not some kind of dressed-down version of the present copyright system? One could say that. But there are remarkable differences between the copyright approach and our alternative, in which we first let market processes take their course, perhaps followed by a form of limited protection. First, under the regime of intellectual property rights, a protective shield of copyright becomes affixed to an artistic work by definition, from its moment of inception onwards. This does not hold true for our alternative, on the contrary. The maker, producer, or patron has a competitive advantage in the market by being the first to offer a certain kind of product: let markets be markets! Second, if it is somehow necessary to offer a certain kind of protection, as when a work could not be made profitable by any other means, then that protection will remain incomparably less elaborate in terms of its scope and duration than the sheer boundless system of institutionalised gifts with which the copyright system presently spoils the “holder of an intellectual property right.” A period of about a year of usufruct is something quite different than 70 years after the death of the author, and also in the case of neighbouring rights the duration of the protection may be called generous. Under the present system of copyright, creative adaptation is at risk of being interpreted as a wrong and of being fined by the courts, so the scope and duration of the protection are immensely important. In our approach, creative adaptation is instead applauded and encouraged.

There is also a third reason as to why what we propose is completely different from copyright. Our alternative redefines ownership and property of creativity and knowledge. Creative works are not owned in the same way as, for instance, a table. A table is the property of person A, but not at the same time also of person B, unless they are married. But this is not the case with artistic creativity and knowledge. After its usage by someone it has not been exhausted. It is a public good. That is as we have argued before, why those works of the intellect and of the creative mind belong to the public domain. Strategically it is important to underpin this public character of knowledge and creativity time and time again. Jack Valenti, the former president of the Motion Picture Association of America, once unhesitatingly said: 'Creative property owners must be accorded the same rights and protection resident in all other property owners in the nation.' (in Lessig 2004: 117) This quote makes clear why it is necessary to make a distinction between knowledge and creativity at one side and the ownership of, for instance, a house at the other side. They are not the same and should not be treated the same.

Result: a new cultural market and a level playing field

With our new system a new cultural market will emerge. The first observation is that with the abolition of copyright cultural conglomerates will lose their grip on the agglomeration of cultural products, with which they determine the outlook of our cultural lives to an ever-increasing extent. Because what will they lose? They have to give up control over huge chunks of the cultural markets. They lose the monopolistic exclusivity over broad cultural areas because everyone is allowed to exploit artistic materials that are not protected by temporary usufruct and absolutely no limitations are put on creatively adapting works of art. With these new conditions, the rationale is then lost for cultural conglomerates to make substantial investments in blockbusters, bestsellers, and stars. After all, by making creative adaptation respectable again and by undoing the present system of copyright, the economic incentives to produce at the present scale will diminish. However, it will not be forbidden for a cultural entrepreneur to invest millions of dollars or euros in, for instance, a film, game, CD or DVD. Of course not, but the investment will no longer be made under an endless wall of protection.

There will once again be room to manoeuvre in cultural markets for a variety of entrepreneurs, who are then no longer pushed out of the public's attention by blockbusters, bestsellers, and stars. Those plentiful artists are more likely to find audiences for their creations and performances in a normal market that is not dominated by a few large players. There is not a single reason to believe that there would be no demand for such an enormous variety of artistic expressions. In a normalized market, with equal opportunities for everyone, this demand can be fulfilled. This increases the possibility that a varied flock of artists would be capable of extracting a decent living from their endeavours.

A second observation is about cultural adaptation and how the market should be regulated with respect to fraud and plagiarism. We stress the fact that we do not like theft. We of course do not propose that X can attach his or her name to Y's book or film, suggesting to be the author of that work. That is plain misrepresentation or fraud. If that is found out, and that is bound to happen sooner or later, than the lazy fraudster will receive his or her fair penalty in the court of public opinion; we do not need a copyright system to accomplish that. It is up to all of us not to be afraid to publicly accuse artists of misrepresentation or fraud. This will only happen if we are culturally alert, and we have to be if we want to do without judgments of the courts, which have made us culturally lazy in the past! We should critically discuss what we consider culturally inappropriate use.

