

CREATIVE IMPROPER PROPERTY

copyright and the non-western world

Joost Smiers

copyright and the non-western world

Gradually, we start to understand that the philosophy backing our present copyright system is less self-evident than we usually accept. At the same time we observe that copyright mostly is not in favour of artists, the public domain and Third World countries. In *Arts Under Pressure. Promoting Cultural Diversity in the Age of Globalization* I analyse that we cannot go on with a system that favours huge cultural industries more than the public interest. (Smiers 2003) Copyright has an octopus-like character. It even includes all expressions that have a vague reference to a specific work, and it is nearly endless.

As an alternative I propose to substitute the system of copyright by a restricted and limited ownership right. This would be a restriction in time: a work that is very popular may fall back in the public domain already after a couple of months; for other works this may take, for instance, ten years, but not more. This would be as well a limit in size: the owner has a right on the creative work itself and not on what looks like the work. It would be a gain for cultures if creative adaptation would become widely accepted again. Hasn't creative adaptation been practice and driving force of all cultures, everywhere in the world? In most cultures it is still a normal daily practice that creating and performing is an ongoing process of lending and adaptation; nobody thinks that someone can be the exclusive owner of a work of art.

Let's suppose that we introduce an extremely restricted ownership right for artists and their direct intermediaries. Consequently, we would have a broad public domain of artistic expressions everybody can draw from. What would happen? The consequence would be that cultural industries will lose their monopolistic exclusivity and nearly eternal right on works of art (which for the main part have their roots in the public domain; there is no reason to be romantic about the genius who creates out of nothing, and cultural industries are not at all creators!). One of the results would be that it does not make sense any longer for cultural industries investing heavily in blockbusters, stars and bestselling authors and in all the gadgets, t-shirts and theme parks surrounding the books, films, and songs that refer to each other as endless publicity tools.

This market dominating practice of the cultural giants should be stopped anyway. Ronald Bettig, taking the example of films, considers it 'legitimate to question the spending of as much as \$100 million or more for the production, distribution, and marketing of major feature films in terms of taxing our society's budget for cultural creativity. Many more filmic visions could be available if these resources, as well as the training and technology to produce the films, were more broadly distributed.' (Bettig 1996: 109) Such a "normalization" of the market (following the abolishment of copyright while replacing it by a very restricted ownership right) creates attention space for the multitude of other artists now being pushed away from public attention by the dominance of a few cultural conglomerates. While the present copyright system provides a substantial income only for a limited group of artists, this new market openness will give hundreds of thousands of artists a reasonable income. Why? It gives them the opportunity to find audiences, readers and buyers not hindered by the market dominance of a few cultural industries.

The change from copyright to a restricted ownership right limits the time span in which creative works can be exploited, and brings it back to more normal proportions. It

makes the artistic work less sacrosanct as well. It may be adapted creatively, and this should be encouraged. Nobody should have the right to freeze our cultures, as happens in the Western copyright system, and to own their cultural products exclusively. It may take some time getting used to this analysis concerning copyright that I present here briefly. On the other side, people who exchange music and films after the Napster era, artists who sample in the digital domain, and audiences that buy pirated cd's do not think that they harm any particular interests of artists. They feel that the balance got lost between private and public interests concerning the cultural creation, production, distribution, promotion and reception, and thus they "normalize" this balance again!

The background of the debate on copyright concerns the concept of private ownership (that dominates the beginning of the twenty first century's ideology) versus the neglected notion that we need to have a broad public domain of knowledge and creativity. We know that, under such circumstances, discussing ownership questions is a thorny issue! Nevertheless, it is worthwhile to do so, because the Universal Declaration on Human Rights impresses that everybody should have access to the means of communication. In this Declaration has been mentioned as well that artists should have the right to make a living from their work. Our present copyright system hinders both purposes, and should be rethought accordingly.

The indirect reason to focus this article on copyright and the *non-Western world* is a conflict that has existed for many years between the theatre of the Royal Tropical Institute in Amsterdam (that presents music, dance and other theatrical performances from most non-Western countries) and the Dutch music rights collecting society that wants money for the music and other expressions performed in this theatre. The theatre objects to this for two reasons. The money never will reach artists from the non-Western countries that perform in

Amsterdam, or anywhere in the Western world. The second objection has been based on the fact that no split exists between creators and performers in most parts of the world. Therefore, the theatre prefers paying the artists well and directly, without the intermediation of a collecting society.

However, this conflict deserves a broader analysis. If we already doubt whether the copyright system serves the cultural fields in the Western societies, there is the more reason to look at countries that did not have such systems of intellectual property rights until recently. Do they need to introduce and enforce this if we know that it will not benefit their cultures and that a part of the debt problem of non-western countries has been caused exactly by the huge amounts of money they have to pay for intellectual property rights to Western enterprises? In the context of the treaties of the WTO (specifically the treaty on the so called Trade Related Aspects of Intellectual Property Rights, TRIPs) the poor and developing countries have become pushed aggressively to introduce the systems of copyrights, patents, and related intellectual property rights. One may wonder how this works out. What are the consequences of the changes taking place in such societies going from most of the artistic creations belonging to the public domain to the privatization of cultural expressions? Nearly no systematic analysis has been done until now on this crucial question. This article categorizes, on a local and a global level, the different situations in which the introduction of copyright and the privatization of creativity transform local cultures in one way or another. Obviously, this categorisation and the analysis need to be refined, corrected and completed. I introduce this categorisation with a couple of observations: one is about, who is the true author? The second observation concerns the debt problem of Third World Countries and its relation with intellectual property rights.¹

¹ Both observations are adaptations from some pages (126-131) in my article *The abolition of copyrights: better for artists, Third World countries and the public domain*, in Towse 2002: 119-139.

