



RECONCEPTUALISING COPYRIGHT:

Adapting the Rules to Respect
Freedom of Expression
in the Digital Age

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Expression in the Digital Age**



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Table of Contents

Introduction	1
Part I: Recognising a Broken System	2
I.1 Mapping the landscape: copyright	2
I.2 Mapping the landscape: freedom of expression.....	6
I.3 A pirate planet.....	9
I.4 Economic issues underlying piracy	11
<i>A. The Australian experience.....</i>	<i>11</i>
<i>B. The developing world</i>	<i>12</i>
I.5 Enforcement has been draconian yet ineffective.....	14
<i>A. Attacking piracy networks</i>	<i>14</i>
<i>B. Attacking individual pirates.....</i>	<i>15</i>
<i>C. Attacking the Internet itself.....</i>	<i>16</i>
<i>D. Attempts at voluntary measures.....</i>	<i>17</i>
I.6 Copyright law is poorly suited to the digital age.....	18
<i>A. The music business: mashups and sampling.....</i>	<i>18</i>
<i>B. Impact in other media.....</i>	<i>21</i>
<i>C. Piracy in daily life.....</i>	<i>23</i>
Part II: Copyright and the Three-part Test.....	24
II.1 Problems with the test in the context of copyright	24
II.2 Applying the three-part test: provided by law	26
II.3 Pursuing a legitimate aim	27
II.4 Necessity.....	30
Part III: Reconceptualising Copyright	32
III.1 Scope of applicability of copyright	32
<i>A. The framework.....</i>	<i>32</i>
<i>B. In support of broad applicability.....</i>	<i>33</i>
<i>C. In support of narrow applicability.....</i>	<i>33</i>
<i>D. Finding the right formula.....</i>	<i>34</i>
III.2 Copyright term length	37
<i>A. The argument for open access.....</i>	<i>38</i>
<i>B. The incentivisation question.....</i>	<i>39</i>
<i>C. Finding the right formula.....</i>	<i>41</i>
III.3 Derivative works.....	43
<i>A. Global approaches to derivative works.....</i>	<i>43</i>
<i>B. Borrowing and adapting in the creative process.....</i>	<i>45</i>
<i>C. Issues in the current approach</i>	<i>46</i>
<i>D. Finding the right formula.....</i>	<i>47</i>
III.4 Sanctions.....	48
<i>A. Healthy business outlooks.....</i>	<i>49</i>
<i>B. Alternative revenue streams.....</i>	<i>51</i>
<i>C. Finding the right formula.....</i>	<i>53</i>
Recommendations	53
Conclusion	55

Introduction

In February 1930, ten years into the United States' experiment with alcohol prohibition, police in Washington carried out a raid in the basement of the Senate Office Building. The man they arrested, George L. Cassidy, had set up a liquor store among the Senate offices, and established a brisk trade selling illegal alcohol to politicians, with a regular client list that reportedly included two-thirds of United States lawmakers.¹

The arrest confirmed what most in the United States already knew: that laws prohibiting alcohol were utterly divorced from reality. But while prohibition is recognised today as a byword for disastrous government policy, there is a legal framework that remains in place which is equally unenforceable, equally divorced from reality and equally counterproductive to its intended aim. That framework is the international system of copyright, which is probably the most commonly ignored legal construct in human history.

Whenever a law is being widely flouted, it should naturally lead to questions over its wisdom, efficacy and appropriateness, and indeed copyright and copyright enforcement are today among the most controversial legal issues. Proposed crackdowns, such as the Anti-Counterfeiting Trade Agreement (ACTA) in Europe and the Stop Online Piracy Act (SOPA) and the Protect IP Act (PIPA) in the United States, have attracted enormous global protests, with detractors claiming the measures would have a catastrophic impact on online speech while supporters claim they are necessary to protect the interests of content creators.

Although these measures were ultimately defeated, the debate surrounding their passage illustrates a significant problem in analysing copyright law from a human rights perspective. Under international law, there is a robust and well-established framework for determining whether an interference with freedom of expression is legitimate, based on the factors spelled out in Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR).² In general terms, this test places a significant burden on the party seeking to justify the interference, with the party defending freedom of expression enjoying a concomitant advantage, which is consistent with its status as a human right. However, when applied to copyright, this analytical model is problematic, since both sides of the debate are defending freedom of expression interests and it is not clear where the extra burden should lie. This creates a significant conceptual difficulty in analysing copyright from a human rights perspective. Given the pressing need to revise this area of the law, it is important to

¹ Andrew Glass, "Capitol Hill bootlegger revealed, Oct. 23, 1930", Politico, 23 October 2009, available at: <http://www.politico.com/news/stories/1009/28617.html>.

² UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.

develop an appropriate methodology for determining how copyright should be analysed in accordance with international human rights standards.

This Report examines the current framework of copyright rules from a freedom of expression perspective in order to determine how copyright should be reformed to best achieve its underlying purpose of promoting and protecting expression. Part I begins by providing an overview of the systems for protection of copyright and freedom of expression, and goes on to spell out the problems with the current system of copyright rules, which underlie the need for a reconceptualisation of those rules. There is a particular emphasis on the broad chasm between copyright law and the realities of the modern digital age, and the numerous ways in which copyright is failing to achieve its core objective of promoting the creation of cultural works and, in some cases, is actually obstructing it. Part II begins by illustrating the difficulty of analysing copyright using the traditional three-part test, and proposing a modified test for analysing copyright restrictions. This analytical framework is then applied to various copyright issues, leading to specific recommendations for reform regarding copyright's scope, duration, exceptions and sanctions.

Part I: Recognising a Broken System

I.1 Mapping the landscape: copyright

Intellectual property is a relatively new concept. Many great historical works, such as *The Iliad* and *Beowulf*, lack specific attribution or any particular author that could claim ownership. The stories as they exist today are the product of generations of poets, each of whom left their own mark, making their own additions, deletions and changes. These historical roots are consistent with a fundamental idea of art as a collective good which is created to be shared and enjoyed. From Michelangelo's David, displayed in a public square, to the plays of Euripides and Sophocles, performed for free in Athens, the historical norm for artistic works was that they should be enjoyed by as many people as possible. The principle of accessibility is core to the notion of culture as a collective good, which underlies the maintenance of galleries, museums and libraries.

Among these early works, the notion of property only existed in the tangible object. One might own a particular painting or book, but there was no recognition of a property rights interest in the image or words, and other artists were free to borrow or copy ideas, characters and styles.

The core rationale underlying the establishment of copyright was to promote and encourage expression by granting economic rights to creators, incentivising the production of creative works and enabling the maintenance of a professional class of

authors.³ For example, the preamble of the United States' Copyright Act of 1790 describes it as:

An Act for the encouragement of learning, by securing the copies of maps, Charts, And books, to the authors and proprietors of such copies, during the times therein mentioned.⁴

Freedom of expression is recognised as imposing positive as well as negative obligations on States. Thus, in addition to constraining States' ability to limit expression and requiring States to take action to prevent private actors from interfering with the exercise of freedom of expression, the right includes an important promotional dimension. States are required to take positive action to secure the free flow of information and ideas in society:

[T]he State may be required to put in place positive measures to ensure that its own actions contribute to the free flow of information and ideas in society, what may be termed 'direct' positive measures. This might involve, for example, putting in place a system for licensing broadcasters which helps ensure diversity and limit media concentration. Perhaps the most significant example of this is the relatively recent recognition of the obligation of States to put in place a legal framework to provide for access to information held by public bodies. [references omitted]⁵

From this perspective, systems of copyright can be seen as fulfilling a key positive freedom of expression obligation of States, namely to support and nurture the creative talent of the society.

It should be noted that, as a proprietary structure, there are also significant property rights interests at play within copyright. The Statute of Anne, probably the world's first copyright law (in the modern sense of that term), cites a dual need to protect authors from being cheated by publishers and to encourage creation:⁶

Whereas Printers, Booksellers, and other Persons, have of late frequently taken the Liberty of Printing, Reprinting, and Publishing, or causing to be Printed, Reprinted, and Published Books, and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families: For Preventing therefore such Practices for the future, and for the Encouragement of Learned Men to Compose and Write useful Books; May it please Your Majesty, that it may be Enacted...

The recognition of the right to property as a central feature of copyright law is particularly strong in civil law jurisdictions, and also features in ARTICLE 19's

³ See http://www.wipo.int/freepublications/en/intproperty/909/wipo_pub_909.html.

⁴ Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124. Available at: <http://www.copyright.gov/history/1790act.pdf>.

⁵ Toby Mendel, *Restricting Freedom of Expression: Standards and Principles* (Halifax: Centre for Law and Democracy, 2011). Available at: <http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf>.

⁶ c. 19. Royal Assent 5 April 1710. Available at: <http://www.copyrighthistory.com/anne.html>.

*Principles on Freedom of Expression and Copyright in the Digital Age.*⁷ However, although there are undoubtedly proprietary interests at play, it is arguable that these are secondary since it is expressive interests which underlie the proprietary establishment of copyright. The notion that writers, for example, should be protected in practising their art is predicated on the idea that there is social value in that art, in the form of a rich and diverse expressive landscape. If there were no inherent value in the creation of artistic works, there would be no reason to erect legal barriers to the benefit of their creators. Looked at in this way, the property rights interest is, at its core, a servant of the overriding freedom of expression interest.