What we have suggested thus far is that it is quite feasible to have a flourishing cultural domain without the existence of a copyright system, while at the same time many artists in the Western and non-Western countries alike can make a reasonable income from their labours. However, it is evident that the completely new approach as we propose it does not immediately eradicate all conceivable problems. With this we come to our third observation. If cultural enterprises can no longer control the market with copyright in hand, they must resort to a second protective mechanism, which they will then attempt to apply with even greater force than is presently the case. That is the far-reaching control over distribution and promotion of cultural expression they possess and wield.

This too must be limited with metes and bounds. After all, from a democratic perspective it is impermissible that a limited number of cultural giants is able to determine the contents of artistic and cultural communications, using traditional as well as new media (Smiers 2003). Democracy is not the privilege of a few cultural conglomerates. It is a necessity to use ownership and content regulations to organize the cultural market in such a way that cultural diversity gets the best possible chance. First of all, there should not be dominant modes of distribution. It cannot be the case that a single owner dominates, controls, or concert the market for music, films, or books. Vertical integration and other forms of cross ownership must be condemned. Content regulations may take the form of diversity prescriptions. That is to say: diversity in terms of genre, musicians' backgrounds, and geographical diversity, and the latter representing diversity from the home country, neighbouring countries, and many other parts of the world. Of course there will be outlets specializing in a certain genre that want to be known for it. These too will be subject to diversity prescription, albeit within that genre (Smiers 2004). This type of regulation does not take anything away from a free market economy. To the contrary, these rules, while in need of further elaboration, serve to create a free market, or differently put, to "normalize" the market and to bring about a level playing field. No one should be able to dominate the cultural market or to have such a strong position that cultural diversity will be suppressed, pushed aside, or taken away from the public attention. This demands some regulations: on the one

hand the elimination of the control mechanism “copyright” and on the other hand the instalment of some regulations concerning ownership and content that protect and promote the flourishing of artistic diversity.

Let’s focus now on the main point of attention of this essay, it must be clear that abolishing copyright will benefit the public domain in all its keys, colours, movements, wits, and images! But what does it yield for artists and those who do organizing work for them? Let us see how this takes shape per discipline of the arts, and per professional activity within them.

Putting it to the test

*** Music

If the present system of copy and neighbouring rights were suspended, how would musicians generate an income? We have to keep in mind, of course, that for many of them copyright was never, or hardly ever, a serious source of revenues. What we propose here applies without restrictions to all performing artists, in all walks of musical life and all genres, from popular to world music, and from improvisation to composed materials. A bit further on in the text we will reflect on the situation of those creating new works.

The background assumption is that especially performing artists are well equipped to add value or generate a competitive advantage. Neighbouring rights nevertheless offer a disproportionate protection against the performance and interpretation of one’s own or somebody else’s work. Many musicians are experts in personifying their relationship with an audience. Direct contact with audiences generates a substantial part of the income of many musicians. This way they build their own, unique market niche. This means, for example, that many musicians go on tour to give concerts and thus develop a close relationship with their audience. Their promotion is therefore oriented towards cementing that relationship. Their work may be embedded in merchandising activities of all sorts, such as t-shirts, books, brochures, et cetera. They can also offer their work via the Internet to music lovers worldwide. Several options come to mind: one can download only after paying a small amount, or one can download at all times, and subsequently hope that the fan will pay. A real fan will be more inclined to do this than a coincidental passer-by.

Record sales can also be a considerable source of revenues. Many people do not want to download music, or they want to get hold of the specially designed compact disk cover with the accompanying information. By paying special attention to the design of the cover, or by adding a lot of information,

value is created. Records can be sold at concerts, in stores of various shapes and kinds, or ordered via the Internet.