The first draft of this article has served as a research paper for a conference on this subject that I have organised on the 19th June 2003 in the Royal Tropical Institute in Amsterdam, together with Huib Haringhuizen. I thank the panellists, Lucky Belder, Bernard Kleykamp, Jeroen de Kloet, Otto Romijn and Wim van Zanten, for their curiosity, involvement and well informed contributions. I am grateful as well to the staff of the Institute taking the initiative for this conference and for their great support, namely to Wieb Broekhuijsen, Isabelle Vermeij and Frank van der Schaar. During my research I got stimulating and encouraging comments from Jaap Klazema, Lisa Kölker, Joep Bor, Kwela Sabina Hermanns, and from Giep Hagoort, my colleague in the Research Group Arts & Economics at the Utrecht School of the Arts. Thanks to all of them.

who is the true author?

Copyrights do not benefit Third World Countries any more than those in the West. The individual appropriation of creations and inventions is a concept alien to many cultures. Artists and inventors are paid for their work, the success of which is obviously dependent on their fame and on other circumstances. They may be highly respected for what they have created. However, in most cultures no justification exists for an individual to exploit a creation or an invention monopolistically for many decades, and it is also not the practice. After all, the artist or inventor proceeds with the work of predecessors. A good example of this type of artistic continuity is Algerian raï music. Other examples are traditional and popular music cultures such as calypso, samba, rap, and so on. Regarding the raï, Bouziane Daoudi and Hadj Miliani emphasize ‘that the same theme may know as many variations as there are performers’. The base is shared knowledge, which refers less to a repertoire of

existing “texts” but more to a whole of social signs (*el mérioula, el mehna, el minoun, e har,* etc.) (Daoudi 1996: 126-9)

It is difficult to recognize the true author – in the Western meaning of copyrights. Raï has no author. Until some years ago, with the entrance into the Western market, the singers “borrowed” songs or choruses from each other. The public added words spontaneously to a song. Theft, pillage, and plagiarism of texts do not exist as far as these singers, known as the chebs and the chebete, are concerned. It is a form of music that depends heavily on influences from the immediate circumstances, period, place, or audience. Bouziane Daoudi and Hadj Miliani describe the raï as a ‘continuum of a strongly perturbed social imagination’. (Ibid.)

The idea of paid copyrights is also foreign to Japanese culture. Japan had to change its copyright law in 1996 under pressure from the USA. The *International Herald Tribune* reported at the time that, ‘current Japanese copyright law does not protect foreign recordings made before 1971, meaning that Western record companies, by their estimates, are losing millions of dollars a year in royalties from the copying of tunes that are still highly popular.’ The headline of the article on this matter in the *International Herald Tribune* read: ‘U.S. Take Music-Piracy Charge Against Japan to WTO.’² This is curious: a cultural difference (that is, a different opinion about how long rights should hold) has been interpreted as “piracy”!

Tôru Mitsui explains that the basic conception of copyright has become familiar in Japan mainly through newspaper coverage of copyright issues concerning records, tapes and computer programs. ‘But still the Japanese people do not take well to copyright, or more properly, to the idea of the individual right. Generally speaking, to claim one’s right is regarded as dishonourable or undignified, especially when the right involves money.’ (Mitsui 1993: 141-2)

² *International Herald Tribune*, 10/11 February 1996.

Even when copyrights are applied in many non-Western cultures, it soon becomes clear that the ideology sustaining the system is not fit for the complexity of the creative processes. In the Western world there seems to exist a sharp division between, in the case of music for instance, the composer and the performer. This not so, for example, in African music, which according to John Collins, is usually associated with many more aspects than only the music. Thus, in this case, “royalty”-accruing components ‘should, in the name of creative equity, be divided into four: the lyrics, the melody, the rhythm and the dance-step – with the melody further divided into various contrapuntal or cross melodies and the polyrhythm into its multiple subrhythms.’ (Collins 1993: 149,150) However, this is not all: ‘in African performing arts the audiences often have a creative role too, as they chant, clap and perform dance-dialogues with the musicians.’ Obviously all those elements change every performance. It is clear that the individual allocation of copyrights cannot work. After all, ‘how does one measure the degree (and value) of “originality” in a continually *reworked* piece of music?’ (Ibid.)