The modern system of copyright emerged with the *Berne Convention for the Protection of Literary and Artistic Works* (Berne Convention), which was signed in 1886.⁸ The Berne Convention requires member States (which currently number 164) to grant certain protections to the creators of literary or artistic works and their designates (right holders). These works are defined broadly by Article 2(1):

The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

Importantly, Article 5(2) mandates: “The enjoyment and the exercise of these rights shall not be subject to any formality”. In other words, copyright attaches automatically to a work as soon as it is created. This is unlike, for example, intellectual property claims under patent law, which are subject to rigorous certification and vetting processes.

The protections guaranteed include the exclusive right to authorise reproductions of the work, translations of the work, public performances of the work and adaptations or alterations of the work (referred to as ‘economic rights’). They also include ‘moral rights’, such as the right to claim authorship and to object to any modification of the work which would denigrate the author’s reputation. With a few exceptions, such as for anonymous works, the Berne Convention requires signatories to guarantee these rights for a period of at least the life of the author plus fifty years. However, many

⁷ *The Right to Share: Principles on Freedom of Expression and Copyright in the Digital Age* (London: Article 19, 2013). Available at: <http://www.article19.org/data/files/medialibrary/3716/13-04-23-right-to-share-EN.pdf>.

⁸ 9 September 1886, as revised at Paris on 24 July 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986). Available at: http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html. Since it was first signed, the treaty was revised in 1896, 1908, 1914, 1928, 1948, 1967, 1971 and 1979. For simplicity’s sake, references to the Berne Convention are as amended.

jurisdictions have since extended their copyright terms to life plus seventy years, including the United States,⁹ Brazil,¹⁰ Russia¹¹ and the European Union.¹² In Mexico, copyright has been extended to the life of the author plus one hundred years.¹³

The Berne Convention allows for exceptions to the applicability of copyright “in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author”.¹⁴ The scope and nature of these exceptions varies from country to country, although the Convention explicitly established exceptions to copyright protection for the purposes of review, education, reporting the news and making quotations. Some, but not all, jurisdictions also allow an exception for “transformative” uses of copyrighted material, which turn the content into a new work.

With the emergence of digital technology, the past two decades have seen a significant tightening of copyright enforcement procedures, particularly through two major treaties. The first of these is the 1994 *Agreement on Trade-Related Aspects of Intellectual Property Rights*, which established a set of intellectual property provisions which all World Trade Organisation members must adopt. Article 61 requires members to punish copyright infringement as a criminal matter:

Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.¹⁵

The 1996 *World Intellectual Property Organization Copyright Treaty* (WCT), requires parties to adopt measures making it illegal to circumvent digital “locks” designed to prevent infringing activities:

⁹ Pub. L. 94-553, 90 Stat. 2541 (Oct. 19, 1976), available at: <http://www.copyright.gov/title17/>.

¹⁰ Law No. 9.610 of February 19, 1998 on Copyright and Neighboring Rights. Available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=125393.

¹¹ Civil Code of the Russian Federation (as last amended on June 29, 2009). Available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=277674.

¹² European Commission, *Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version)*, [2006] O.J. L 372. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0116:EN:NOT>.

¹³ Federal Law on Copyright (as last amended on 27 January 2012). Available at: <http://www.wipo.int/wipolex/en/details.jsp?id=11495>.

¹⁴ Berne Convention, note 8, Article 9(2).

¹⁵ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, 1869 UNTS 299, 33 ILM 1197. Available at: http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm.

Article 11 Obligations concerning Technological Measures

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

...

Article 14 Provisions on Enforcement of Rights

(1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.

(2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.¹⁶

When translated into national legislation (such as the Digital Millennium Copyright Act in the United States),¹⁷ the WCT led to a crackdown on online copyright infringement. However, as following sections discuss, copyright legislation has been singularly ineffective in stemming the popularity and prevalence of online piracy.

I.2 Mapping the landscape: freedom of expression

When evaluating State actions that impact on freedom of expression, there is a robust and well-established body of international law to draw from. This begins with the *Universal Declaration of Human Rights* (UDHR),¹⁸ a UN General Assembly resolution:

Article 19

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.

The right to freedom of expression is given clear legal effect in the *International Covenant on Civil and Political Rights* (ICCPR):¹⁹

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

¹⁶ *WIPO Copyright Treaty*, 20 December 1996, 36 ILM 65 (in force 6 March 2002). Available at: http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html.

¹⁷ Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

¹⁸ UN General Assembly Resolution 217A(III) of 10 December 1948.

¹⁹ UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

If any legal framework which restricts expression fails to conform to the three-part test enumerated in Article 19(3), it is not legitimate under international human rights law. In its most recent General Comment on Article 19 of the ICCPR, adopted in September 2011, the UN Human Rights Committee stated:

Paragraph 3 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be “provided by law”; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality. [references omitted]²⁰

Given the importance of this test, and its centrality to freedom of expression, there has been a significant amount of commentary devoted to each of its three parts. The first part of the test is that a restriction must be provided by law or imposed in conformity with the law. The restriction must be based on a legal provision, and that provision must also meet certain standards of clarity and accessibility. Where the scope or applicability of restrictions is uncertain, they may exert an unacceptable chilling effect on freedom of expression, as individuals steer well clear of the potential zone of application to avoid censure. As the Human Rights Committee has stated:

For the purposes of paragraph 3, a norm, to be characterized as a “law”, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.²¹

The second part of the test is that any restriction on freedom of expression must pursue one of the legitimate aims listed in Article 19(3). It is quite clear from both the wording of the article and the statements of the UN Human Rights Committee that this list is exclusive and that restrictions which do not serve one of the listed aims are not legitimate:

Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed

²⁰ General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para. 22. See also *Mukong v. Cameroon*, 21 July 1994, Communication No.458/1991, para.9.7 (UN Human Rights Committee).

²¹ General Comment No. 34, *ibid.*, para. 25.

and must be directly related to the specific need on which they are predicated.
[references omitted]²²

The aims listed in Article 19(3) are: respect for the rights or reputations of others; protection of national security and public order; and protection of public health or morality.

The third part of the test is that the restriction must be necessary to secure the aim. The necessity element of the test presents a high standard to be overcome by the State seeking to justify the interference, apparent from the following quotation, cited repeatedly by the European Court of Human Rights:

Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.²³

Courts have identified three aspects of the necessity portion of the test. First, restrictions must be rationally connected to the objective they seek to promote, in the sense that they are carefully designed to achieve that objective and that they are not arbitrary or unfair. Second, restrictions must impair the right as little as possible (breach of this condition is sometimes referred to as 'overbreadth'). Third, restrictions must be proportionate to the legitimate aim. The proportionality part of the test involves comparing two factors, namely the benefits of the restriction in terms of likely protection afforded to the legitimate aim and the harm done to freedom of expression.

The UN Human Rights Committee has summarised these conditions as follows:

Restrictions must not be overbroad. The Committee observed in general comment No. 27 that "restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected...The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law". The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.

When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat. [references omitted]²⁴

²² *Ibid.*, para. 22. See also *Mukong v. Cameroon*, note 20, para.9.7.

²³ See, for example, *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Application no. 13778/88, para. 63.

²⁴ General Comment No. 34, note 20, paras. 34 and 35.

The three-part test has proven to be an effective measure of the legitimacy of laws which restrict freedom of expression, and it has been accepted internationally as the standard by which violations of this foundational right should be evaluated.

I.3 A pirate planet

Although estimates vary, there is no question that the prevalence of infringing activity has exploded in recent years. Once the domain of a small cadre of bootleggers and smugglers, the spread of the Internet has turned copyright piracy into a routine activity for hundreds of millions of people around the world. BitTorrent Inc., creator of one of the most popular protocols for file sharing, claimed in January 2012 to have more than 150 million monthly active users worldwide.²⁵ A 2008-2009 study found that peer-to-peer file sharing accounted for well over half of all online traffic, including up to 70 percent of traffic in Eastern Europe.²⁶ Studies have estimated the percentage of BitTorrent files being shared in violation of copyright at about 99 percent.²⁷

Survey-based studies present a similar picture of ubiquity. Surveys conducted in 2010 found that 29 percent of United Kingdom respondents admitted to having downloaded unauthorised music. A 13-country survey of 8,500 adults found that 15 percent of respondents admitted to having downloaded a song without paying for it in the United States, 46 percent in Spain, 60 percent in South Korea and 68 percent in China. Globally, 29 percent of respondents answered the question in the affirmative.²⁸ Given the nature of how respondents can be expected to self-report illegal activity, the actual numbers are potentially even higher. In some countries, particularly in the developing world, pirated goods far outnumber legitimate ones. Industry estimates put the rate of piracy at 68 percent of software in Russia, 82 percent of music in Mexico and 90 percent of movies in India.²⁹

²⁵ "BitTorrent and µTorrent Software Surpass 150 Million User Milestone; Announce New Consumer Electronics Partnerships", 9 January 2012. Available at: http://www.bittorrent.com/intl/es/company/about/ces_2012_150m_users.

²⁶ Hendrik Schulz and Klaus Mochalski, "Internet Study 2008/2009", ipoque, 2009. Available at: <http://www.ipoque.com/sites/default/files/mediafiles/documents/internet-study-2008-2009.pdf>.

²⁷ See Jacqui Cheng, "Only 0.3 percent of files on BitTorrent confirmed to be legal", Ars Technica, 24 July 2010. Available at: <http://arstechnica.com/tech-policy/2010/07/only-03-of-files-on-bit-torrent-confirmed-to-be-legal/> and Jacqui Cheng, "BitTorrent census: about 99 percent of files copyright infringing", Ars Technica, 30 January 2010. Available at: <http://arstechnica.com/business/2010/01/bittorrent-census-about-99-of-files-copyright-infringing/>.

²⁸ Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), pp. 70-71. Available at: <http://www.ipo.gov.uk/ipreview-finalreport.pdf>.