What is then to become of the record companies? In principle, musicians do not need record companies, at least not in the conventional meaning of the word. With the latest digital technology, they can make magnificent recordings and distribute them via the Internet or on compact disks. If they still feel the need to use an intermediary, they can commission dedicated companies to perform various kinds of services, like making digital recordings, and/or produce and distribute a compact disk, and/or market the recording worldwide in digital format. It is very imaginable that we will see the emergence of many new enterprises that offer services to artists.

A lot of music finds its way to audiences via radio and television. Must broadcasting corporations, public or private, pay a fee for this content? The first impulse is of course to answer in the affirmative. We still live in the matter-of-fact world of copy- and neighbouring rights. Yet, there is a lot to say in favour of not charging fees, while bringing many artists in a financially better position. How does this add up? When the diversity of supply blossoms, as was described above, the air will be filled with many different kinds of music, supplied by many musicians. While this is culturally exciting in and of itself, it also yields a lot for artists. Not by being played by radio or television stations, but by familiarizing many different audiences with their existence – because they can be heard over the radio, and seen on television. Those audiences will visit their concerts, book them for festivals and parties, and obtain works from their favourite artists over the Internet and pay them for it.

The new situation opens up the possibility that many artists will benefit from the latent demand for a diverse offering of cultural products, and find and develop their own audience. Those audiences guarantee that artists will be able to make a decent or even a good living. After all, they are involved with “their” artists.

*** Composers, playwrights, choreographers

Above we have primarily put performing musicians in the spotlight (and focused on abolishing neighbouring rights). For many kinds of music there is no distinction between creators and performers. Those musicians do both; they perform their own creations. They earn their living in the way described above.

Still, there are many creators in the theatrical and musical arts that do not perform their own compositions, plays, and choreographies. This holds true for numerous composers, playwrights, choreographers, and related others. How can we imagine them earning a good living in absence of the

present system of copyright? It may be that one him- or herself takes the initiative to compose, or that a work is being commissioned. We touched upon that matter above, when we described the new system, but it is relevant to elaborate upon the principle here, now that we have taken on a concrete exemplar.

The core of the matter is: how can an artist abstract an income from his or her work? When the work is commissioned, the answer is clear. The patron pays, and that is all that matters to the artist. So what does the paying patron receive? A beautiful (or not) piece of work, and the opportunity to take it to the stage. What is essential is that the patron obtains a competitive advantage from the act of commissioning a work, whereas the work itself becomes part of the public domain again after its first performance. We deliberately say “again,” because the work was largely derived from the public domain in the first place. So everyone who wishes to do so can take the composition, choreography, or play into production, free of charge. It also means that no one else is exclusively entitled to that work, or could obtain such a title. Many different versions of a piece can thus simultaneously be sung or played. Because of this lack of exclusivity, it all comes down to performing so attractively for different audiences that they want to come see it. If that happens, the composer, choreographer, or playwright has a good chance of receiving another commission, and so on and so forth.

In many cases there is no commission at all, and the composer, playwright, or choreographer initiates the creative process autonomously. This happens more with composers and playwrights than with choreographers, who are usually more dependent on commissions and planned performances. By taking an initiative the creative artist takes the entrepreneurial risk. That sounds nice, but it is not unthinkable that this type of artistic enterprise represents a considerable investment for a one-man (or one-woman) shop or freelancer. Because it is important to encourage composers or playwrights to make this investment, it is fair to give the creative artist a temporal usufruct, which extends over a certain period of time. Several transactions must be undertaken to earn back the relatively large initial investment, for example a year’s cost of living. This may encompass, for example, three stagings or performances. The usufruct is also temporarily restricted, notably: to one year.

Of course, creative adaptation is again most welcome (the moral right no longer exists under the new regime). We make note of that because in some cases, as happens with musicals, for example, highly detailed directing concepts are a compulsory element of the sales transaction. It is unthinkable that this practice will persist, because commissioned musicals too will be absorbed by the public domain again after their first performance, making them available for creative adaptation. When the writer and/or composer have initiated the musical him- or herself, the work also becomes part of the public domain again quickly, notably: when the period of usufruct expires. The free reign of creative adaptation is left unimpeded even in this period.