Rosemary Coombe perceives the comparable impossibility of applying copyright law to the Native people of Canada. ‘The law rips asunder what First Nations people view as integrally related, freezing into categories what Native people find flowing in relationships that do not separate texts from ongoing creativity production, or ongoing creativity from social relationships, or social relationships from people’s relationship to an ecological landscape that binds past and future generations in relations of spiritual significance.’ (1998: 381)

Would a new kind of copyright, a system of collective rights, solve the issues raised thus far? Whereas the Western concept of copyright requires an identifiable author, the notion of authorship does not exist in this way in many other societies (and even not always in the

West!). Copyright has a time limit (in theory, yes), but artistic expressions in many non-Western societies are important elements of people's cultural identities. Copyright normally requires works to be fixed, but such a freezing of cultures is not how creativity works in most societies in all corners of the planet. (Dutfield 2002: 78)³

In the academic debate a misunderstanding exists about what the problem really is that the Western copyright system poses on most cultures all over the world. The idea is that there should be found a solution for "folklore" and for "traditional cultures". Of course, it is difficult to determine who the collective author in such circumstances is, and therefore the establishment of some form of collective copyright does not proceed. But actually this is a minor problem, something nearly from the past, because in the majority of cases the Western copyright system is applicable. This is how the argument goes. Creativity and performance become individualized, and this brings intellectual property rights, unavoidably, into the game. However, the example of the raï music (developed in a modernising world) makes clear that concepts like "folklore" and "traditional cultures" only partially cover the broad field of artistic creation worldwide that does not fit in the Western notion and practice of copyright.

Apparently, the real struggle is this: should all forms of artistic expressions be pushed, sooner or later, into the framework of the Western copyright system, and should we in the exceptional cases where this may not work, try a system of collective rights (knowing that we cannot find the right definitions for such a system, and hoping that after some years the problem doesn't exist anymore because all creations from all cultures in the world from past and present have been adapted already in such a way that the Western copyright system is applicable nearly everywhere and in all cases)? Or should we recognise that the Western copyright system is not fit for most processes of artistic creation and performance?

³ See for an overview of debates within WIPO, the World Intellectual Property Organization, on intellectual property and the protection of expressions: Wendland 2002. See as well, Von Lewinski 2002, on traditional knowledge and folklore.

This is not yet the general debate. Therefore, the search for something like a collective property right on cultures goes on. This very notion has been mentioned in *Our Creative Diversity*, the Report of the World Commission on Culture and Development published in 1996.⁴ The Report states, ‘that traditional cultural groups possess intellectual property rights *as groups*. This leads to the radical idea that there can be an intermediary sphere of intellectual property rights between individual rights and the (national or international) public domain.’ (Pérez de Cuellar 1996: 196) However, this “group-idea” is not without problems. It raises, for instance, the issue of what is to be protected. ‘The simple notion provided by an imagined primeval cultural source is obviously inadequate here: the Navajo rug, for instance, contains influences which can be traced, through Mexico and Spain, to North Africa.’ (Ibid.)

The Commission understands that there also is a problem with the word “folklore” as a protectable object, and suggests therefore ‘that the word “folklore” should be applied to living creative traditions shaped by powerful ties to the past.’ It has also been pointed out by the Commission ‘that “intellectual property” is perhaps not the right juridical concept to be used at all. A case can be made for a new concept based on ideas inherent in traditional social rules. This might be more constructive than trying to make forms of protection fit within a framework which was never designed for them and where existing users and developers of copyright notions resist strenuously any such development.’ (Ibid.) Those interesting first steps of *Our Creative Diversity* did not get a follow-up towards a full-scale treatment of the problem how to deal with artistic expressions and their artists that do not fit at all in the corset of the Western copyright system.

Krister Malm describes how, in 1996, the same year that *Our Creative Diversity* was published, the question of international copyright protection of folklore was put on the agenda by a number of Third World governments, this time in the context of the preparations for the

⁴ See as well: Grosheide 2002.

World Trade Organization meeting that took place in Geneva in January 1997. 'The move to get the issue onto the WTO agenda failed', he reports. 'Again, the failure was due to resistance from powerful industrialized countries and the cultural industries to any introduction of "collective" or "cultural property" rights into the present system of intellectual and industrial property rights.' At the end, the decision was made that a meeting organized jointly by Unesco and WIPO in Phuket, Thailand, would take place in April 1997.

There was a consensus among some participating countries, notably from the Third World, that an international legal instrument ought to be worked out how such a collective intellectual property right should be affected. This did not at all please the American and British delegates. Krister Malm reports that tension rose 'when the U.S. delegate said that since most of the folklore that was commercially exploited was U.S. folklore and Third World countries would have to pay a lot of money to the U.S. if an international convention should come about. The Indian lawyer Mr. Purim answered that this was already the case with existing conventions and that, by the way, all U.S. folklore except Amerindian was imported to the U.S. from Europe, Africa and other countries. Thus, the money should go to the original owners of that folklore.' (Malm 1998: 26-9)⁵ In April 1998, Krister Malm noted that nothing thus far has come out of the Phuket meeting and that his expectations of collective rights being taken seriously by the Western countries in the near future are not very high. The WTO Ministerial conference, held in Doha, Qatar, in November 2001, issued the so called Doha Declaration. Article 19 of this Declaration instructed the WTO TRIPs Council to examine the relationship between the TRIPs agreement and the Convention on Biodiversity, giving particular attention to the protection of traditional knowledge and folklore.⁶ This process does not show any progress either.

⁵ See as well: Blakeney 2002: 168-173.

⁶ The Doha Ministerial declaration has been adopted on 14 November 2002.

the debt problem

The fact that Western countries earn enormous amounts of money from intellectual property rights, which Third World countries must transfer to them, may be a thorn in their eyes. James Boyle illustrates with some well-chosen examples, how cynically this works out for poor and powerless countries. 'The author's concept stands as a gate through which one must pass in order to acquire intellectual property rights. At the moment, this is a gate that tends disproportionately to favour the developed countries' contributions to world science and culture. Curare, batik, myths, and the dance "lambada" flow out of developing countries, unprotected by intellectual property rights, while Prozac, Levis, Grisham, and the movie *Lambada!* flow in - protected by a suite of intellectual property laws, which in turn are backed by the threat of trade sanctions.' (1996: 125).