²⁹ Joe Karaganis, *Media Piracy in Emerging Economies* (New York: Social Science Research Council, 2011), p. i. Available at: http://www.ssrc.org/workspace/images/crm/new_publication_3/percent7Bc4a69b1c-8051-e011-9a1b-001cc477ec84_percent7D.pdf.

File sharing has even permeated the highest levels of government and law enforcement. Activists analysing peer-to-peer BitTorrent traffic have found illegal file sharing originating from IP addresses in the United States Departments of Justice and Homeland Security, the United States House of Representatives, the German Bundestag, the Dutch Tweede Kamer, the Spanish Cortes Generales and the European Parliament.³⁰

The prevalence of piracy is even more striking when considered in demographic and generational terms. Attitudes towards file sharing are far more permissive among the youth. A 2001 study found that 60 percent of Canadian secondary students admitted to having illegally downloaded MP3s and 30 percent admitted to having similarly downloaded movies.³¹ 61 percent of British 14-24 year olds download music using P2P networks or torrent trackers, 83 percent of whom do so on at least a weekly basis.³² In the United States, a survey tracking attitudes towards file sharing reported that respondents aged 18-29 were three times more likely to say that it is acceptable in any circumstance than those over 30. A Swedish survey found that 75 percent of respondents aged 18-20 agreed with the statement: "I think it is OK to download files from the Net, even if it is illegal."³³ A similar attitude was noted in *Digital Opportunity*, an independent report commissioned by the United Kingdom government:

In the last two decades, it has sometimes appeared that the very idea of copyright as a protected source of income to creators is under threat, swept away in a philosophical tide which proclaims a world wide web which is open, unmanaged and essentially the domain of free speech and "free" goods.³⁴

The fact that many illegal downloaders do not see what they are doing as wrong reflects a fundamental disconnect between traditional economic models and the worldview of a younger generation who see free and open access as the natural order of things. Many of these consumers have never visited a music store, and would consider the concept of paying for recorded music as being as antiquated as handwritten letters. In part, this change in attitude can be explained by a preference for obtaining things for free rather than for a fee, but there is also a cultural shift against the restrictions of only being able to access the content that one can pay for. It is easy to see how these consumers, who are used to being able to access virtually unlimited content for free at the click of a button, would balk at an economic model of paying individually for each album, film or book. But while cultural changes and the expanded availability of downloadable content have done a great deal to increase

³⁰ "Exposed: BitTorrent Pirates at the DOJ, Parliaments, Record Labels and More", Torrent Freak, 26 December 2012. Available at: <http://torrentfreak.com/exposed-bittorrent-pirates-at-the-doj-parliaments-record-labels-and-more-121226/>. "FBI Employees Download Pirated Movies and TV-Shows", Torrent Freak, 9 February 2013. Available at: <http://torrentfreak.com/fbi-employees-download-pirated-movies-and-tv-shows-130209/>.

³¹ See <http://www.cippic.ca/file-sharing>.

³² See http://www.academia.edu/238038/Music_Experience_and_Behaviour_in_Young_People.

³³ Adam Ewing, "Young voters back file sharing", The Local, 8 June 2006. Available at: <http://www.thelocal.se/article.php?ID=4014&date=20060608#.UR300aU4vmQ>.

³⁴ Ian Hargreaves, note 28, p. 26.

popular acceptance of file sharing, there is evidence to suggest that the shift in attitudes towards intellectual property has also been driven by consumer frustration with the conduct of major content producers, and their inability or unwillingness to adapt to the digital world.

I.4 Economic issues underlying piracy

“You cannot compete with free” has been a common lamentation of rights-holding lobbies in describing the economic harm that they have endured as a result of the spread of piracy. The language evokes a sense of victimisation in the face of unfair market conditions. But while it is certainly difficult to sell a product that is readily available for free, the shift in attitudes towards piracy, and its broad mainstream acceptance among the young, are also driven by consumer frustration at inefficient and unfair pricing, and distribution schemes that stymie attempts to access content legitimately.

A. The Australian experience

In September 2007, at a concert in Sydney, Australia, Trent Reznor, a prominent industrial rock musician who performs under the name Nine Inch Nails, offered a message to Australian fans frustrated with the exorbitant pricing of his latest album:

Steal it. Steal away. Steal, steal and steal some more and give it to all your friends and keep on stealing. Because one way or another these [expletives] will get it through their head that they're ripping people off and that's not right.³⁵

Apparently the tirade followed unsuccessful negotiations between Reznor and his record label on lowering the retail price of his albums after the artist discovered that they were far more expensive in Australia than elsewhere. In fact, Australian consumers are frequently asked to pay far more for the same product, a discrepancy known locally as “the Australia tax”. Studies have shown that prices are typically around 150 percent of those elsewhere in the world.³⁶ For example, Adobe’s Creative Suite Master 6 software, which retails at USD2599 in the United States, cost the equivalent of USD4462 in Australia as of February 2013. Reporting on the story, a newspaper calculated that it would be cheaper to fly to the United States and purchase the software there than to buy it in Australia.³⁷

³⁵ Terrence O’Brien, “Trent Reznor Tells Fans to Steal Music”, Switched, 18 September 2007.

Available at <http://www.switched.com/2007/09/18/trent-reznor-tells-fans-to-steal-music/>.

³⁶ Asher Moses, “Aussies gouged on tech prices, inquiry hears”, *The Sydney Morning Herald*, 30 July 2012. Available at: <http://www.smh.com.au/technology/technology-news/aussies-gouged-on-tech-prices-inquiry-hears-20120730-23991.html>.

³⁷ “It is cheaper to fly to US than buy Adobe software in Australia”, *The Australian*, 13 February 2013. Available at: <http://www.news.com.au/technology/biztech/it-is-cheaper-to-fly-to-us-than-buy-adobe-software-in-australia/story-fn5lic6c-1226576920561>.

While it is within companies' prerogative to market their products as they see fit, it is also easy to see the connection between pricing systems that strike many as being arbitrary and unfair, and the increasing culture of acquiescence towards online piracy. The Internet also allows local grievances to be heard around the world. The revelation that content producing industries are behaving unfairly in Australia has a global impact as the stories trickle through online message boards and social media networks. Reznor's explicit instruction that fans should steal his music may have targeted Australians, but it made global news.

B. The developing world

Pricing issues in the developing world also impact on attitudes towards piracy. A 2011 study found that prices for copyrighted consumer products, such as music, DVDs and software, fluctuated somewhat according to local pricing needs. In other words, consumers in the developed world can generally expect to pay more than consumers in the developing world. However, this discrepancy does not come close to accommodating wage and currency differentials. In India, for example, the legal price of a typical CD from an international artist was found to be USD8.50, while a DVD of a major Hollywood movie cost USD14.25. Analysing the prices according to "comparative purchasing power", the study found that this meant Indian consumers were paying the equivalent of USD385 for a CD, and USD641 for a DVD.³⁸ This pricing structure severely limits access to these sorts of cultural goods for huge numbers of people in the developing world. While this does not justify piracy, the disconnect between the effectively prohibitive pricing of items like music and movies, on the one hand, and the ease of piracy, on the other, helps explain why users in the developing world have embraced the latter so enthusiastically.

The same study also notes that, in many cases, content is simply not available in particular countries or languages, leaving smuggled copies or unauthorised translations as the only option. Rural movie fans are also often left out in the developing world, where official retailers and cinemas tend to be clustered in capital cities. Again, this demonstrates that the tensions which partly underlie piracy can be traced to distribution issues as well as price. Research has shown that the most downloaded television shows are ones that are not legitimately available online.³⁹

Where content is available, it is often subject to a delay of months or even years in developing countries after its release in the United States. This is another source of understandable frustration among consumers which, given the material is available online almost immediately, increases the temptation to download content illegally. The delays must be understood in the context of a significant acceleration in the speed

³⁸ Joe Karaganis, *Media Piracy in Emerging Economies*, note 29, pp. 56-62.

³⁹ Nick Bilton, "Internet Pirates Will Always Win", *New York Times*, 4 August 2012. Available at: <http://www.nytimes.com/2012/08/05/sunday-review/internet-pirates-will-always-win.html? r=0>.

of information distribution. Digitisation has also led to an evolution in consumer expectations. iiNet, an Australian ISP, cited time lags as contributing to their decision not to participate voluntarily in anti-piracy schemes being pushed by content producers:

The law as it stands has given clarity; this whole idea that people will wait 12-18 months; consumers are just not buying it. You've got to address what is now a broken model from last century.⁴⁰

These facts do not justify piracy, but they do present an alternative narrative to the pirate as simply a thief siphoning profits away from hard working musicians and filmmakers, and unwilling to pay for products just because they can get them for free. Although the economic appeal of free is certainly strong, the global culture of piracy did not evolve in a vacuum. Outdated and unfair distribution policies and realities cannot be ignored as contributing factors. With the emergence of an online culture that has become accustomed to instant delivery, it is hardly surprising that consumers who are not served by traditional models seek to fill the gaps in other ways.

Many instances of piracy do not, furthermore, result in any loss of income to the content producing industries. For most consumers in India or Nigeria it is not a choice between whether to watch a Hollywood movie legally or illegally. Either they watch the movie illegally or they do not watch it at all. This is also true for radio stations in many developing countries, which could not possibly afford to purchase enough copyright protected international music to satisfy their listeners' interests. The reason major content producers are relatively inflexible in their pricing structure is not because they believe that their rates maximise profitability in the developing world but rather because they are afraid that undercutting their prices significantly will lead to lost revenue in more lucrative developed countries. In a globalised market, this is an understandable approach, but it does result in unfair pricing structures for the global poor.