*** Books

Most books these days still appear on paper. While pondering about how writers can earn an income in a world without copyright, we have to take into account that digitisation has also entered the world of books and is likely to increase. Essentially, we have described a similar situation above when we analyzed the case of music. The music piece, and in this case the book, can be downloaded in return for some form of compensation, or free of charge, in the hope that a payment will still be made. The writer either organizes all of this him- or herself, or hires a specialized intermediary, similar to what has been discussed in the case of music. This phenomenon may crumble the power of huge publishing houses.

Next, the book on paper. We must take into account that author and publisher enjoy a competitive advantage. They are the first to take a specific book to the market, which gives them a certain period of time to rebalance expenditures and revenues. Writing a novel does however come with relatively large initial investments, which cannot be recouped with the first imprinting alone. Selling a hundred copies in the first few weeks will not adequately compensate the author for his or her labours. A certain amount of copies thus has to be sold, and this will take a certain stretch of time. The most obvious criterion for temporary protected usufruct is to offer the person taking the entrepreneurial risk, author or publisher, a certain period to bring the book to financial maturity. As was the case on previous occasions, our thoughts go out to a period of one year.

It happens to be an interesting fact that authors reap ancillary benefits, next to their primary income from book sales, from contributions to newspapers and magazines, from literary readings, and from other public appearances. In this respect they are quite comparable to performing musicians. The difference, however, is that these activities have a little less in common with their primary activities than what happens to be the case with musicians. That is why we opted for a different regime.

*** Film

In principle, we propose, must filmmakers too profit from the competitive advantage they enjoy when bringing their product to market first. Reality is different, of course. Even a low-budget movie costs at least a million euros or dollars. The average movie is incapable of recouping the money invested in it on the basis of first-mover advantages alone. On top of that, it happens to be very easy to copy a

movie, which makes it very difficult to make this type of product profitable. This makes it evident that a temporarily protected usufruct should be introduced in the domain of film.

The most important source of revenues is therefore the temporarily protected usufruct of the film producer. The film producer too must do with a usufruct that last only a year. It should be possible to recoup the costs of a film within that year. He or she can use that year to offer the film via all imaginable media, including digitally via the Internet.

But it is also well imaginable that governments endow filmmakers with subsidies. It may occur that the market is insufficiently developed to support a large diversity of, say, European films. Cultural-political arguments may also support measures like tax reliefs. Finally the government can contribute to the creation of efficient networks for the distribution of a variety of films. Experience teaches us that distribution is more difficult than production. An individual producer is bound to be incapable of developing an effective distribution network for a variety of films. There is a role here for governments to support the realization of such networks and to contribute to them in their initial phases.

*** Design disciplines and visual arts

In the area of visual culture, the question relevant for determining whether the creators of a work of art will be able to extract a decent living from their labours is as follows: is the work a unique piece or is it a replica? Many visual artists make unique works and figure out for themselves how they will go about doing so. Their main source of income is the sale of this unique work. The orthodox copyright system is less relevant here, and the same holds true for the new system sketched above.

Apart from that, subsidy instruments will remain relevant for protecting artists from the whims of the market; they provide the foundation for a process of continuous, emergent creation. Nevertheless, artists will have to be stimulated and trained to commit various audiences to themselves, thus providing their income. There is no room for derivative rights. Creative adaptation too must be applauded. This may imply that similar looking pieces will enter the market, just like what has always been the case in all cultures.

Where a work has been commissioned or ordered, the situation is also clear. The work, regardless of whether it involves a design or painting, is created and delivered against the agreed-upon price. It should be clear that creative adaptation is allowed to take its course here too. It can obviously not be the case that, say, an architect is allowed to claim: this realized building is my design and no one is

allowed to change it without my permission, or – at the opposite end of the spectrum – no one is allowed to imitate it. The reality is, in this case, that the architect has been paid for his or her endeavours. After that the building will once again become part of the public domain, and may be altered or imitated if so desired.