This transformation of ideas and raw materials, and the exploitation of markets, are rewarded with intellectual rights; but raw materials, including music and images, are given very little consideration in the area of intellectual rights. Jutta Strötter-Bender gives an example in the field of design. 'For Western designers the whole universe of decorations and images coming from the Third World constitutes an inexhaustible reservoir by which they serve themselves shameless and for sure without adequate payment to the source of their "inspiration".' (1995: 45) It is obvious that more research should be done to get a clearer picture of the harm being done to the cultures of Third World countries in this perspective.

Noam Chomsky may not be far from the truth when he observes, that American companies stand to gain \$61 billion a year from the Third World on intellectual property rights, 'at a cost to the South that will dwarf the huge current flow of debt services from South to North.' (1993: 3) This is a calculation from the beginning of the nineteen nineties. Ten

years later, in 2003, this amount of money will be considerably higher, certainly also when other Western rights holding companies would be included in the calculation. A portion of this sum concerns (besides patents and trade marks) copyrights on cultural “products”. Which part this is, however, is difficult to calculate due to enormous differences in commercial statistics between countries. One may assume that the money poor countries must pay for copyrights is increasing, partly because Southern and Eastern countries feel pressure from the West to fight piracy. This places a drain on the already scarce resources of their police forces. Moreover, transnational cultural conglomerates penetrate those countries more effectively with their entertainment and other cultural products. Consequently, those countries must transfer the scarce hard currency they have to Western and Japanese cultural industries.

It is not surprising that Third World countries did not perceive that the intellectual commons of their societies would be brought under the umbrella of the World Trade Organization and its new Treaty on Trade Related Aspects of Intellectual Properties, TRIPs, by which they would be hindered in developing their own policies in this sensitive field. Friedl Weiss gives the following overview of the struggle between North and South which took place in the years before 1993: “Although there is considerable antecedent and multilateral treaty practice on industrial and intellectual property rights (IIPRs), the subject matter, as is well known, became a matter for multilateral negotiations in the Uruguay Round only upon the insistence of industrially advanced countries (IACs), especially the United States. Developing countries (DCs) were at first extremely reluctant to enter into such negotiations as there was scarcely any common ground between them and IACs, in economic philosophy, objectives or regulatory tradition. Leading DCs, for instance, considered it inappropriate to establish within the framework of the GATT any new rules and disciplines pertaining to standards and principles concerning the availability, scope and use of intellectual property rights.’ (1998: 8.9)

What happened? ‘Consequently, they emphatically rejected any idea of integrating the TRIPS Agreement into the GATT itself which, they claimed, played only a peripheral role in this area precisely because substantive issues of IPRs are not germane to international trade. On the other hand, DCs were content with the integration of substantive standards of the major IPR treaties into the TRIPS Agreement. In the end the deadlock in IPR negotiations was overcome through a combination of allowing DCs and LDCs more transitional time for achieving higher standards of IPR protection and of concessions in other areas, notably textiles and parallel trade.’ (Ibid.)

More research is needed in order to know what the precise considerations were, and still are, of non-Western countries concerning intellectual rights in the cultural field. In *The Challenge to the South*, a report written under the chairmanship of the former president of Tanzania, Julius Nyerere, bitter words have been spoken about the Western approach concerning intellectual property rights. ‘The objective clearly is to install a system that would oblige developing countries to restructure their national laws so as to accommodate the needs and interests of the North. This initiative seeks to expand the scope of the system governing intellectual property rights, extend the lifetime of the granted privileges, widen the geographical area where these privileges can be exercised, and ease restrictions on the use of granted rights.’ (Nyerere 1990: 254,5)

After those observations – on the author and the debt – it makes sense to categorize, on a local and global level, the different situations in which the introduction of copyright and the privatization of creativity transform or affect local cultures in one way or another. Unesco, WIPO, WTO, TRIPs and all the scholars involved in questions of collective versus individual copyrights have failed, thus far, to make such a concrete analysis based on the daily practice of cultural life in the non-Western parts of the world.

A. the local level

A.1. the public domain and the cultural heritage

Without being romantic, we may observe that in many parts of the world artistic creations, from past and present, belong to the commons. Of course, people may be jealous of each others creations, or, at the other end of the scale, someone may be considered being a better artist and may be respected accordingly. However, the work of predecessors and contemporaries is always available to rewrite, and to reinterpret those creations and performances. Creating in such societies is an ongoing process of changing and adapting. In many cultures artistic expressions are even considered as being the external manifestations of the inner spiritual life.

The French philosopher Roland Barthes explained in *The Death of the Author* that in, what he called ethnographic societies, ‘the responsibility for a narrative is never assumed by a person, but by a mediator, shaman or relator whose “performance” – the mastery of the narrative code – may possibly be admired but never his “genius”.’ (in Newton 1988: 155)⁷ The author is a modern figure. Of course, societies are changing permanently and the position of artists and their work also differs in distinguishable cultures. During the last decades in several places of the world the relation between artists and traditional cultural life got different characteristics and became less direct. The tradition became more individualised and artists became personalities on their own merit.

