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CREATIVITY AND INTELLECTUAL PROPERTY RIGHTS

Chapter 7 in H. Anheier and Y. R. Isar (eds.) *Cultural Expression, Creativity and Innovation*. London: Sage (2010), pp: 86-98

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Abstract

Copyright, the main form of intellectual property in cultural production, has played a key part in globalization. Although it is presented as an unalloyed good by its powerful defenders in corporations and states, this chapter argues to the contrary that copyright is of dubious value. For in fact the expansive copyright regime which characterizes the present era threatens vulnerable cultures – traditional and hybrid – around the world. The argument is made by refuting the conventional rationales for copyright, both economic and aesthetic. Supporting evidence is then drawn from the cases of music making in Jamaica, and the Bollywood film industry in India. Each, in a perhaps surprising parallel, suggests that creative cultures can flourish in, and may even depend upon, the absence of effective copyright.

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Copyright performs a central role in the global system of cultural production. According to one estimate 5 per cent of the GDP of Europe and the USA is derived from ‘copyright industries’ (IFPI 2008). But does that mean that creativity – from film making to song writing to designing computer games – depends on copyright? This chapter argues not, suggesting instead that the current intellectual property regime tends to inhibit creativity and reduce public access to culture, with especially severe consequences in the global south.

As the standard defense of copyright has it, from the eighteenth century onwards intellectual property (IP) provided the means for the exponential development of creativity, enabling patronage of the arts to give way to a market system in European culture. A golden age followed (schematically, from Romanticism to Rock) in which

copy- and related rights fuelled the production and distribution of innovative symbolic artifacts for the benefit of all. However, according to IP defenders, the system is now imperiled by a combination of new ICT technologies, morally reprehensible consumers, and governments unwilling to take the necessary measures to protect creators in this new and dangerous age of globally accessible culture. Over the course of the chapter we will argue that such a defense of IP is mistaken in its premises as well as its practical applications. Most perniciously, perhaps, it has been mobilized as an argument for the *extension* of IP in the period since the 1980s. Content owners have lobbied governments and international organizations for stronger and longer copyright, and to a great extent they have got what they wanted. Today we are confronted with an IP regime which is expansionist, even imperialistic, in its global scope and thrust (Hesmondhalgh, 2008).

Now it's fair to say that the editors of this volume for the most part consider globalization to be a good in relation to culture (xx - xx). The present chapter doesn't challenge such a view – apart from anything else the focus is too narrow for that. It does, however, suggest we need to be extremely wary of the legal and economic frameworks of globalizing culture. Taking up this critical approach the hope is that the chapter will contribute to the renewal of a more rounded modality in cultural studies, one in which tough critique finds its place *alongside*, rather than as an alternative to, affirmation of the redemptive power of globalizing culture.

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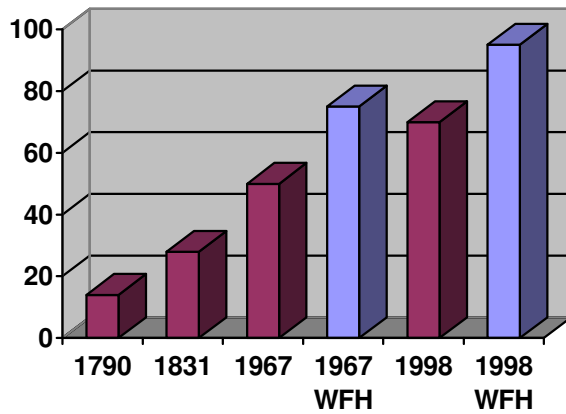
We begin by sketching the nature, history and extent of intellectual property in relation to culture. The suggestion is that it has always been the subject of continuous crisis, although this is now intensifying. In the second section we then set out the case for a more limited IP regime on both economic and aesthetic grounds, showing how IP is actually opposed to creativity in many forms of popular culture. The next two sections are case studies. One concerns music making in Jamaica where it is argued that the virtual absence of intellectual property was a condition for the development of a thriving music scene in the 1960s and 70s. The partial introduction of a copyright regime in the more recent period has done nothing to help music making on the ground, or distribute revenues to creative workers on a wider and fairer basis. The other case study is in 'Bollywood piracy', that is to say the distribution of unofficial copies of films and soundtracks made in Mumbai for markets in the Indian subcontinent and its diaspora.

The chapter concludes by looking at some implications for policy. It is suggested that cultural policy-makers, traditionally concerned with issues of national protection and development via quota and subsidy, need to take on the issue of copyright. For as globalization and the expansion of the digital domain proceed apace, the politics of intellectual property become acute. Rather than merely responding to the lobbies of the rights owning corporations, states ought to reflect on the cultural needs of their citizens and work accordingly to protect them from the depredations of corporate IP.