Authors need to earn a living, and the profit motive plays an important and legitimate role in the production and distribution of cultural works. It is worth noting that, in line with copyright's aim of promoting original creations, the modern cultural landscape is undoubtedly richer as a result of the ability of authors to control and sell their work. However, these benefits need to be balanced against the consequences of copyright protection and its practical implications. The tension is particularly strong when the system effectively denies the global poor an opportunity to enjoy the creative output of the developed world.

In sum, there are structural problems with the global market for copyrighted goods that act as significant drivers for piracy, either by effectively pricing users out of the

⁴⁰ Steve Dalby, "iiNet withdraws from proposed notice-notice trial scheme", iiNet Blog, 14 December 2012. Available at: <http://blog.iinet.net.au/iinet-withdraws-notice-notice-scheme/>.

market or by alienating consumers through arbitrary pricing policies. However, rather than seeking to rectify these driving forces, rights-holding industries have responded to the growth of piracy by lobbying for increasingly draconian copyright measures.

I.5 Enforcement has been draconian yet ineffective

In contrast to the growing mainstream acceptance of file sharing, the past decade has seen a tightening of enforcement of intellectual property laws, as rights holding industries have fought a rear guard action to protect their interests against the apparent threat to their business models. There have been several distinct branches to this strategy, none of which have been particularly effective.

A. Attacking piracy networks

First and foremost, rights holders, often working hand-in-hand with government and law enforcement agencies, have sought to shut down major hubs of online piracy through a combination of civil and criminal litigation. In the short term, these campaigns have often been successful, and a number of websites or services have been shut down. However, none of these closures has resulted in any long-term decrease in online piracy.⁴¹ Instead, users have adapted by developing more decentralised systems for file sharing, making the practice increasingly difficult to target.

After Napster's centralised music-swapping service was shut down users migrated to a model of peer-to-peer sharing, where files are shared between computers over distributed networks. When Limewire, the biggest peer-to-peer network, was shut down, users switched to using BitTorrent, an entirely decentralised model where files (torrents) are shared from user to user without the use of any central "hub" that could be shut down. Without any consolidated network to target, rights holders have attempted to stem the sharing of torrents by launching campaigns against websites that allow users to search for uploaded torrents, the largest of which is The Pirate Bay.

The Pirate Bay has proven far more resilient than its "predecessors" to this kind of pressure, and has employed a variety of novel means to stay operational. After courts in several countries issued injunctions against the website in 2012, the operators responded by offering their search code as a free download, allowing any user to set up his or her own version of the website (and hundreds of copies soon popped up).⁴²

⁴¹ Josh Halliday, "LimeWire shutdown just a temporary inconvenience for filesharers", *The Guardian*, 27 October 2010. Available at: <http://www.guardian.co.uk/media/pda/2010/oct/27/limewire-filesharers-injunction>.

⁴² Nick Bilton, "Internet Pirates Will Always Win", note 39.

More recently The Pirate Bay announced that it is shifting its entire website to a cloud-based infrastructure and scattering its information across providers around the world, making it virtually immune to traditional shutdown attempts.⁴³

B. Attacking individual pirates

Actions against major facilitators of online piracy have been complemented by a practice of bringing cases against individual users, most notably in the United States, in an attempt to scare the broader file sharing community away from infringing behaviour. Between 2003 and 2008, the Recording Industry Association of America (RIAA) filed suit against 18,000 people for copyright infringement, settling the majority of cases for between USD3,000 and 5,000.⁴⁴

However, because United States law allows fines of up to USD150,000 for each occasion of wilful copyright infringement, some of the cases that were not settled ended up with astronomical damages being awarded. Jammie Thomas-Rasset, who was found to have downloaded and shared 24 songs, was ordered to pay USD220,000.⁴⁵ Joel Tenenbaum, who was found to have downloaded and distributed 31 songs, was ordered to pay USD675,000 in damages.⁴⁶ Tenenbaum was 16 years old when the file sharing took place.

In 2008, the RIAA abandoned its policy of suing individual file sharers, deeming the practice to be ineffective and not worth the bad publicity. However, examples of draconian enforcement of copyright legislation continue. In 2012, a man in the United States was fined USD1.5 million for pirating 10 pornographic movies while another person, in an unrelated case, was sentenced to 15 years in prison for selling five bootlegged movies and one music CD.⁴⁷

Although the vast majority of harsh enforcement cases originate in the United States, other countries have passed legislation allowing for equally draconian sanctions.

⁴³ "Pirate Bay Moves to the Cloud, Becomes Raid-Proof", Torrent Freak, 17 October 2012. Available at: <http://torrentfreak.com/pirate-bay-moves-to-the-cloud-becomes-raid-proof-121017/>.

⁴⁴ Nate Anderson, "Has the RIAA sued 18,000 people... or 35,000?", Ars Technica, 9 July 2009. Available at: <http://arstechnica.com/tech-policy/2009/07/has-the-riaa-sued-18000-people-or-35000/>.

⁴⁵ Amanda Holpuch, "Minnesota woman to pay USD220,000 fine for 24 illegally downloaded songs", *The Guardian*, 11 September 2012. Available at: <http://www.guardian.co.uk/technology/2012/sep/11/minnesota-woman-songs-illegally-downloaded>.

⁴⁶ "US music file-sharer must pay damages", BBC News, 24 August 2012. Available at: <http://www.bbc.co.uk/news/technology-19370862>.

⁴⁷ "Pornographic films on BitTorrent: Flava Works gets huge damages", BBC News, 2 November 2012. Available at: <http://www.bbc.co.uk/news/technology-20178171>. "RIAA Celebrates 15 Year Jail Sentence For Movie and Music Pirate", Torrent Freak, 12 November 2012. Available at: <http://torrentfreak.com/riaa-celebrates-15-year-jail-sentence-for-movie-and-music-pirate-121112/>.

Panama's Bill 510, passed in 2012, allows users to be fined USD100,000 for their first offence of copyright infringement and USD200,000 for their second offence.⁴⁸ These fines are levied through an administrative process, with the onus on users to demonstrate their innocence once charged. The imposition of overly harsh sanctions, even where it is otherwise legitimate to sanction abuses of the right to freedom of expression, violates the "necessity" branch of the three-part test.⁴⁹

In South Korea, recent amendments to the Copyright Act introduced a graduated response regime where repeat copyright infringers can have their Internet access cut off entirely. The law allows these provisions to be applied in a broad and arbitrary manner, by a government body and without adequate procedural protections. Despite ostensibly being targeted at heavy offenders, the majority of user accounts suspended so far have been as a result of relatively minor infringements.⁵⁰ The suspension of Internet access for copyright violations is particularly troubling in light of the core role that the Internet plays as a facilitating mechanism for human rights, and the increasing recognition that access to the Internet should be considered a human right.⁵¹ In their 2011 Joint Declaration, the four special international mandates on freedom of expression – at the United Nations (UN), the Organization for Security and Co-operation in Europe (OSCE), the Organization of American States (OAS) and the African Commission on Human and Peoples' Rights (ACHPR) – stated that cutting off access to the Internet was an "extreme measure" which could only be justified where "less restrictive measures are not available".⁵²

C. Attacking the Internet itself

Even more troubling than the push towards harsher penalties, from the perspective of freedom of expression, has been a raft of proposals which threaten to fundamentally reshape the free and open nature of the Internet. The most notorious so far was the Stop Online Piracy Act (SOPA).⁵³ This legislation, which was proposed in the United States in 2011, would have empowered the Justice Department to take measures at the level of the Internet's domain name system (DNS) to create a "blacklist" of sites that infringed copyright. Some experts predicted that this type of

⁴⁸ Law available at:

http://www.asamblea.gob.pa/apps/seg_legis/PDF_SEG/PDF_SEG_2010/PDF_SEG_2012/PROYECTO/2012_P_510.pdf [in Spanish].

⁴⁹ See, for example, *Tolstoy Miloslavsky v. United Kingdom*, 13 July 1995, Application no. 18139/91 (European Court of Human Rights).

⁵⁰ CLD has prepared a detailed Analysis of the problems with the South Korean Copyright Act, along with suggestions for reform. Available at: <http://www.law-democracy.org/live/south-korea-copyright-act-restricts-freedom-of-expression/>.

⁵¹ Centre for Law and Democracy, *A Truly World-Wide Web: Assessing the Internet from the Perspective of Human Rights* (Halifax: Centre for Law and Democracy, 2012). Available at: <http://www.law-democracy.org/wp-content/uploads/2010/07/final-Internet.pdf>.

⁵² Adopted 1 June 2011. Available at: <http://www.osce.org/fom/66176>.

⁵³ U.S. Bill H.R. 3261, Stop Online Piracy Act, 112th Cong., 2011. Available at: <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.3261>.

structural interference could “break the Internet”.⁵⁴ SOPA also undermined the principle of safe harbour, whereby websites are sheltered from liability for the actions of their users as long as they take reasonable steps to remove offending material once notified. Under SOPA, if a website was alleged to have infringed copyright or trademarks, content rights holders could require advertisers and payment companies to stop doing business with it, regardless of any reasonable measures it had taken to shut down piracy. This provision could have made it impossible for sites like YouTube or Facebook to function by strangling their commercial viability.

Similar hardline measures were proposed in the 2011 *Anti-Counterfeiting Trade Agreement* (ACTA). ACTA was meant to conflate enforcement mechanisms for traditional physical counterfeit goods with those of digital copyright infringement. The treaty introduced a graduated response regime that severely punished Internet service providers for repeated copyright infringements by their users, and was harshly criticised for undermining the principle of safe harbour.⁵⁵ The treaty also sought to bring signatories into line with the harsh copyright enforcement practices of the United States.