A. 2. private appropriation within local communities

⁷ Originally, Roland Barthes, *La mort de l’auteur*, Manteia 5 (4), 1968 ; also in Barthes, *Œuvres complètes*, Vol. II : 1966-1973, Paris (Seuil) : 491-5.

Meanwhile, it happens more and more in non-Western societies that local artists privately appropriate an artistic idea, a melody or a cultural development originating from the collective tradition, and start to use it for their own commercial interests. They pretend it is theirs which starts the process of excluding others of those cultural resources. In this transformation the concept of copyright gets introduced rather quickly. This phenomenon should not be a reason for amazement. The modern body of thought concerning the supposition that copyright may support artists to make money does not stop at the borders of the Western world. One may wonder what kind of tensions this cause in local communities. In any case, once the private appropriation of cultural resources has started accompanied by the introduction of the notion of copyright, societies are never the same as before.

What has been described here in a nutshell covers huge social transformations taking place all over the world since a couple of decades (but in the last years going quicker and quicker). There is a big need for analysis concerning those processes, because radical changes of cultures are at stake. It looks like automatic and self-evident happenings that do not demand specific attention. It goes the way it does with copyright as the ultimate winner. The only leftover problem is, then, that it is so difficult vindicating them. However, it is not sure that everybody is content with those transformations. We do not know much about the tensions this brings about in different parts of the non-Western world. Are there counter movements that claim that the public cultural domain should not be hollowed? What are their arguments? Where do they think a new balance should be found between the commons in the cultural field and the right of artists to make a living from their work?

A.3. local artists and local record companies

Let's consider this situation. A local record company produces cassettes or cd's of local artists. In a bigger country such a record company may also be active in a region. The

distribution of this music or those videos is local or regional as well. Let's assume as well that the system of copyright does not yet exist in those situations. What are the kind of usual agreements between artists and producers that can be found in different societies? Are there any agreements at all? Does it deliver the artists an income, or mainly promotion that may generate performances? What are the optimal conditions that make artists as well as producers and distributors in specific situations content?

What happens when an artist feels that he or she has been treated incorrectly? Would a well regulated system of copyrights give him or her a stronger position? When does the claim rise that another artist must refrain from using, for instance, a certain melody? From a Western perspective one would be inclined to think that intellectual property rights would really help artists. However, there are several reasons for doubt. The state should be strong enough to provide legitimacy to collecting societies and support their practical operations with an effective system of sanctions. This is not everywhere the case. Moreover, in the Western world the idea exists that it can be indicated easily who the creator or who the performer is, and this distinction is the building block for the present copyright system. In most cultures such a distinction does not exist at all. Thirdly, in the Western world most artists do not profit from the existence of a copyright system; only a tiny minority gets a substantial income from this rights system. Why would this be different in parts of the world where this system recently became introduced? Fourthly, the present practice of copyrights privatises rather aggressively complete fields of creativity and knowledge development. This is disadvantageous for artists' future processes of creating and performing.

Considering all those facts, one may wonder whether artists are not better off when they negotiate directly with producers and distributors and, if necessary, associate themselves in unions to make general agreements. Are there examples of best practices that indicate how a satisfying balance can be reached between the needs of artists and the public interest while

avoiding the introduction of the copyright system that, apparently, has more disadvantages than advantages?

A 4. composers, writers

It looks like we have only been speaking about performing artists until now. But, many others play a role in accomplishing works of art as well. It is a fact that in most cultures the distinction between, for instance, composers and performers does not exist as rigidly as is supposed in the Western world. Besides this, for instance, rhythm and dance have their own creators, or sources of creation. The achievement of a cultural work mostly is not conveniently arranged as if there are only creators and performers. Moreover, it is also the public that contributes actively to what may be called at a certain moment “the” artistic work that, however, may be different the next day.

We do not know much about the economic relations between the many people involved in processes of cultural creation and performance that are, moreover, fluid from day to day. What are their mutual payments? What is the role of intermediaries? Do they control the financial assets underpinning the whole process? What are the changes that characterise the transformation processes of the last decades? It is relevant understanding those questions that may differ enormously between cultures. After all, it might happen that the segmentation of the different stages between idea and ultimate artistic work may have serious consequences. One of the consequences may be that it causes that different groups of artists get worse off.

A.5. tourists and ethnomusicologists

The bus arrives, and the tourists occupy the space or the performance that they consider as exotic, or at least their travel agent makes publicity with this dreamland, without providing

the context that could have caused some respect. Cameras and small recorders are the tools to register the fascinating music, dance or images. Post cards are for sale, maybe even eroticising the local culture. This phenomenon is the occasion for several reflections. First, it is undisputable that the photographer or the person that records takes more than just an image or a sound. In the Western world the belief is strong that a sanitary cordon exists between, for instance, event and photo, or between singer and recording. This belief helps having no moral objections while infringing the personal or cultural sphere of other people. However, in many cultures such a distinction between image and reality does not exist. The image *is* the person and the recording *cannot be* distinguished from the real voice. Both are the same. Probably this conviction holds much truth. There is a direct link between, for example, a performer and the image. Taking a photo means taking something from someone. Who has the right to do this if the link is so close?