Copyright and the crisis of intellectual property in culture

Although other forms of IP such as trade marks have some relevance in the realm of cultural production, copyright is by far the most significant kind. We can make a preliminary definition along these lines. Copyright is a type of property in symbolic products ('texts' in the language of cultural studies) which is specified according to law. It confronts the reproducibility of such products by vesting the exclusive right to copy, perform or otherwise reproduce them in an owner (or owners). This is usually the author/creator, or a corporation such as a publisher or record company who initiates cultural production. There is invariably a time restriction on copyright – the 'term'. After this period has elapsed private ownership ceases, and the work returns to the 'public domain', becoming freely available for replication and reuse. A key aspect of the new, more vigorous IP regime noted above is that copyright term has been getting longer. So, in the US copyright now lasts for seventy years after the death of the author, or ninety five years after publication if the work is commissioned in-house by a corporation (a 'work made for hire' as the law puts it). Table 1 shows the historical expansion of copyright term in the US.

Table 1: Expansion of copyright term in the US



Notes:

- in 1909 the 28 year term introduced in 1831 was made renewable for a further 28 years
- in the 1967 and 1998 legislation, term begins from death of the author rather than date of publication as was previously the case; this in itself represents a considerable extension of term
- notwithstanding the above, in the case of a 'work made for hire' (**WFH** in the chart) the date of publication still initiates copyright term.

Like other forms of property copyright is assignable. In other words it can be sold, or else transferred ('licensed') to another party under more limited conditions – say for a certain number of years, in a specific territory, or in respect of part of a work. This assignability of copyright has enabled a trade in creative rights, and is a key factor underpinning the political economy of the production of culture. Indeed, it needs to be emphasized that historically copyright law has developed hand in hand with the mechanical reproduction of culture and the emergence of the cultural industries. It is the knot which ties culture to capitalism.

The first copyright law was the British Statute of Anne (1710). It gave an ownership right of twenty one years term over literary works to booksellers and printers. Printing technology pre-dated the Statute of Anne of course. But the crucial factor at this juncture was the emergence of a powerful printing/bookselling (what we would now call 'publishing') sector, one that was newly independent of state control in Britain. Until 1662 the state had controlled printing through the granting of a license to the Stationers Company. Only its members could print books. But with the abolition of this monopoly, the established printers began to lobby for a new form of protection, namely

a statutory copyright. In other words, and crucially, modern copyright began as a way of preserving the monopoly power of cultural capitalists in a post-authoritarian communication system. In this context, the notion of the right of authors was little more than a post hoc rationale intended to legitimate what was effectively the renewal of the booksellers' monopoly (Patterson 1993: 9-14).

As we will see this pattern, established at the birth of copyright, has been repeated time and again. Cultural capitalism lobbies the state for new IP measures, while invoking the rights of authors because authors are widely considered the more worthy beneficiaries. In practice, though, the economic power of corporations means that authors generally assign their rights to the corporation via publishing contracts, record deals and so on. Quite simply, if you are a vulnerable creator struggling to break into an overcrowded and uncertain labour market (the endemic condition of cultural work, see Miège 1989: 29-30) then you are hardly in a strong position to bargain about copyright. Still, that does not mean that cultural capitalism exploits copyright without let or hindrance. For in an important sense the copyright system is in perpetual crisis.

Technologies of replication are the original cause of copyright. Only by making symbolic expressions copy-able through material means does the 'need' arise to stop people copying. In fact the history of communications has been one of the continuous development of new media and new forms of replication; hence the periodic demand of cultural industries for the expansion of copyright law to cover new technologies – whether that be printing, radio, cinema, or MP3 file sharing. This profound instability of copyright is crucial. As cultural capitalism drives onwards in the quest for new products, markets and revenues it keeps having to turn to governments to ensure that the law prescribes ownership in whatever brave new communication medium is being heralded.

The problem of dependence on governments for legal protection of ownership is then compounded by a conflict of interest between different communication sectors; namely, content producers who make texts – the objects of copyright – and disseminators such as broadcasters, cable companies and internet service providers who distribute them. The former want to charge or otherwise restrict the disseminators in respect of their use

of copyrighted content. The disseminators naturally want to minimize such charges and restrictions.

The conflict between Napster and the music industry is a case in point. Napster was a service provider which enabled subscribers to freely share digital music files across the internet. Soon after its launch in 1999 the Recording Industry Association of America brought a copyright infringement case against the company on behalf of the five major global record companies. The grounds of the suit were that Napster was responsible for mass infringement of copyright which was allegedly taking place. In the original case, and then on appeal, the courts found for the RIAA, and Napster was forced to close in July 2001 after less than two years of operation. Bankrupt, the company was bought by a 'legitimate' commercial subscription service, Roxio, in 2002. It is now one of the most successful music downloading services in the world, making profits on its own account, but also posting copyright revenue back to record companies and publishers derived from its paying customers (Burkart and McCourt, 2006: 55-63).

The Napster episode suggests that the historical balance may have swung in favor of the copyright owners. In an early inter-sectoral battle the result was very different. At the end of the 1930s music publishers in the US increased the license fees paid by radio stations for the broadcasting of copyrighted musical works. In 1940 they doubled them. The stations refused to pay and set up their own publishing organization (BMI) to provide new musical material instead. In this way they were able to break the traditional music publishers' monopoly, thus effectively winning this round of the copyright wars (Ryan, 1985). Interestingly, the victory of the radio stations played a key role in unleashing a new cycle of musical creativity in North America. The songs which BMI publishers put out included material from the relatively untapped country and western, and rhythm and blues markets. These styles in turn provided key source material for the emerging genre of rock'n'roll in the 1950s (Peterson, 1990).