Although both SOPA and ACTA were defeated after massive protests, there are reports that similar measures are being built into the intellectual property section of the Trans-Pacific Partnership Agreement (TPP), a major multi-national free trade deal which, as of the time of research, is being negotiated in secret.⁵⁶ The activists who mobilised to stop SOPA and PIPA are girding themselves for a new fight when the TPP’s final text is unveiled, with some dubbing 2013 “the year of counter-attack”.⁵⁷

D. Attempts at voluntary measures

Rights holders have also sought to enlist the voluntary cooperation of service providers in their fight to track and punish pirates. In the United States, several major ISPs (including AT&T, Cablevision, Comcast, Time Warner Cable and Verizon) have voluntarily signed up to a Copyright Alert System, whereby users found to be infringing copyright will be subject to an escalating series of interventions, from warning letters to mandated “educational” sessions and discussions to network

⁵⁴ Joel Hruska, “How SOPA could actually break the internet”, Extreme Tech, 19 December 2011. Available at: <http://www.extremetech.com/computing/109533-how-sopa-could-actually-break-the-internet>. See also Mark Lemley, David S. Levine & David G. Post, “Don’t Break the Internet”, (2011) 64 *Stan. L. Rev. Online* 34. Available at: <http://www.stanfordlawreview.org/online/dont-break-internet>.

⁵⁵ See analysis by the Electronic Frontiers Foundation at: <https://www.eff.org/issues/acta>.

⁵⁶ See analysis by the Electronic Frontiers Foundation at: <https://www.eff.org/issues/tpp>.

⁵⁷ Joe Mullin, “Will 2013 be the year copyright reformers hit back?”, Ars Technica, 9 January 2013. Available at: <http://arstechnica.com/tech-policy/2013/01/will-2013-be-the-year-copyright-reformers-hit-back/>.

throttling.⁵⁸ Google announced, in August 2012, that it planned to recalibrate its search algorithms to lower the rankings of websites found to be the subject of “valid copyright removal notices.”⁵⁹ There have been rumours that Google’s decision was part of a quid pro quo agreement with the RIAA aimed at facilitating its entry into the market for downloaded music sales. Otherwise, however, it is difficult to fathom why a service provider would voluntarily sign onto a programme that will result in punitive actions being taken against its customers (at least some of whom, one assumes, would switch to providers that had not signed onto the scheme).

ISPs in Australia have engaged in a battle with content rights holders over a similar voluntary scheme that would see them storing and tracking user data for evidence of infringing activity. In December 2012, iiNet, Australia’s second largest ISP, announced decisively that it was pulling out of the scheme saying:

iiNet won’t support any scheme that forces ISPs to retain data in order to allow for the tracking of customer behaviour and the status of any alleged infringements against them. Collecting and retaining additional customer data at this level is inappropriate, expensive and most importantly, not our responsibility... we’re not prepared to harass our customers when the industry has no clear obligation to do so.⁶⁰

Amidst this sparring over extending responsibility for policing the Internet, and the increasingly extreme nature of the proposals for law reform emanating from rights holders,⁶¹ it is worth questioning whether the prevalence of copyright infringement and the inefficacy of attempts to enforce copyright law are reflections of a fundamental problem with the underlying framework for copyright, and its incompatibility with the realities of the digital age.

I.6 Copyright law is poorly suited to the digital age

Digital technologies have led to a fundamental change in the way many forms of art are generated and distributed. These changes have impacted every media, but are particularly notable in the effect they have had on music.

A. The music business: mashups and sampling

⁵⁸ See a description of the program, as written by its proponents, at <http://www.copyrightinformation.org/alerts>.

⁵⁹ See <http://insidesearch.blogspot.ca/2012/08/an-update-to-our-search-algorithms.html>.

⁶⁰ Steve Dalby, “iiNet withdraws from proposed notice-notice trial scheme”, iiNet Blog, 14 December 2012. Available at: <http://blog.iinet.net.au/iinet-withdraws-notice-notice-scheme/>.

⁶¹ The “Report of the Commission on the Theft of American Intellectual Property” discusses legitimising the use of trojans, malware and viruses, including programs designed to hold computers hostage by freezing all operations until their owners pay a settlement, as a means of thwarting piracy. See http://ipcommission.org/report/IP_Commission_Report_052213.pdf.

A mashup is a process whereby an artist takes components of a previously released song, a particular bass line or a guitar riff, for example, and splices them together with components from other songs to generate a new composition. Mashups and sampling, where an audio clip from one source is inserted whole into another (usually original) composition, have become increasingly popular musical techniques, made possible by the spread of digital mixing technology.

These techniques first emerged in live performances by hip-hop DJs in the 1980s, but gained mainstream recognition with the 1989 release of *Paul's Boutique*, the seminal album by hip hop trio the Beastie Boys which sold more than two million copies and featured as many as 300 separate samples.⁶² At the time, the legitimacy of sampling under United States copyright law and the applicability to it of the fair use exception were unsettled. However, this changed the following year with the release of two songs, Vanilla Ice's "Ice, Ice, Baby" and M.C. Hammer's "U Can't Touch This", both of which heavily sampled two earlier compositions (Queen and David Bowie's "Under Pressure" and Rick James' "Superfreak"). In both instances, legal action for copyright infringement led to large payouts. In 1991, the case of *Grand Upright Music v. Warner Bros. Records* offered further clarification. That decision, which began with the admonition "Thou shalt not steal", enjoined the defendant record label against any distribution of an album by rapper Biz Markie on the grounds that it contained unauthorised samples of a Gilbert O'Sullivan song.⁶³

These cases sent a chill through the recording industry, leading to a strict licensing regime for any music distributed in the United States. As the world's biggest market, these developments in the United States have impacted on attitudes towards content creation around the world. Record companies have been extremely cautious in approving distribution of albums containing samples, insisting that artists first seek out the copyright holder and obtain permission to use the track, which generally involves payment of a licensing fee.

In addition to the financial burden this imposes, which can run to hundreds of thousands of dollars for a single song,⁶⁴ artists now face the problem of orphan works, where the original creator (or his or her descendants) cannot be tracked down. For orphan works, the possibility that the rights holder could present themselves after a product's release and demand a substantial settlement or the destruction of all copies of the work in question, can effectively place it off limits to modern artists, historians, archivists, scholars and publishers.

⁶² Matthew Yglesias, "Was Paul's Boutique Illegal?", Slate, 7 May 2012. Available at: http://www.slate.com/articles/business/moneybox/2012/05/adam_yauch_and_paul_s_boutique_how_dumb_court_decisions_have_made_it_nearly_impossible_for_artists_to_sample_the_way_the_beastie_boys_did.html.

⁶³ *Grand Upright Music Limited v Warner Brothers Records, Inc.* 780 F Supp 182 (NY (City of) 1991). Available at: <http://www.detritus.net/rhizome/legal/bizmarkie.txt>.

⁶⁴ "Mad Men' Paid \$250K for Beatles Song", Rolling Stone, 8 May 2012. Available at: <http://www.rollingstone.com/music/news/mad-men-paid-250k-for-beatles-song-20120508>.

Some jurisdictions have found solutions to this problem. For example, Canada's Copyright Act allows the Copyright Board of Canada to issue a licence to a user who has made reasonable attempts to find the owner of a work without success.⁶⁵ In the United Kingdom, the Enterprise and Regulatory Reform Act of 2013 contains a similar provision allowing publishers to use works after performing a "diligent search" that fails to identify the creator, though the specifics of how this will work in practice remain unsettled at the time of publication.⁶⁶ In 2012, the European Union passed the Orphan Works Directive, which allows certain beneficiaries to use orphan works, but only to achieve aims related to their public interest mission.⁶⁷ Furthermore, attempts to implement a similar system in the United States in 2008 died after resistance from rights-holding lobbies.⁶⁸ In other words, although some jurisdictions have taken steps to address the problem of orphan works, it remains a significant constraint on artists in many countries.

Collectively, these restrictions mean that an album like the critically acclaimed *Paul's Boutique* would be extremely difficult to make today. It would require significant financial backing and the willingness to invest in expensive licensing schemes (implying strong confidence in a highly lucrative product), as well as substantial legal and investigative resources in order to track down rights holders. Very few musicians have that sort of backing, and those that do tend not to be up-and-coming innovators.

The restrictions have not stopped heavily sampled albums from being produced, but this is happening in violation of the law. One particularly high profile illegal work is *The Grey Album* produced by Danger Mouse, a mashup of rapper Jay-Z's *The Black Album* and the Beatles' *White Album*, which enjoyed enormous popularity in 2004.⁶⁹ Danger Mouse, an obscure DJ at the time, made the album without any permission or licensing, and escaped legal consequences only because he never sold the album commercially. Instead, he offered it for free online, while an accompanying video (which splices video clips to show Jay-Z apparently rapping alongside the Beatles) was released on YouTube.⁷⁰ Although Danger Mouse was contacted and threatened by lawyers for the Beatles, there was little they could do. There were no profits to seize from the impoverished artist, and with the album having been unleashed over the Internet there was no way to control its spread. Most prominent mashup musicians, such as Girl Talk and pomDeterrific, also release their music online for

⁶⁵ Copyright Act, R.S.C., 1985, c. C-42, s. 77. Available at: <http://laws-lois.justice.gc.ca/eng/acts/c-42/FullText.html>.