Interesting is that this idea has been translated by Hegel in what we call nowadays the moral rights aspect of copyright.⁸ He claims that the work of an artist is a part of his soul, and therefore nobody else should have the right to change this work of the soul. It belongs to the individual. However, this is of course a very romantic concept of the processes of creation. Not one person ever creates out of nothing. There is no poem without a former poem. Every creator and performer uses the cultural heritage and adds something to it. This addition (how beautiful it may be) cannot be an argument for giving an artist an exclusive, monopolistic ownership right for decades on a creation that is in reality based on the work of many other artists before him or her, from the past and even from yesterday.

In most societies this notion of an individual ownership on a creation or a performance does not exist. Artistic creations and performances are shared in common. For this specific quality of the work the Western concept of ownership is not appropriate, because this suggests

⁸ The author wishes to thank Kwela Sabine Hermanns for drawing his attention on Hegel and moral rights.

that a strict borderline exists between who is entitled to the ownership and who is excluded. The reality in most cultures is most of the time fluid and not concerned with those rigid forms of exclusion. At the other side, more important is the recognition that an image or a recording of a work *is* not different from the reality and that it is an infringement to take a photo or to make a recording without being consented in doing so. This observation has a major consequence. The concept of respect is apparently more important than the concept of ownership. Taking away the deepest expression of someone should not be done and is disrespectful; it is an infringement. This is a higher level of how to deal with cultures that are not your own than the shallow Western concept of ownership provides as a solution for those kinds of situations.

Besides this philosophical reflection, there is also a material reality. If people in other cultures would consent that their work will be recorded or eternalized in images, then they are of course entitled to a due remuneration. This raises two questions. Who in the community is entitled, and how should a payment be effectuated? It would be a step forward if best practises considering those issues would be collected.

What has been discussed thus far relates not only to tourists but also, for instance, to ethnomusicologists that collect sounds and images in all different parts of the world. If they would make money with those materials it is not more than reasonable that the communities from where it originates would profit as well. A careful relation demands that something will be agreed on use and payment, now or in the future. As said before, Western collecting societies are not helpful in playing the role of intermediary. The agreement should have a more direct character.

A.6. *piracy*

It is important to realise that there cannot be piracy in societies where the individual appropriation in the form of copyright does not exist. Why not? Everybody in the community has the self-evident right to use and adapt all works from past and present creatively. If individual ownership has no currency, then there cannot be stolen either. Therefore, in most non-Western cultures piracy is an unknown phenomenon, at least until recently. Cultures have been characterised by their ongoing processes of creative adaptations. Otherwise those cultures would not exist.

A.7. degradation of local artistic life

On the other side, the word piracy is on the top of the agenda in many non-Western cultures. This mostly concerns the piracy of Western stars and sometimes the piracy of the work of extremely popular local artists. It is certain that this form of piracy makes Western cultural products immense popular in many poorer countries. There are people who even claim that it pushes aside, for instance, locally made music from public attention and makes it less important in the eyes of several layers of the population.

Is this an unexpected form of cultural imperialism? It sounds exaggerated, but let's see what actually happens. In China, for instance, huge shipments of remains of cd's of the five big global record companies illegally enter the market. This import, called in Chinese dakos, has two remarkable characteristics. First, the market becomes rather quickly inundated with those illegal imports. It is unlikely that record companies have immediately remains from best-selling stars! Second, at the edge of the cd's a notch has been cut. The idea behind this notching is to make them unusable, but this is only the case for a little bit of music on the cd!

If there are remains, would it not be more effective to cut them in several pieces? One might start to think that cultural industries have a vested interest in promoting their artists in parts of the world where people would not have the money to buy for normal prices.

Moreover, all that is forbidden (buying pirated cd's in this case) is desirable. Rumour has it that record companies themselves at the same time distribute legal cd's and so called cheap pirated copies of the work of their artists. Of course, not all piracy originates from the big record companies. There are many entrepreneurs, and politicians, who make big profits out of something that is illegal, like in this case, piracy.

What would happen with piracy if the present copyright system would be abolished as I have proposed up here and replaced by a limited ownership right? There is only one answer possible. Piracy would become less attractive. Why? If artistic work is from the launch on very popular, I propose that it would, or must, fall back in the public domain because the ownership title must be as restricted as possible in order to serve two purposes: providing artists and their direct intermediaries an income, and respecting the public domain of knowledge and creativity and letting it be as big as possible. So, if the work of a star falls back in the public domain soon after its publication, everybody may feel free to copy it. It is no illegal activity any longer.

Pirates make their money by doing something that is forbidden, they take a financial and legal risk, and they hope, and expect, that they have a more or less unique, exclusive position on the market of illegal ware. If everybody may copy, it is the end of the exclusivity of pirates. Then, it is not, or in any case less profitable to make the effort to pirate any longer. The open market drives out pirates. Culturally this might have an interesting side effect. If there will be less piracy, it might be expected that Western stars will inundate less local markets in non-Western countries.

B. the global level

B.1. *western cultural conglomerates*

In the ongoing process of globalisation we see that Western cultural conglomerates, or their sublabels, start using artistic material from non-Western cultures on a huge scale. One could claim that this is the creative adaptation that should be stimulated, as I argued before. Everybody should have the right to make even minor creative changes in a work as was tolerated and promoted in all cultures, everywhere in the world. Does this mean that those forms of industrial creative adaptations do not have problematic aspects? I would not say so.