Perhaps the significant points to draw from these episodes in the 'copyright wars' are first that a more open rights regime can foster creativity in quite concrete ways, and second that the present period seems to be one of particularly vigorous expansion of copyright. This historical tendency towards an increasingly powerful IP regime can be seen at the international as well as the sectoral level. During the nineteenth century

copyright laws were enacted in all advanced capitalist societies as print media became a major industry. Yet the exploitation of copyright on an international basis remained problematic. For instance, Charles Dickens and his publishers were unable to assert their copyright in the US. Publishers there simply printed and distributed his work without paying fees or royalties in respect of what were understood to be purely British rights (Allingham, 2001). Then, towards the end of the century, international treaties were established such that signatory nations recognized the rights of owners in other countries, so enabling a global trade in copyright to develop during the Twentieth Century.

This international copyright regime has never been secure though. For one thing developing countries have tended not to enforce rights. As gross users of cultural products made in countries of the core of the world system, they have little interest in policing rights – in this context copyright is effectively a tax on culture. The outcome is that today we have a paradox: the most comprehensive IP treaties and agreements such as TRIPS 1994 and WIPO 1996 (respectively Trade Related Intellectual Property Rights and World Intellectual Property Organization, see Sundara Rajan 2008) combined with high levels of unsanctioned reproduction of cultural artifacts across the world, or what rights owners tendentiously call ‘piracy’.

It seems, then, that a central theme in the history of copyright is its agonistic nature. As new technologies of cultural replication develop, so too new crises arise around the specification of culture as a commodity in law, or via conflict over access and control of creative goods. Meanwhile, as copyright has been globalized, so too has there been an increase in reproduction and the use of copyrighted content without the permission of rights owners. Critically, this has been happening both in the developing world, particularly via ‘old’ technologies of replication like photocopying or cassette tapes, and in the rapidly expanding belt of industrialized countries where digital technologies now make access to culture more open than ever before. These de facto contradictions and tensions raise important questions about whether the present global copyright regime benefits public culture. But there is also a set of theoretical and normative problems with copyright which underlie the practical difficulties. It is these we turn to next.

The suit against copyright: economics and creativity

The rationale for copyright – from a critical perspective, the ideology of copyright – has two prongs. The first is *economic*. According to it intellectual property overcomes a certain problem in culture whereby symbolic objects can be freely appropriated without reference to creators or other consumers. In the language of economics a symbolic object like a musical recording is ‘non-rival’. That is to say, it can be used by someone without preventing anyone else’s use. And there is a further aspect. Symbolic objects do not degrade through consumption. Using a term from economics again, they do not become ‘exhausted’ when they are used. We are referring here to the primary text of course – the ‘film’, ‘novel’, ‘song’ and so on – which is then copied, broadcast, downloaded or otherwise replicated. It is the ease of replication at stake here which makes symbolic objects tend towards the non-rival. In practice the material medium – television, CD, book, cinema – adds a degree of rivalrousness. But not much. Replication offers a high degree of share-ability, and this is becoming more the case in the digital age as networks positively encourage the mutual exchange of culture. Music file sharing is the now classical case in point.

In addition to being non-rival, symbolic objects also tend to be non-excludable. In other words, it is hard for creators to prevent would-be users from using them, a key issue if you want to charge. Once again, this quality derives from ease of replication, although it does vary in degree across types of cultural artifact. So, cinema exhibition enables a high degree of excludability – doorkeepers check your ticket before you go in – whereas it is impossible to exclude anyone from listening to a conventional radio broadcast once they have access to a receiver.

What does all this have to do with copyright? Quite simply, the argument goes that the non-rival, non-excludable qualities of cultural products make it difficult to sell them for a sufficient return in a conventional market place. Take the case of a new computer game. Were it to be released on the market in the same way as a car say, so-called ‘free riders’ would immediately appear and either use the game themselves for nothing, or copy and sell it on to others at a price way below that which the creators need to charge in order to recover the enormous costs of creating it. In this situation the function of copyright law is to extend property rights beyond the first copy (of a manuscript, recording, director’s cut and so on) to any and every copy over a specified term. Thus

the possibility of making sufficient charges to cover costs, and hence an incentive to create, is restored.

All this sounds fine in theory, and indeed it is widely accepted not only in economics but by states around the world. In effect this economic argument has prevailed in the round of IP expansion which has been occurring since the mid-1980s. But the difficulty is that no case has been made as to how extensive IP rights actually need to be in order to overcome the economic ‘problem’ of (non-rival, non-excludable) cultural goods. As we have seen the period since the early 1990s has seen an unprecedented expansion of copy- and related rights via international treaty and national statutes around the world. Copyright has grown longer, and covered more forms of cultural practice and technologies of replication. It has also extended its reach into the poorest countries of the world. Yet there is no evidence that we have seen a concomitant increase in creativity.