⁶⁶ Enterprise and Regulatory Reform Act 2013. Available at: <http://services.parliament.uk/bills/2012-13/enterpriseandregulatoryreform.html>.

⁶⁷ European Commission, *Directive 2012/28/EU of the European Parliament and of the Council on certain permitted uses of orphan works*, [unpublished]. Available at: <http://register.consilium.europa.eu/pdf/en/12/pe00/pe00036.en12.pdf>.

⁶⁸ David Kravets, "Orphan Works' Copyright Law Dies Quiet Death", *Wired*, 30 September 2008. Available at: <http://www.wired.com/threatlevel/2008/09/orphan-works-co/>.

⁶⁹ The album is available for download at: <http://archive.org/details/DjDangerMouse-TheGreyAlbum>.

⁷⁰ Available at: <http://www.youtube.com/watch?v=3zIqihkLcGc>.

free.⁷¹ There is a sad irony in this. Copyright law, having originally been conceived to spur artistic creation by guaranteeing a reasonable income for artists, is now preventing innovative artists from selling their music and restricting the ability of commercial musicians to explore new methods of derivation.

In these cases, copyright rules promote the rights of original creators, and their downstream rights holders, to the detriment of new creators. They thus represent instances where copyright rules both promote freedom of expression in certain ways and also limit it in other ways.

B. Impact in other media

Although the music industry is where copyright restrictions are felt most profoundly, they impact on other media as well. In 2008, graphic designer Shephard Fairey decided to create a poster to support Barack Obama's campaign for President of the United States. He located an appropriate photograph via Google Images, digitally manipulated it into the now iconic "Hope" poster, and distributed it over the Internet (the image has since been acquired by the Smithsonian Institution for its National Portrait Gallery). Mr. Fairey was subsequently sued by the Associated Press, who claimed copyright over the original image. Although Mr. Fairey claimed that his work should be protected under the fair use exception to United States' copyright law due to the transformative nature of the work, the case was settled for undisclosed terms after the judge in the case declared at an early hearing that "sooner or later, the Associated Press is going to win".⁷²

With the spread of the Internet, visual reinterpretations akin to Mr. Fairey's creation are becoming an increasingly common part of the artistic landscape. Street artist Thierry Guetta (aka Mr. Brainwash) has been successfully sued over several of his images that reinterpret iconic musical photographs, despite the artist's claims that his work should be considered transformative and therefore protected as fair use.⁷³

Guetta's experience echoes that of web developer Andy Baio. Mr. Baio was the producer of *Kind of Bloop*, a chiptune⁷⁴ version of Miles Davis' *Kind of Blue*, created to commemorate the 50th anniversary of the release of the original. Mr. Baio maintained no personal commercial interest in the project, which was financed through the

⁷¹ Albums available at: <http://illegal-art.net/allday/> and <https://soundcloud.com/pomdeterrific>.

⁷² Dave Itzkoff, "Judge Urges Resolution in Use of Obama Photo", *New York Times*, 28 May 2010.

Available at: <http://www.nytimes.com/2010/05/29/arts/design/29arts-JUDGEURGESRE BRF.html? r=0>.

⁷³ Milord A. Keshishian, "Mr. Brainwash Sued For Infringing Copyrighted Photos Of Jimi Hendrix, John Coltrane And Other Musicians", Milord & Associates Blog, 25 April 2012. Available at: <http://www.iptrademarkattorney.com/2012/04/copyright-photographer-infringement-brainwash-jimi-hendrix-marshall-thierry-guetta.html>.

⁷⁴ Chiptune is a style of electronic music produced using sound chips from vintage computers (or their emulators), particularly associated with older video games. See <https://en.wikipedia.org/wiki/Chiptune>.

crowdfunding site “Kickstarter”, and profits from album sales were distributed among the musicians. Although Mr. Baio was careful to obtain proper licensing for the music, he got into trouble over his cover art, which was an eight-bit (pixelated) rendering of the original *Kind of Blue* album cover.⁷⁵ Lawyers for Jay Maisel, the photographer for the original cover, contacted Baio demanding “either statutory damages up to USD150,000 for each infringement at the jury’s discretion and reasonable attorneys fees or actual damages and all profits attributed to the unlicensed use of his photograph, and USD25,000 for Digital Millennium Copyright Act (DMCA) violations.”⁷⁶

In order to save the costs of a trial, Baio ultimately settled the case for USD32,500. A note on his website eloquently expresses his feelings about the case:

It breaks my heart that a project I did for fun, on the side, and out of pure love and dedication to the source material ended up costing me so much — emotionally and financially. For me, the chilling effect is palpably real. I’ve felt irrationally skittish about publishing almost anything since this happened.

Although Guetta’s and Baio’s cases are among the most prominent, they are merely the tip of the iceberg. Similar projects can be found all over the Internet. Focusing just on the reinterpretation of album covers, a Google search uncovers websites dedicated to portraying classic album covers as cartoons,⁷⁷ lego figures,⁷⁸ comic-book heroes⁷⁹ and rubik’s cubes.⁸⁰

Filmmaker Nina Paley also found herself in a legal minefield as a result of her 2008 animated film *Sita Sings the Blues*. The film heavily featured music by jazz singer Annette Hanshaw which was recorded in the 1920s. The filmmaker claims that she researched the copyright issues around the music prior to making the film and that she believed the songs had entered the public domain in the 1980s. However, the compositions were actually still under copyright, and as a result the rights holders demanded USD220,000 in licensing fees (USD20,000 per song) after the film’s release.⁸¹ The film was created on a shoestring budget and, though critically acclaimed, was only released in a very limited manner. Without the money to pay for the licensing fees, Paley has since resorted to a number of novel approaches to distributing the film, usually without compensation.

⁷⁵ Images, along with Baio’s description of events, available at: http://waxy.org/2011/06/kind_of_screwed/.

⁷⁶ *Ibid.*

⁷⁷ See <http://www.flickr.com/photos/18103738@N00/sets/72157622581372586>.

⁷⁸ See <http://www.formatmag.com/features/lego-hip-hop-album-covers/> and <http://speckyboy.com/2009/07/22/30-classic-music-albums-recreated-with-lego/>.

⁷⁹ Cliff Chiang, “80’s Album Covers Recreated With Comic Book Heroes”, Planet Oddity, 22 April 2010. Available at: <http://planetoddity.com/80s-album-covers-recreated-with-comic-book-heroes/>.

⁸⁰ Gavin Lucas, “Space Invaders, Rubik’s Cubes and album art”, Creative Review, 17 August 2009. Available at: <http://www.creativereview.co.uk/cr-blog/2009/august1/space-invaders-rubiks-cubes-and-album-art>.

⁸¹ See <http://www.sitasingstheblues.com/faq.html>.

C. Piracy in daily life

In addition to the problems noted above, the disconnect between copyright and the digital world is illustrated by the staggering amount of innocuous copyright infringement that goes on every day.

In an article in the Utah Law Review, John Tehranian lists multiple acts of copyright infringement that he (or, to be precise, a hypothetical law professor named “John”) might commit on a typical day, including forwarding emails, doodling famous photographs or paintings, uploading a video to the Internet of children singing happy birthday and obtaining a tattoo of a famous cartoon character.⁸² By the end of the day, “John” is potentially liable for millions of dollars in damages under United States law, even though he never used a file sharing service.

Although most of these copyright claims will never be enforced, the broad potential for liability can create a culture of cautiousness around reproduction and use that spills over beyond the artistic realm. Retail giant Wal-Mart has a strict policy for all of its photo laboratories of requiring customers to present proof of release before dealing with any photos that could be sourced to a professional photographer or studio.⁸³ This effectively rules out the digitisation or reproduction of older family photos where the original studio or photographer cannot be tracked down.

However, probably the most outrageous example of the over-extension of copyright law is its enforcement over the online sharing of civil rights hero Martin Luther King Jr.’s iconic, “I Have a Dream” speech. As a result of a licensing agreement made between the King family and publishing giant EMI, the speech, along with all of Dr. King’s other intellectual property, is under the company’s control. This agreement came under renewed scrutiny on 18 January 2013, the one-year anniversary of the successful anti-SOPA protests, which Internet activists had declared as the first ever “Internet Freedom Day”. Because the timing coincided with the run-up to Martin Luther King Jr. Day in the United States, an activist group called Fight for the Future used the occasion to upload the speech onto a video sharing website. Quoting the civil rights leader’s exhortation that “one has a moral responsibility to disobey unjust laws”, the website noted that the video was under copyright but invited users to “share it anyway”. Within 12 hours the site was taken down after a copyright complaint. It is worth noting that copyright in King’s speech is not set to expire until 2038.⁸⁴

⁸² John Tehranian, “Infringement Nation: Copyright Reform and the Law/Norm Gap”, (2007) Loyola-LA Legal Studies Paper No. 2007-46, pp. 543-547. Available at: <http://ssrn.com/abstracts=1029151>.

⁸³ See <http://photos.walmart.com/walmart/copyrightpolicy>.

⁸⁴ Alex Pasternack, “Web Activists Are Waging a Guerrilla War to Free Martin Luther King from Copyright”, Vice Magazine, January 2013. Available at: <http://motherboard.vice.com/blog/internet-activists-are-waging-a-guerrilla-war-to-free-martin-luther-king-from-copyright>.

The realisation that this seminal moment in United States history is essentially “owned” by a private corporation, and that it is impossible to legally view footage of the event without paying USD20 for a DVD copy, generated considerable outrage. It is not difficult to see why. The “I Have a Dream” speech, delivered on the National Mall at the height of the civil rights movement, is an incredibly important moment in United States history. The speech is of profound significance to people around the world who struggle against oppression, but particularly for millions of African Americans whose national and cultural identity, and whose place in the United States, is wrapped up in that speech. There is something gravely wrong with the idea that it is a commercial product, owned by a private corporation, rather than something that collectively belongs to the community that Dr. King was speaking for.