The main problem is that Western cultural conglomerates exploit the work being derived from non-Western cultures while controlling cultural markets all over the world. They determine the character, sphere and ambiances in which the work will be presented. This is not anymore the normal kind of creative adaptation that takes place in an ongoing cycle of additions, changes, and cultural dynamics within a community. However, this should be characterised as: after we, giant cultural industries, got grip on the work by owning its copyright no creative adaptation will take place anymore, unless, we, cultural conglomerates, decide that it might or will happen, and moreover only under our conditions. Actually, this means that the cultural conglomerate alone decides what the work will be, now and in the future. This is completely opposite to the practice in all cultures that creative adaptations were the object of quarrels and enjoyment within a community where nobody could say: this work and all its possible adaptations belong forever to me. A problem as well is that cultural industries are not by definition respectful to the work they adapt.

By the ownership of copyright the creative adaptation ends with the cultural conglomerate that has appropriated artistic material from non-Western countries. Copyright is the legal fence causing the final phase of the creative adaptation. Moreover, the price of the works cultural industries have adapted and copyrighted is astronomic compared to what it costs and yields in non-Western local cultures. This is a discrepancy too great to be justifiable.

B.2. a fair remuneration

A major problem will remain taking care that artists will get a fair remuneration if their work has been used in geographically far away contexts. It happens that work of artists of non-Western countries pops up in Western publicity expressions or has been used otherwise, while the artist does not know anything about it. This is also the case when, for instance, Western ethnomusicologists use artistic materials they have gathered in other parts of the world. A first question is of course how wide this phenomenon is. It goes without saying that the artist should be paid for this use based on the limited ownership right he or she has, as I discussed in the above.

How can this be guaranteed, and organized, knowing at the same time that the present copyright system does not serve them? For the time being I can only imagine that the different categories of users make a code of conduct, facilitated by their branch organisations. One may think of travel agents, record and publishing companies, designers and advertising agencies. By this code users of artistic materials originating from non-Western countries oblige themselves transferring payments to the communities involved or to individual artists. More often than not it might be difficult to trace the source of an artistic work. In such a case the users oblige themselves to report this to a NGO that has good cultural contacts with non-Western countries. They try to trace the source of the work concerned by asking their networks and contacts. They intermediate that money will be transferred. If the source cannot be found the users contribute a donation to the funds that support cultural developments in non-Western countries.

B.3. contracts

More and more artists from non-Western countries are getting contracts with one of the big five globally operating record companies or with their sublabels. If the work will be distributed only on their own local or regional market more or less the same questions will be under discussion as mentioned under A.3 concerning the relation between local artists and locally operating record companies.

The contract that makes an artist from a non-Western country a star with a global distribution will not differ much from his or her counterpart from the Western part of the world, including all the problems and objections that are inherent to the star system. It must not be excluded, however, that the negotiating position of an artist from Africa, Asia, Latin America or from one of the Arab countries is weaker than for artists from the Western countries.

What corresponds as well is that the (intending) star must obey to all the procedures that belong to being under contract with a multinational record company: the music will be polished endlessly; concerts and tours have as the only purpose to promote a new cd; and all what is spontaneous should disappear behind the horizon. However, this might affect the artistic work of a non-Western artist more than an Anglo-Saxon star. His or her rhythm and tonality will stay more or less the same as it was in the local pub where they played before. It will be polished a little bit more; one may like this, or not. Let's listen now to the music of a non-Western musician; this should still sound exotic. However, the changes might be more fundamental in order to tune in to the Western ear (or what this is supposed to be).

It is amazing that nearly no research has been done to what happens to the music of non-Western artists when they are in the hands of cultural conglomerates' producers. This is not a nostalgic question. If musicologists investigate what kinds of influences have penetrated the work of, for instance, Bach, why are they absent when it concerns the big transformation processes taking place at the moment that music from the Arab world, Africa, Latin America

or Asia becomes adapted to a global market? It should not be difficult to investigate those kinds of interventions. For instance, there are artists from the non-Western parts of the world that have two kinds of repertoire: what they perform at home, and what they present as a star on the world market. The comparison can be made quite easily. The research can be focused as well on what is current in the country or region of the artist him or herself, and how his or her work sounds and looks in the global context. It is strange and regrettable that such forms of analysis is not what keeps (ethno)musicologists busy.

B.4. small record labels distributing music from non-western countries

Around thirty years ago the process has started that music, and of course also theatre and visual arts from non-Western countries got the interest of people in the West. One of the factors that has facilitated this growth is the fact that some aficionados started small record companies. Their purpose was, and is, to make those recordings qualitatively as good as possible; to respect the work of artists without bringing it in contexts which harm its real intentions; and to pay them fairly and as directly as possible (without loosing money for bank transfers, for instance).

Economically this is a challenging task that culturally should be estimated highly. I discussed up here that our system of copyright should be replaced by a limited ownership right. In the case of such small record companies it is clear that it takes them a long period to recoup their costs and to make some profit. Therefore, it is understandable that the ownership period for them might be, for instance, ten years.

B.5. performances in western countries

The number of concert halls (smaller and bigger) where artists from non-Western countries perform has grown considerably during the last decades. What does this mean concerning

copyright? I have already discussed that collecting societies are not the adequate organizations insuring that artists from non-Western parts of the world will get their money. It is better to pay them as directly as possible. This is the only way that guarantees that money will not be lost underway.