Indeed, some economists argue that the current ‘big copyright’ regime is leading to *less* innovation in cultural markets. For Boldrin and Levine (2002, 2005) the issue is that IP goods (what we are calling symbolic objects) are not nearly as different from other commodities as is made out in the economic literature. That being the case, through its grant of monopoly IP law simply generates massive costs in the shape of licenses and fees and the expenses associated with government lawmaking and policing. Boldrin and Levine take the example of the potato. They point out that, ‘[w]hen you buy a potato you can eat it, throw it away, plant it, or make it into a sculpture.’ (2002, p. 209). But imagine a situation in which rights over the use of potatoes were under monopoly control; every time you ate one you would have to pay not just for the potato itself but also a license fee to the owner of the potato monopoly. And you would not be able to make a new potato based product without paying a fee either. In an analogous way, Boldrin and Levine suggest, IP restricts creativity and innovation via the enormous costs it imposes.

There remains the ‘free rider’ argument of course, the notion that the non-rival, non-excludable nature of cultural goods means that one cannot prevent others exploiting one’s own creation. But in response to this Boldrin and Levine (2005) argue that, absent copyright, coming first to market provides a sufficient advantage to enable creators to

recoup their costs. This is especially so with network systems of distribution. But actually in all cases just being first gives you an effective if short lived monopoly. In this situation the only IP requirement is a copyright limited to the initial copy of any symbolic product. In other words up till the point at which the work is released it is protected – after that it is in the public domain.

The case made by Boldrin and Levine is important because it suggests that a ‘low copyright’ system is not only compatible with a market economy in culture, it actually makes such a market work better. Significantly, the argument of these writers also chimes with the second strand of our argument against copyright ideology. This concerns *creativity*.

When corporate copyright owners make a pitch to government for larger, longer copyright, or when they call for more vigorous policing of ‘piracy’, they often appeal to the interests of creators. We noted this tendency in the previous section. For, crucially, the economic rationale of copyright coincides with the Romantic discourse of the expressive author which has had such a pervasive influence in all forms of culture since the end of the Eighteenth Century. Authorship has of course come in for sustained criticism in cultural studies and related fields. The essay ‘The Death of the Author’ by Roland Barthes (1976) is perhaps the best known example. It offers a powerful critique of the author cult, but it does not offer much in the way of an alternative account of cultural production, let alone creativity. Instead, and somewhat enigmatically, Barthes focuses on the productivity of texts and language. We need to begin somewhere else, then, if we are to come up with an account of cultural production which focuses on the process through which symbolic objects are actually created and innovation is carried out.

Prima facie it seems clear enough that there are indeed creative roles in the making of culture. The problem comes in defining what these might consist in without slipping back into a Romantic conception, namely where the individual artist is the locus of creativity, and her/his genius consists in extraordinary powers of autonomous expression. As George Steiner (2001: 25-32) has suggested, on this view the creative act is a kind of transubstantiation of the soul. Undoubtedly, such mystical overtones have been very effectively mobilized by defenders of copyright. It is all too easy to imply

that vulnerable geniuses, touched by the creative spirit, require a grant of special protection.

However, creativity is arguably much more a matter of ‘social authorship’ (Toynbee, 2001) than transubstantiation of the soul or expression from within. In the first place, we can note that creative acts are incremental rather than colossal. To make a new aesthetic object is to make one which is marginally different, and an even major figure – the Japanese film director Kurosawa says – who has apparently made revolutionary transformations can be seen, when their work is examined more closely, to have actually been assembling many small changes in their chosen medium. This cumulative aspect of creativity is connected to a second dimension, namely the collective, or at least interactive, nature of the labour process. To produce a cultural product involves working with other people, both those in obviously creative functions as well as people whose role is more prosaic.

The third aspect of creativity which the notion of social authorship brings out is that acts of creation derive not so much from the autonomous generation of ideas from within as the re-use or appropriation of symbolic materials from a ‘historically deposited common stock’ (Toynbee 2001: 2). To be creative is essentially to select, combine and re-frame not only themes and ideas, but also concrete bits of ‘cultural fabric’ (particular scenes in a film, pieces of melody, characters, colours ... the list is endless) which are already there.

With these factors in mind, it becomes pretty clear that creators can have no legitimate claim to control the product of ‘their’ labour once it is done – the basic moral and aesthetic premise of copyright. To make this claim is to argue not only with corporate defenders of Big Copyright, but also those such as Mira Sundara Rajan (2008) who have suggested that renewed attention to *moral* rights (the rights of authors to claim attribution and assert control over their work) is required in order to counter-balance today’s overly economic IP regime. The point is that creative innovations of ‘authors’ are invariably small and depend on interaction or collaboration with others in more or less creative roles. Perhaps most damaging of all for the case for copyright, is the fact that when you are engaged in what seems to be the most original act of creation, you are actually using materials already there, left by other creative workers.

In this section we have criticized some key theoretical and normative strands in the case for strong copyright. And we have seen, too, how an alternative account of creativity under the rubric of social authorship poses a different way of thinking about creativity, a way which contradicts some basic premises of IP. Over the course of the next two sections we show how this critique can help to illuminate cultural production today. We take two case studies of creativity in the global south.