This cuts to the heart of a fundamental problem with copyright, a problem that goes beyond the need to adapt the concept to deal with new digital realities. Dr. King’s speech was not a product designed to be bought and sold, but rather a form of advocacy, meant to be seen, heard and disseminated as widely as possible. Dr. King did not write or deliver the speech with the aim of securing direct financial gain for himself or his family, and it is ludicrous to suggest that without a profit motive Dr. King would have stayed home that day. There is absolutely no sensible reason why copyright should have attached to Dr. King’s speech in the first place, and certainly no justification for it remaining under restricted use until 2038.

These issues cannot be divorced from the core question of how to react to the increasing prevalence of piracy which, in addition to the spread of digital technologies that make file sharing easier, can be traced to a fundamental lack of respect for copyright as a legal institution. This lack of respect is understandable given the litany of problems, inconsistencies and absurdities documented in this Report. The first step to fixing copyright, which is a prerequisite for fostering obedience to the international copyright regime, is to conduct a conceptual re-examination of the standards governing the legal framework for copyright.

Part II: Copyright and the Three-part Test

II.1 Problems with the test in the context of copyright

Part I of the Report highlights the serious problems with copyright law, specifically inasmuch as it restricts the right to freedom of expression and, in particular, the right to seek and receive information and ideas. There are legitimate concerns, from a freedom of expression perspective, with copyright’s vagueness, duration, sweeping applicability, incompatibility with the digital age and enforcement. Fostering respect for copyright law requires a broad rethink of the overall framework for copyright, and how it should be redesigned so as to comply with international standards relating to freedom of expression.

Because copyright law restricts expression, an analysis of the current framework would normally be conducted using the three-part test set out in Article 19(3) of the ICCPR. However, the three-part test is designed for situations which pit freedom of expression against other competing interests. In analysing a law criminalising the publication of certain material for national security reasons, for example, the three-part test would require showing that the law really was *necessary* to protect national security, for otherwise it would fail to pass muster as a restriction on freedom of expression. Thus, the UN Human Rights Committee has held that commercial information should not generally be treated as a national security issue.⁸⁵

However, the fact that copyright both negatively and positively impacts on freedom of expression creates a difficulty in applying the three-part test. In essence, instead of pitting freedom of expression against another interest, these cases pit one freedom of expression interest against another. Proponents of expanding and strengthening copyright, for example by extending term length, claim that they are acting in the interests of freedom of expression by incentivising the creation of new content, thereby enhancing the diversity of available information and ideas and, in turn, the rights of the receiver or listener, while also protecting the free speech interests of content creators. Proponents of shorter copyright terms, on the other hand, claim to be promoting expression by pushing more material into the public domain, by removing fetters to the creation of new content through reuse and adaptation and by enabling consumers to access and share content more easily.

In some cases, there is tension between authors' interests in promoting the creation of content and readers' interests in accessing it for purposes of consumption and sharing (while always keeping in mind that creation is also in readers' interests, because you cannot access something that has not been created). In other cases, interests will diverge along more complex lines. For example, authors who make derivative works will have an interest in ensuring that exceptions to copyright are interpreted broadly to allow them to make free use of source material, while other authors will have an interest in tighter exceptions and a stricter interpretation of the scope of acceptable reuse, in order to increase royalty and licensing fees, and their ability to control the way their work is used. In such cases, readers will favour the option which best spurs on creative activity, while also having an (potentially conflicting) interest in rules which grant them easy access to creative content.

Using the three-part test to analyse copyright law presents a significant functional problem since analysis under the test is heavily weighted in favour of the side which is defending freedom of expression. In effect, the test creates a strong presumption against restrictions on or interferences with freedom of expression, so that once the existence of an interference is established, its legitimacy, including its necessity, must be justified (according to the enumerated factors). This is appropriate because freedom of expression is a fundamental human right, and significant hurdles should

⁸⁵ See United Nations Human Rights Committee, General Comment No. 34, note 20, para. 30.

be placed against limiting it. But when the other interest is also a (different) freedom of expression interest, applying the presumption and hurdle it creates would effectively tilt the playing field against the interest which happened to be defending.

In such cases, the three-part test would potentially generate a different assessment of the same issue depending on which party brings the case. Thus, for example, a challenge by newspaper owners to a rule restricting concentration of newspaper ownership would require a showing that the rule was necessary to protect diversity and the right of readers to receive information. But a case brought by readers arguing that the rule was not robust enough to ensure media diversity would require a completely different showing, namely that the rule was necessarily limited because otherwise the right of owners to express themselves would not be sufficiently protected.⁸⁶

The European Court has recognised the problem of potentially different results depending on who brings the case in *Von Hannover v. Germany (No. 2)*, where it stated:

In cases such as the present one, which require the right to respect for private life to be balanced against the right to freedom of expression, the Court considers that the outcome of the application should not, in theory, vary according to whether it has been lodged with the Court under Article 8 of the Convention, by the person who was the subject of the article, or under Article 10 by the publisher.⁸⁷

Although this case involved a conflict between freedom of expression and privacy, the principle is the same.

As a result, when it comes to copyright, a more appropriate test needs to be used to determine whether the rules respect the right to freedom of expression. The following sections propose and apply a modified version of the three-part test which is more effective at weighing the divergent freedom of expression interests that are impacted by copyright rules.

II.2 Applying the three-part test: provided by law

Not every aspect of the three-part test is problematic when applied to copyright law. The first part of the analysis, which requires restrictions to be spelled out clearly in law, is as relevant to copyright as to any other restriction on freedom of expression. The arguments for clarity and accessibility, and the dangers of a chilling effect in the absence of these qualities, remain valid. In particular, consumers and users of creative content have a right to clarity about what copyright does and does not allow.

⁸⁶ This argument was first advanced in Toby Mendel, *Restricting Freedom of Expression: Standards and Principles*, note 5.

⁸⁷ 7 February 2012, Applications nos. 40660/08 and 60641/08, para. 106.

Given the uncertain legal ground that many authors, particularly digital authors, tread with regard to derivative uses and exceptions, uncertainty is a significant problem in copyright's current design. To illustrate the legal difficulties he encountered after adapting the photograph of Miles Davis, Andy Baio's website shows a series of increasingly pixelated versions of the image, from his actual cover graphic to one with just four squares of different colours. Baio asks where, among these increasingly abstract and unrecognisable images, copyright protection ends? Musicians who incorporate samples and writers who include quotes from other works must ask themselves the same question, knowing that an incorrect answer could mean paying hundreds of thousands of dollars in fines, the destruction of their work or even time in jail.

These problems are compounded by the fact that digital publishing is global, while copyright exception frameworks are set nationally. Works whose distribution and sale are perfectly legal in one country might run into trouble if marketed (or even downloaded) in another, resulting in possible sanctions against the creator. In other words, authors now have to consider a patchwork of global standards for what constitutes legitimate use of copyrighted material.⁸⁸

As a result, it is important to develop clear and globally standardised (i.e. international) rules for copyright, which will provide a degree of consistency among all States.

II.3 Pursuing a legitimate aim

Pursuant to the second branch of the three-part test, restrictions on freedom of expression are not legitimate unless their goal is to protect one of the interests recognised in Article 19(3) of the ICCPR. These interests are respect for the rights and reputations of others, protection of national security, public order (*ordre public*) and public health or morals.

Inasmuch as copyright rules promote freedom of expression, they pursue the legitimate aim of promoting respect for "the rights and reputations of others", a recognised interest under Article 19(3) of the ICCPR. The restrictive elements of copyright rules, in terms of limiting the reuse of creative works, are at the same time a mechanism to incentivise and encourage the production of creative works, and allow for the maintenance of a class of professional authors (writers, photographers, musicians and so on). As a result, although copyright law restricts expression, it also promotes it, and therefore pursues a legitimate aim.

⁸⁸ This problem is by no means unique to copyright. Indeed, it has proven extremely problematical in the context of defamation law, giving rise to the phenomenon of 'libel tourism', whereby wealthy plaintiffs choose friendly jurisdictions, often the United Kingdom, to bring defamation cases.

The fact that, in this aspect, copyright rules represent a positive measure of support for freedom of expression does not matter. Under international law, States are not only permitted to take positive measures to facilitate the free flow of information and ideas in society, but in certain circumstances they are even required to do so.⁸⁹

There are other examples of rules that, seen from one perspective, restrict freedom of expression and yet which are broadly understood as being legitimate, and even necessary, to fostering a climate in which freedom of expression can flourish. For example, many States impose regulatory constraints on the use of the radio spectrum, normally prohibiting broadcasters from using frequencies unless they have been specifically licensed to do so. This is clearly a restriction on freedom of expression, and yet it is generally accepted as being necessary (subject to the way in which the system works) since without such a restriction there would be chaos in the airwaves. Having multiple broadcasters on the same frequency would leave users incapable of receiving a clear signal from any of them, so this sort of restriction is necessary to ensure that (terrestrial) broadcasting remains effective and functional.