Especially the products of the design professions are easily replicable and imitable. But the maker, or the buyer of the work, enjoys a competitive advantage. He or she is the first to market the product manufactured according to a certain design. Let markets be markets; additional forms of protection are unnecessary.

Discussion and conclusion

Admittedly, it may take a while to get used to letting go of the system of copyright. It urges us to make a mental and an economic transition, but this is worth the trouble in every conceivable way. Many practical matters still need to be solved with respect to the usufruct model. Should a temporary protected usufruct be granted automatically or should we implement a licensing system? Following some of our test cases, it seems logical to automatically grant some types of artistic product (for example films and books) usufruct. But what are the drawbacks of this approach and should the duration of protection for all fields of the arts be the same? Other questions that come to mind are: is there still a role to play for the collecting societies and what is the effect of the one-year usufruct on the product life cycle of artistic products?

In this essay we have presented a thought-experiment. We urge everybody to participate in our quest. Who should, for instance, be our strategic partners in our journey into a world without copyright? What is at stake is to once again begin respecting the public domain of creativity and knowledge. Our main concern is providing the makers of artistic work with a decent income and sufficient possibilities to bring their work, in all its diversity, under the attention of many audiences without being pushed from the market by a few oversized cultural conglomerates. The system of copyright has existed for over a century in Western societies. It has been long enough. It is not equipped to withstand the digitisation that has once again supplied artists with a magnitude of entrepreneurial freedom. Profit from it!

References

Alderman 2001, John, *Sonic Boom. Napster, P2P and the Battle for the Future of Music*, London (Fourth Estate)

Barthes 1968, Roland, *La mort de l'auteur*, Manteia, no. 5, 4e trimestre 1968. Published as well in: Roland Barthes, *Oeuvres complètes*, Tome II, 1966-1973, Paris 1994 (Editions du Seuil): 491-495

Bettig 1996, Ronald V., *Copyrighting Culture. The Political Economy of Intellectual Property*, Boulder (Westview Press)

Bollier 2003, David, *Silent Theft. The Private Plunder of Our Common Wealth*, New York and London (Routledge)

Boyle 1996, James, *Shamans, Software, and Spleens. Law and the Construction of the Information Society*, Cambridge MA/ London (Harvard University Press)

Coombe 1998, Rosemary J, *The Cultural Life of Intellectual Properties. Authorship, Appropriation, and the Law*, Durham and London (Duke University Press)

Correa 2000, Carlos M., *Intellectual Property Rights, the WTO and Developing Countries. The TRIPS Agreement and Policy Options*, London/ Penang (Zed Books/ Third World Network)

Daoudi 1996, Bouziane, et Hadj Miliiani, *L'aventure du raï. Musique et société*, Paris (Éditions du Seuil)

Drahos 2002, Peter, with John Braithwaite, *Information Feudalism. Who Owns the Knowledge Economy?*, London (Earthscan)

Drahos 2002a, Peter, and Ruth Mayne, *Global Intellectual Property Rights. Knowledge, Access and Development*, Basingstoke (Hampshire) and New York (Palgrave Macmillan and Oxfam)

Edelman 2004, Bernard, *Le sacre de l'auteur*, Paris (Seuil)

Fombrun 1996, C.J., *Corporate reputation: How Companies realise Value from the Corporate Brand*, Boston MA (Harvard Business School Press)

Frith 1993, Simon (ed.), *Music and Copyright*, Edinburgh (Edinburgh U.P.)

Frith 2004, Simon, and Lee Marshal (ed.), *Music and Copyright. Second Edition*, Edinburgh (Edinburgh U.P.)