Jamaican popular music: blooming in a copyright desert

From the late 1950s onwards a recording industry and a series of popular music styles emerged together in the small Caribbean island of Jamaica. Undoubtedly the appearance of what would become as known as reggae music has been a major global cultural phenomenon. There can be few other places in the world where such a small population – under two million in 1970, less than 2.8 million today (Intute 2008) – has produced so much music. Michael Witter (2004: 32-3) estimates that, despite a decline in its popularity since the early 1990s, international sales of recorded Jamaican music were worth between US \$60 and 100 million in 2000. In terms of foreign exchange earned this puts music ahead of sugar, the main product of the island under colonialism.

No doubt a number of factors played a part in the development of reggae music. Urbanisation was certainly crucial; the population of Kingston grew from 237,000 in 1943, to 379,980 in 1960, to 870,000 in 2001 (Clarke, 2006: 91, 154, 267). Proximity to, and hence influence of, the US with its modern black popular culture has been important too. But there are also a number of factors to do with the way a peculiarly Jamaican music making culture and economy developed quite apart from the global music industry.

Although various folk styles, notably mento, preceded the emergence of ska at the beginning of the 1960s it was this style which marks the inauguration of modern Jamaican popular music. Most importantly, ska was almost entirely a recorded form produced in order to supply the sound systems, or mobile discotheques, which from the late 1940s constituted the main musical entertainment in Kingston. In the development of ska – and then in transformations to rocksteady, reggae, dub and a host of later styles

– the incremental and collective aspects of social authorship which we discussed in the previous section were key.

We might call the central process at stake here *intensification*, that is to say the production of change through identification of a certain trope, and then the making of it more and more salient over a cycle of recordings (see Toynbee, 2007: 87-94). The trope in question in the case of ska was an accent on the offbeat. The source music in which this accent was originally found was ‘jump R and B’, the swinging, brass-laden sound popular in black America during the late 1940s and early 50s, and which had then become a staple of the Jamaican sound systems. One characteristic of jump was a voiced offbeat in the rhythm – the ‘da’ in the ‘BOOM da BOOM da BOOM da BOOM’ meter that drove dancers wild. What the Kingston musicians did as they started to copy jump R and B records was accent the offbeat, making it louder and more prominent.

‘Easy Snapping’ by Theophilus Beckford (2002) from 1959 is the tune often credited as the first Jamaican recording with a pronounced offbeat. Of course in the case of a collective and incremental process of creativity it is dangerous to canonize a foundational work. Quite simply, there are always going to be rival claimants from the same period. That said, ‘Easy Snapping’ is a good example. Beckford sings plaintively in a Jamaican accent, while voicing the offbeat in his left hand on the piano. Three years later, on Bob Marley’s (1992) first recording, ‘Judge Not’, from 1962 the trope has been intensified to such an extent that it is clear we are no longer listening to R and B. The offbeat is now much stronger than the onbeat in the four/four rhythm. Indeed the onomatopoeic name given to the new style represents this rhythm: SKA ₁ SKA ₂ SKA ₃ SKA ₄. There is also a tin whistle playing riffs in the manner of mento, the national ‘folk’ music style. ‘Judge Not’ can be considered, then, as a snapshot in the emergence of a highly idiomatic popular music style. Critically, though, it is a style wrought by many cumulative changes across the hundreds of recordings made since the canonical ‘Easy Snapping’.

It is difficult to evaluate to what extent this process of intensification was self-conscious. Probably, it began in a relatively unreflexive way, being expressed in musical practice much more than discourse. However changes were progressively

recognized and codified. In the case of ska, the term itself was not coined until 1962 by which time, as we have just heard, the style was already mature.

Regarding copyright the main point about intensification is its essentially social character. Change was generated collectively in that the whole cohort of musicians in Kingston was involved as a group in the research and development of the new sound. True, there was intense competition among sound system operators and producers in particular. But across all roles (musicians, vocalists, engineers, producers, selectors), and despite divergent material interests and contractual relations, there was effectively a common creative culture. One worked on the basis of taking things a little further than last time; picking up on a trick used on that big dancehall hit; copying but subtly changing something in order to make the effect even more sublime.

In an important sense intensification makes copyright irrelevant. It points up the thoroughly social character of the authorship at stake in Jamaican popular music, and thus the inappropriateness of attributing the creative value of a recording to an individual. But there is another creative process we can identify in the Jamaican scene which confronts copyright much more squarely: translation. Intensification is essentially an endogenous creative process. Development takes place within a style through the highlighting of a particular aesthetic zone – in the case of ska it was the accented offbeat. We might call this a vertical principle of change. With translation the creative dynamic is horizontal, leading to appropriation of musical materials from outside the style. Translation thus involves broadening the range of musical signifying rather than deepening it.