Nevertheless, the issue should be raised whether all people who contributed to the creation and performance have been remunerated fairly. In the case that there is, for instance, a composer, one may wonder whether he or she has been or will be paid by the performing artists and how.

B.6. *the public domain*

The recognition is growing that the public domain of creativity and knowledge is paying a high price by the cultural privatisation that is underway. From time to time the idea sprouts that something like a system of collective copyright for traditional knowledge and folklore should be developed. This sounds sympathetic, but it is not realistic, as discussed before, for several reasons.

First, apparently the idea exists that what is very old, may be protected from too harsh privatisations, but the cultural dynamic of the poorer parts of the world may become victims of privatisations. Second, there is no political will giving ample space for the recognition of the collective public domain. The neoliberal agenda does not provide such a thing like respect for the commons, despite some hollow phrases in WTO's Doha Declaration that something like a collective copyright should be developed. Why would respect for the commons be placed on the political agenda all of a sudden when the cultural interests of Third World countries are at stake? There is no reason to believe that the Western world would make serious efforts to do something that is against their interests, namely exploiting knowledge and creativity from non-Western countries as much as possible. Third, intellectual property

rights have been constructed around the philosophy of the individual appropriation. The system of copyrights focuses on exclusive, monopolistic and long-lasting ownership rights. The concept of a collective ownership that is at the same time fluid does not suit with this rigid legal individualism.

Basic principles and practice of the copyright system are contested in the Western world. It does not amaze that many people from non-Western countries put this system even more in doubt. It does not square with philosophies that soak through their cultures. In this overview I have tried to bring some order in the problematic by categorising it. But, much more research and discussions are needed to get grip on what really is at stake. Moreover, it must be possible to construct an adequate philosophy that combines the rights of artists to make a living; that stimulates the creative adaptation; that recognises that much knowledge and creativity belongs to the commons; and that respects the public domain. A third task would be to translate this in a system adequate enough replacing the present old fashioned copyright system.

references

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

Blakeney 2002, Michael, *Protecting the Cultural Expressions of Indigenous Peoples under the Intellectual property Law. The Australian Experience*, in Grosheide 2002: 151-180

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

Chomsky 1993a, Noam, *Notes on Nafta*, in Kristin Dawkins 1993, *Nafta. The New Rules of Corporate Conquest*, Westfield, New Jersey (Open Magazine, Pamphlet Series): 1-6

Collins 1993, John, *The Problem of Oral Copyright – The Case of Ghana*, in Frith 1993: 146-158

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 Miliani, *L'aventure du raï. Musique et société*, Paris (Éditions du Seuil)

Dutfield 2002, Graham, *Traditional Knowledge and Folklore*, in Grosheide 2002: 63-99

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

Frow 1996, John, *Information as Gift and Commodity*, in *New Left Review* 219/1996: 89-108

Grosheide 2002, Willem, and Jan Brinkhof (eds.), *Intellectual Property Law. Articles on Cultural Expressions and Indigenous Knowledge*, Antwerp (Intersentia)

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

Macmillan 2002, Fiona, *Copyright and corporate power*, in Towse 2002: 99-118

Malm 1998, Krister, *Copyright and the Protection of Intellectual Property in Traditional Music, Music, Media, Multiculture*, (Musikaliska akademien, Stockholm)

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

Mediacult 2000, *Musik und Globalisierung*, Wien (Mediacult)

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

Newton 1988, K.M., *Twentieth-Century Literary Theory. A Reader*, London (Macmillan)

Nyerere 1990, Julius K. (chairman), *The Challenge to the South. The Report of the South Commission*, Oxford (Oxford U.P.)

Pérez de Cuellar 1996, Javier, *Our Creative Diversity. Report of the World Commission on Culture and Development*, Paris (Unesco Publishing)

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)

Said 1993, Edward W., *Culture and Imperialism*, New York (Alfred A. Knopf)

Shiva 2001, Vandana, *Protect or Plunder? Understanding intellectual property rights*, London (Zed Books)

Shohat 1994, Ella and Robert Stam, *Unthinking Eurocentrism. Multiculturalism and the Media*, London and New York (Routledge)

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

Smiers 1998, Joost, *État des lieux de la création en Europe. Le tissu culturel déchiré*, Paris (L'Harmattan)

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 Globalization*, London (Zed Books)

Ströter-Bender 1995, Jutta, *L'art contemporain dans les pays du "Tiers-monde"*, Paris (L'Harmattan)

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

Unesco-Wipo 1998, *Unesco-Wipo World Forum on the Protection of Folklore*, Phuket, Thailand, April 8 to 10, 1997, Paris (Unesco)

Wendland 2002, Wend, *Intellectual Property and the Protection of Cultural Expressions. The Work of the World Intellectual Property Organization (WIPO)*, in Grosheide 2002: 102-138

on the author

Joost Smiers is professor of political science of the arts in the Research Group Arts & Economics at the Utrecht School of the Arts, the Netherlands. His books include *Arts Under Pressure. Promoting Cultural Diversity in the Age of Globalization*, London 2003 (Zed Books); and, *Artistic Expression in a Corporate World. Do We Need Monopolistic Control?*, Utrecht 2004 (HKU/ Utrecht School of the Arts)