Grandstrand 2003, Ove (ed.), *Economics, Law and Intellectual Property*, Amsterdam (Kluwer Academic Publicers)

Grosheide 2002, Willem, and Jan Brinkhof (ed.), *Articles on the Legal Protection of Cultural Expressions and Indigenous Knowledge*, Antwerp (Intersentia)

Hauser 1972, *Sozialgeschichte der Kunst und Literatur*, München (C.H. Beck)

Hemmungs Wirtén 2004, Eva, *No Trespassing. Authorship, Intellectual Property Rights, and the Boundaries of Globalization*, Toronto (University of Toronto Press)

Kretschmer 1999, Martin, *Intellectual Property in Music: A Historical Analysis of Rethoric and Institutional Practices*, special issue Cultural Industry (ed. P. Jeffcutt), *Studies in Cultures, Organizations and Societies*, 6: 197-223

Kretschmer and Kawohl 2004, Martin and Friedemann, *The History and Philosophy of Copyright*, in: Frith and Marschall (2004): 21-53

Lessig 2002, Lawrence, *The Future of Ideas. The Fate of the Commons in a Connected World*, New York (Vintage)

Lessig 2004, Lawrence, *Free Culture. How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, New York (The Penguin Press)

Lewinski 2002, Silke von, *Indigenous Heritage and Intellectual Property. Genetic Resources, Traditional Knowledge and Folklore*, The Hague (Kluwer Law International)

Litman 2001, Jessica, *Digital Copyright*, Amherst (New York/ Prometheus Books)

Macmillan 2002, Fiona, *Copyright and Corporate Power*, in Towse 2002: 99-118

McChesney 1999, Robert W., *Rich Media, Poor Democracy. Communication Politics in Dubious Times*, Urbana and Chicago (University of Illinois Press)

Mitsui 1993, Tôru, *Copyright and Music in Japan. A Forced Grafting and its Consequences*, in Frith 1993: 125-145

Motavalli 2002, John, *Bamboozled at the Revolution. How Big Media Lost Billions in the Battle for the Internet*, New York (Viking)

Perelman 2002, Michael, *Steal This Idea. Intellectual Property Rights and the Corporate Confiscation of Creativity*, New York (Palgrave)

Picciotto 2002, Sol, *Defending the Public Interest in TRIPS and the WTO*, in Drahos 2002a: 224-243

Rifkin 1998, Jeremy, *The Biotech Century. Harnessing the Gene and Remaking the World*, New York (Jeremy P. Tarcher/ Putnam)

Rifkin 2000, Jeremy, *The Age of Access. The New Culture of Hypercapitalism, Where All of Life is a Paid-for Experience*, New York (Jeremy P. Tarcher/ Putnam)

Schiller 2000, Dan, *Digital Capitalism. Networking the Global Market System*, Cambridge (MA)/ London (The MIT Press)

Shiva 1997, Vandana, *Biopiracy. The Plunder of Nature and Knowledge*, Boston MA (South End Press)

Shiva 2001, Vandana, *Protect or Plunder? Understanding Intellectual Property Rights*, London (Zed Books)

Shulman 1999, Seth, *Owning the Future*, New York (Houghton Mifflin Company)

Smiers 2001, Joost, *La propriété intellectuelle, c'est le vol ! Pladoyer pour l'abolition des droits d'auteur*, In Le Monde Diplomatique, septembre 2001.

Smiers 2002, Joost, *The abolition of copyrights: better for artists, Third World countries and the public domain*, in Towse 2002: 119 – 139

Smiers 2003, Joost, *Arts Under Pressure. Promoting Cultural Diversity in the Age of Globalisation*, London (Zed Books)

Smiers 2004, Joost, *Artistic Expression in a Corporate World. Do We Need Monopolistic Control?*, Utrecht (HKU/ Utrecht School of the Arts)

Towse 2002, Ruth (ed.), *Copyright in the Cultural Industries*, Cheltenham (Edward Elgar)

Towse 2003, Ruth, *Copyright and Cultural Policy for the Creative Industries*, in: Grandstrand 2002: 1-10

Towse 2004, Ruth, *Copyright and Economics*, in: Firth and Marshall (2004): 54-69

Vaidhyathan 2003, Siva, *Copyrights and Copywrongs. The Rise of Intellectual Property and How It Threatens Creativity*, New York and London (New York University Press)

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