In the Kingston music scene since the 1960s translation (and here it is really no different from intensification) can be seen as both an aesthetic and an economic imperative. The economic need is to respond to the high rate of stylistic innovation, generated by the dancehall mode of reception and the voracious demand for new ‘record-texts’, or 45 rpm singles. In this context, the re-use of existing texts, or the production of same-but-different ones, represents a highly efficient means of solving the problem of demand for innovation. The aesthetic imperative, on the other hand, derives from a tendency towards a peculiarly Caribbean form of cultural hybridity which Shalini Puri (2004) has identified. The Caribbean lies at a cultural crossroads. It forms one corner of a ‘Black

Atlantic' trapezium (Gilroy, 1993) along which African diasporic culture has moved, adopting colonial symbols along the way, repeating and changing cultural forms. As Annie Paul (2009) shows in this volume, Jamaican music in particular is driven by a powerfully transgressive urge to express the vernacular Africanism of everyday life – for example creole language or 'patwa', and the *unrespectable* pleasures of the dancehall. Here, then, transgression is closely allied to translation.

In fact the initial move which culminated in ska was an act of translation, namely the appropriation of R and B, the music of the black working class of the US. Since then reggae music has continuously translated music materials from 'outside', most significantly in the 1960s with soul music, and especially the work of Curtis Mayfield and the Impressions. Bob Marley and the Wailers were only one act among many who used the sound of the Impressions as an *imago*, a reference point for creative musical transformation. Listen to the group's (1992) 'I'm Still Waiting' from 1965, a kind of experiment in the indigenization of the sophisticated soul of the Impressions: falsetto voice and bass vocal response, shimmering reverb guitar, slow tempo, but all re-located to the sonic environment of Kingston.

This kind of translation does not contravene copyright. One of its doctrines, developed in case law is pertinent here: the idea/expression dichotomy. According to it copyright only covers expressions, that is to say the concrete works, or work-parts, produced by an author. The underlying ideas, on the other hand, may be freely taken up and used to inspire new creative work. Thus copying an idiom such as that of the Impressions, rather than a specific melody or set of lyrics, is allowed under the law. The difficulty, however, is that this distinction does not fit a culture like reggae music which is focused on principles of iteration/variation. (Actually, as John Frow [1997: 210] points out, the idea/expression dichotomy is itself relational, historically contingent, and can by no means be taken as a general rule in culture.)

For there is indeed translation in reggae music which crosses over into the copying of expressions as copyright law would understand such a practice. Several forms of it exist. One is the unacknowledged re-use of an existing song. Prince Buster's 'Don't Throws Tones' (sic) (2000) from around 1965 uses the melody of 'Perhaps, Perhaps, Perhaps' from Doris Day's very popular *Latin for Lovers* album, released in the US in

March 1965. This used English lyrics by Joe Davis, but its melody comes from the song 'Quizás, Quizás, Quizás', written by the Cuban songwriter Osvaldo Farrés in 1947. In Buster's version there is a spoken word introduction by the man himself, a warning to rude boys. This is followed by an instrumental arrangement of the tune. On the CD compilation writing credits are shown as 'C. Campbell' (Cecil Campbell is Buster's birth name), and the publisher is given as 'Prince Buster Music (BMI)'.

It would be a mistake to see this simply as fraud though. Rather it reflects the Jamaican practice of treating the provenance of musical material (in economic terms at least) as irrelevant. What matters in this recording is its trans-aesthetic; the 'ska-ification' of a Tin Pan Alley hit which itself translates the Caribbean sounds of Cuba, 90 miles to the North. 'Don't Throws Tones' represents a cultural return, then, under the aegis of that arch trickster, Prince Buster. Under copyright law, however, it would certainly constitute plagiarism.

Another kind of translation, the riddim, would probably also infringe copyright, but in a rather different way. It differs from the unacknowledged cover version in that it is designed to be copied. A riddim can be defined as the accompanying rhythm track to a reggae tune. It includes riffs or other motifs. Sometimes it is a single, four beat unit; sometimes longer. In its original version it will include vocals. A riddim at this point is simply the instrumental accompaniment to a whole recording. But if it is successful, the riddim is then separated from its original context in order to provide the backing for other versions, or even completely new songs. A canonical riddim such as the 'Stalag', originally by Winston Wright, may have a life of thirty years or more. Perhaps the key point of contrast with the copyright/authorship system (as in the case of rock) is that re-use of a riddim is considered to be an accolade rather a case of plagiarism. To have your riddim appropriated many times is a sign that you have made a major contribution to the culture (Manuel and Marshall, 2006).

We have been showing how the reggae system of production is inimical to copyright in this section. Indeed there has been little or no copyright litigation until recently, despite the fact at independence in 1962 Jamaica inherited British copyright legislation, and in 1993 brought in its own Copyright Act. However there are now signs that in response to the 1994 TRIPS agreement, which effectively imposes a copyright regime across the

globe, implementation and policing of IP is starting to be taken more seriously (Daley and Foga 2007). Indeed, Manuel and Marshall suggest that some attempts are now being made to recoup rights revenue from riddims (2006: 464-5). Whether the fragile ecology of creative musical work in Kingston will be damaged by this gathering pressure is still unclear. But those who care about the future of this extraordinary music and the culture which has produced it should surely be concerned about such developments.

Bollywood and the pirates

Surprisingly, perhaps, there are significant similarities between creative practice and context in Jamaican popular music, and the Indian popular cinema produced in Mumbai, formerly Bombay. But there are also illuminating differences which help to reveal some further dimensions of the global copyright regime.

Like reggae music, Indian cinema has colonial roots which in this case stretch back to the early twentieth century (Kabir, 2001; Bose 2006). By the 1930s studios had been established in the cities of Madras, Calcutta, Lahore, Bombay and Pune. The first phase of film production was marked by geographical dispersion then. But it was also combined with a degree of vertical integration and corporatism – the studios employed actors, directors and technical staff on a full time basis. During the 1930s the Indian film musical – ‘all-singing, all-dancing’ – emerged as a distinct genre. *Alam Ara* of 1931, the first Indian sound movie, led the way here. *Alam Ara* was released in Hindi (the adopted national language) and Urdu. In the south, there was also regional production of Tamil and Telegu language films. This pattern persists (Curtin, 2008).

After World War Two and independence from British colonial rule in 1947 the studio system collapsed as new producers and new capital entered the frame. The entrepreneurial system which now emerged depended on free lancing rather than long term contracts. For Hindi national cinema this organizational informality was also accompanied by increasing concentration in Bombay (Mumbai). By the early 1960s the ‘multi-genre’ movie, still popular today, was becoming the dominant form here. This included song and dance, but in addition a structure ‘in which romance is followed by comedy, then family drama, then action’ (Kabir, 2001: 16). A super-star system also

became increasingly important. It was typified in the early 1970s by the irresistible rise of Amitabh Bachchan, an action hero still revered today.

In terms of the relationship between copyright and creativity, historically IP has been as tangential to Bollywood as it has to the Kingston music scene. This is because, although taking quite distinct forms from those found in Jamaica, translation and intensification are important in Indian film too. As Vijay Mishra puts it: ‘in Bombay Cinema (which began as a colonial form) one of the great borrowed literary forms has been melodrama. The expressive possibilities of this mode ... are taken up in a highly localized manner’ (2002: 35). In particular, ‘[m]elodrama acts like a glue that connects discrete texts and generic registers (from realistic to the comic carnivalesque) together’ (39). In the terms we were using in the previous section, melodrama – itself a European form – provides a framework for the translation of other pieces of symbolic fabric, including the Indian epic and ur-text the *Mahābhārata*, British novels of the nineteenth century such as *Jane Eyre* and *Wuthering Heights*, or the contemporary fiction of the Indian writer R.K. Narayan (Mishra 2002: 35-48).

Although these translated components are either out of copyright (the ancient text of the *Mahābhārata* was never in copyright of course) or credit has been given, as with R.K. Narayan in the case of the film *Guide*, this is certainly not true of a host of other appropriations. Indeed, Michael Curtin (2008:) estimates that eight out of ten productions are potentially illicit copies, while the blogger known as IndiaTime (2007) makes a similar point, if rather more polemically:

For last almost a hundred years now, Bollywood, and the Indian music industry (especially of the popular variety), have been stealing right and left from everywhere else. Movie after movie made in Bollywood steals plots, screenplays, shots, camera angles, dialogs, and background scores from Hollywood. Thousands of Bollywood songs over last fifty years, have come from Beethoven, Bach, Mozart, and the American Billboards.

IndiaTime makes her/his comments in response to a complaint from Vijay Lazarus, president of the Indian Music Industry Association, alleging that piracy has now become a serious problem in Bollywood. IndiaTime’s point is well made, but the issue

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which arises here is more than one of hypocrisy. Critically, it also has to do with developments in markets and technology.

Whereas the high point for international sales of reggae music came in the 1970s and 80s following the unique and meteoric rise of Bob Marley as a global superstar, for Bollywood significant international sales and revenue have been a more recent phenomenon. Certainly diasporic Indian audiences have been watching Bollywood product for many years as Kaushik Bhaumik points out. However 'it is only in the 1990s that they emerged as a significant niche in the global market [due to] growing numbers and a radical transformation of youth and middle class cultures' (Bhaumik, 2006: 191). This trend has occurred in the same period that internet and DVD technology have transformed the copy-ability of films. Meanwhile India itself has seen the development of a large new middle class with access to digital technology.

These factors have undoubtedly fed recent growth in the Indian entertainment industry – up by 17 per cent in 2007 to reach a value of US \$12.82 billion (Asia Law and Practice 2008), and by a staggering 360 per cent over the period 1998-2005 (Lorenzen and Arun Taeube 2007: 12). Paradoxically, it is this success which has prompted a recent moral panic about piracy. In April 2008 Ernst and Young India delivered a report on *The Effects of Piracy and Counterfeiting on India's Entertainment Industry* which attributed potential losses in profits to piracy of 25 to 30 per cent of profits. It also suggested that more than 700,000 jobs in the entertainment sector were lost as a consequence of illicit copying. However, the research was commissioned not by Bollywood itself, but by the Federation of Indian Chambers of Commerce and the US India Business Council, and it was it was funded by the Global Intellectual Property Center of the Washington, D.C.-based U.S. Chamber of Commerce (Nelson, 2008). In other words the report was the initiative of a US content industry lobbying group, and its data needs to be read accordingly.

That said, it may certainly be conceded that unauthorised distribution of Bollywood films is taking place, and probably on a considerable scale. Pre-recorded DVDs sold by commercial 'pirates' are one important medium for this (although internet downloading is also increasing). In the UK market alone a recent report, once again based on industry research, suggests that 70 per cent of Bollywood DVDs found on sale in markets and stalls were counterfeit, compared to only 5 per cent of Hollywood films and music

(Cunningham, 2008). In India it is this form of ‘piracy’ which has prompted the content industry to lobby for an Optical Disc Law that would enable inspection and summary closure of disc copying facilities. To date the government has been resisting (Hindu Business Line, 2008).

No doubt the government is in part deferring to a significant segment of public opinion which would be opposed to the large increases in prices that are likely to follow suppression of unauthorised copying – should it be possible to do this outside a police state. But actually there is a certain cogency to the ‘pro-pirate’ view which goes beyond simple opportunism. For as Boldrin and Levine (2005) point out, the economic rationale for any IP measure must be based on the maximisation of utility. In this context simply to argue that profits or even jobs are lost is unconvincing. The criteria that really matter are whether innovation is taking place and consumers are benefiting from cultural production. As these writers argue, absent an IP monopoly, the much *smaller* revenue stream would still be sufficient to guarantee such conditions; more, it is likely to *increase* utility in that prices would be lower, thus leading to greater (and fairer) public access to symbolic goods.

A further point needs to be added. Historically, Bollywood’s economy has depended on the exhibition of films. Indeed this is still a core market for the industry, with 70 per cent of its revenues coming from this source in 2006 (Lorenzen and Arun Taeube 2007: 10). Here, of course, excludability enters the picture. Quite simply, any restriction of digital copying will have little effect on exhibition where distribution circuits are well established, and the turnstile provides a physical means of exclusion. What’s more exhibition is now being bolstered by a programme of cinema refurbishment and multiplex construction. As Mark Lorenzen and Arun Taeube note this kind of dynamic entrepreneurialism does not end here. Bollywood is now vigorously selling films to a profusion of Indian cable TV channels both within and beyond the Republic. At the same time it has been a world leader ‘in embracing new technologies for products and platforms’ (11). And all this has taken place on the basis of Bollywood’s disintegrated and informal industry structure.

In sum, there is a good case to be made that, far from its leading to stagnation or even contraction, the increase in distribution of Bollywood product via unofficial channels (‘piracy’ in the rhetoric of the US content industry) has gone hand in hand with massive

growth and innovation. Whether or not unofficial distribution has promoted the official market – this is notoriously difficult to measure – there can be little doubt that the openness and informality of the political economy of Bollywood have been a boon (Lorenzen and Arun Taeube 2007: 12-16).

Conclusions and implications for policy

In this chapter we have examined the surprisingly tumultuous history of copyright, assessed the theoretical rationale for it as well as arguments against, and undertaken two case studies in copyright from the global South. As we implied at the start, there is no attempt at balance here, if by balance is meant coming up with a neutral position. For the objective situation calls for a critical evaluation from which emerge, we suggest, the following theses:

- historically copyright represents a legal fix for the cultural industries which have attempted to maintain a form of monopoly trading in and through it,
- the economic argument for copyright as a means of giving an incentive to creators who would otherwise be beaten down by free-riders is weak,
- the suit that copyright rewards vulnerable creators who make new from their own intellectual and psychological capacities is faulty too,
- more positively, creativity is best considered as a kind of social authorship, one which thrives on a low IP regime
- examples of music production from Jamaica show that a market system in culture can work well without effective copyright
- the case of Bollywood film making suggests that rampant ‘piracy’ can not only exist alongside a flourishing creative sector, but that it may bring benefits of access and affordability to the many.

There are surely significant implications for public policy here, and we ought to finish by enumerating some of them. First, the general watchword for governments, especially in the global south, is ‘be sceptical’ when faced with advocacy of Big Copyright by international economic organisations and the multinational copyright industries. Extending and policing copyright in developing or newly industrialised countries is no panacea for building a globally competitive cultural sector. Indeed, a strong IP regime is much more likely to damage local creative ecologies.

Second, and following from this point, where possible copyright regimes ought to favour access and openness. There are a number of ways of doing this. Compulsory licensing grants rights to users of copyright material. Even in the US, for instance, the recording industry is able to record whatever copyright songs it chooses on the basis of a 'mechanical' royalty fixed by the state. Such publicly regulated licensing could be extended to many other spheres of cultural use and appropriation. 'Fair use' might also be strengthened. This is the domain which copyright law recognises as being beyond its purview – quotation for criticism and review, copying in an educational context and so on. Here the way forward is not so much specification, but rather the presumption that fair use is the default position.

In any event, such measures will be difficult to achieve, given the current global situation, even if governments have the political will. The TRIPS Agreement of 1994 and the WIPO Treaty of 1996 give very little room for manoeuvre to their national signatories. Still, that is the nature of the struggle for a just and creative globalized world under a neoliberal order – it will be hard. So let us get started right away.

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