Copyright rules also promote the property rights of authors, arguably another legitimate aim falling within the scope of Article 19(3) of the ICCPR. For example, the European Court of Human Rights (ECHR) relied on the right to property as the legitimate aim in a 2013 decision, *Ashby Donald and others v. France*,⁹⁰ which centred on the republication of fashion photographs. The same approach was taken in ARTICLE 19's *Principles on Freedom of Expression and Copyright in the Digital Age*.⁹¹

There are, however, problems with using property rights as the legitimate aim of copyright within the three-part test. While the right to property is protected by regional human rights instruments, it is not universally recognised as a human right. Thus, the right to property *per se* is not protected in the ICCPR or the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).⁹² The property rights aspect of copyright is explicitly mentioned as an intellectual property interest in Article 27 of the UDHR, dealing with culture:

- (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
- (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

These rights are further elaborated in Article 15 of the ICESCR:

1. The States Parties to the present Covenant recognize the right of everyone:
 - (a) To take part in cultural life;
 - (b) To enjoy the benefits of scientific progress and its applications;

⁸⁹ *Ibid.*

⁹⁰ *Affaire Ashby Donald et autres c. France*, Application no. 36769/08, 10 January 2013. Available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115845> [in French].

⁹¹ Note 7.

⁹² UN General Assembly Resolution 2200A (XXI) of 16 December 1966, in force 3 January 1976.

- (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

Where the right to property is explicitly protected, this is generally done in a limited fashion, with recognition that property rights can be restricted in line with the public interest. For example, Article 1 of Protocol 1 of the European Convention on Human Rights,⁹³ provides: “No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.” It also allows States to control the use of property “in accordance with the general interest”.

This represents a weak form of protection for property rights, which may be contrasted with the much stronger standards governing restrictions on freedom of expression. These not only provide a limited list of overriding public interests, but also require any restriction to be ‘necessary’. Furthermore, in practice, international courts have implicitly or explicitly favoured freedom of expression over property interests in many cases, including in the context of criticism⁹⁴ and protection of journalists’ sources.⁹⁵

The formulation is a bit different in the context of the right to culture, where explicit recognition is given to the right to enjoy the moral and material interests resulting from one’s work. However, inasmuch as access to cultural works and to protection of intellectual property rights are juxtaposed in the same articles of both the UDHR and the ICESCR, these provisions fail to provide guidance as to how to assess competing claims. Thus, Articles 15(1)(a) and 15(1)(b) of the ICESCR promote access to culture, while Article 15(1)(c) promotes intellectual property rights. In other words, the right to culture, as protected under international law, represents an inherent balance between speakers’ and listeners’ interests, and provides little guidance as to the specifics of how this balancing should be achieved in practice.

The claim that copyright is a justifiable restriction on freedom of expression because it protects the right to property is also problematic because it presupposes copyright’s legitimacy, and thus represents circular reasoning. The very question at

⁹³ Adopted 4 November 1950, E.T.S. No. 5, in force 3 September 1953. The Protocol was adopted on 20 March 1952.

⁹⁴ See, for example, *Hertel v. Switzerland*, 25 August 1998, Application no. 25181/94 (European Court of Human Rights).

⁹⁵ See, for example, *Goodwin v. the United Kingdom*, 27 March 1996, Application no. 17488/90 (European Court of Human Rights).

issue is whether, and to what degree, copyright should be recognised as a property interest. Although there are undoubtedly property rights issues at play within the modern copyright landscape, to ground a justification in the right to property is unhelpful in determining the proper formula for or limits on copyright. It provides no explanatory power, for example, in relation to the question of how long copyright protection should endure. The fact that copyright regimes currently happen to last for 50 or 70 years after the author's death cannot be used as a basis for arguing that they should last that long, on the basis that that is also the duration of the property interest.

Additionally, and closely related to the last point, the property rights aspect of copyright is inherently based on the underlying freedom of expression interest, as was highlighted in section I.1 of this Report. It is thus problematical to treat the property rights interest separately from its source, namely the freedom of expression interest. Inasmuch as the freedom of expression element benefits from greater protection under international law, looking at the property rights issue from that perspective will not in any case undermine it.

For the purposes of this Report, and in analysing the three-part test, although the property rights aspect is recognised as relevant, the key legitimate aim which copyright is deemed to serve is the right to freedom of expression.

II.4 Necessity

The general principle governing the third branch of the three-part test is that restrictions on freedom of expression must be necessary in order to protect the legitimate aim, as identified in the second part of the test. If a restriction on freedom of expression is unnecessary for the protection of its underlying interest, that restriction is illegitimate.

This part of the test is the most problematical when assessing restrictions on freedom of expression which also promote other freedom of expression interests. Specifically, neither copyright's supporters nor its opponents should have to justify their position according to the 'necessity' standard, which would essentially favour one element of freedom of expression over another. Moreover, the concept of necessity itself is ill suited to a measure aimed at promoting freedom of expression, and particularly one which is as nuanced and multi-dimensional as copyright. While applying the necessity standard helps rule out aspects of copyright law that have no positive impact whatsoever on freedom of expression, it is ultimately unhelpful in determining what set of rules will strike the most appropriate balance between the competing freedom of expression interests involved.

There is, however, a need for some sort of methodology or standard to assess whether copyright rules are legitimate, at least inasmuch as they restrict the right to freedom

of expression. The need for limits on copyright is implicitly recognised within its basic framework, which incorporates exceptions, such as fair use and fair dealing. The fact that copyright is limited to a particular term length, rather than being indefinite, implicitly recognises the need to limit copyright, and the inherent good in works being open to the public (public domain). Similarly, a law which sentenced authors whose derivative use of an earlier work was found to violate copyright to life in prison would be illegitimate because life imprisonment is clearly a disproportionate sentence for a copyright violation and applying such a harsh sanction would chill the creation of legitimate derivative content.

In order to be useful, the standard for assessing copyright as a restriction on freedom of expression, as a replacement for the “necessity” branch of the three-part test, needs to take into account the way different freedom of expression interests are affected by copyright. The traditional considerations that are factored into a necessity analysis need to be modified to reflect copyright’s dual role as both restricting and promoting expression. For example, while the three-part test traditionally calls for restrictions on freedom of expression to be as narrow and limited as possible, a broad copyright framework could potentially provide greater overall benefits in terms of freedom of expression, for example if it in fact promoted a richer expressive environment.

Rather than requiring restrictions which protect competing interests to be necessary, what is needed here is a weighing of the positive and negative impacts of the rules on freedom of expression. The question is not whether copyright is necessary but whether the rules as defined are optimally beneficial to freedom of expression. This requires a broad consideration of the positive and negative impacts of a particular regulatory formula, in order to determine whether it has been carefully designed to maximise the positive and promotional impact on expression, while minimising its restrictive elements.

This type of analysis will ensure that copyright rules are designed in a manner which, in line with international human rights standards, is minimally harmful to freedom of expression while being maximally beneficial in terms of promoting expressive outputs. It is worth noting that this type of balancing comports well with the language of Article 27 of the UDHR and Article 15 of the ICESCR, both of which implicitly acknowledge the need to balance the protection of artists’ moral and economic rights with the broader social good that flows from broad and open accessibility to cultural works.

It does not make sense to try to derive a global answer to what copyright rules should look like, because copyright rules are complex. Different aspects of copyright lead to different positive and negative impacts on various freedom of expression interests. As a result, it makes more sense to focus the analysis on key issues, and examine them individually.

The major areas of debate relating to copyright are scope, duration, exceptions and sanctions. Each of these issues can basically be understood as a spectrum, where laws

can either be more protective of original content creators (with extremely broad applicability, long copyright terms, narrow exceptions and harsh sanctions) or more protective of downstream users, including consumers and derivative creators (with narrower applicability, shorter terms, wider exceptions and weak sanctions). For each issue, there are particular interests or arguments that would suggest that the optimal legal approach is to be either more or less protective of content creators. Instead of the necessity part of the test, this analysis considers the various interests engaged for each of these issues in order to identify where along the spectrum copyright rules should be located in order to be maximally effective overall in promoting freedom of expression interests. Where relevant, alternative approaches which provide significant benefits to one or another interest, while only impacting in a limited way on other interests, are proposed.

The structure of this analysis helps to add flexibility to a system which is currently too crude to provide a proper balance in this regard. Rather than seeking a yes or no answer as to whether copyright is legitimate, this modified test seeks to bring copyright into line with freedom of expression by optimally calibrating the framework to suit that purpose.

Part III: Reconceptualising Copyright

III.1 Scope of applicability of copyright

In evaluating the scope of applicability of copyright, there are two aspects to consider: the range of materials to which copyright applies and the mechanism by which copyright protection is engaged. In relation to both, the current framework for copyright is extremely broad.

A. The framework

In terms of the range of materials covered, Article 2 of the Berne Convention contains a very broad formulation for the types of works that are protected by copyright:

The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art;

illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

This definition has been expanded to include computer programs, which are now understood as literary works, as a result of Article 4 of the *WIPO Copyright Treaty*. Although the wording appears to limit the applicability of copyright to works in the “literary, scientific and artistic domain”, practically speaking copyright has been interpreted to apply to works of any nature, including internal corporate memos⁹⁶ and government regulatory codes.⁹⁷

In terms of the mechanism, Article 5(2) of the Berne Convention requires States to provide copyright protection without any formality, which has generally been interpreted to mean that copyright attaches automatically to a work, as soon as it is created. In other words, all works falling within the scope of the definition attract copyright protection by default.

B. In support of broad applicability

There is a general creator’s interest in applying copyright broadly in both of its scope aspects, in order to ensure that nothing falls through the cracks and that the protections of copyright are accessible to everyone. Putting up barriers to obtaining copyright, such as a registration system, could serve as a hurdle to authors, many of whom lack the resources or training to navigate legally complicated processes. Part of the original purpose of the Berne Convention, as reflected in Article 5(2), was to universalise copyright protection. Prior to signing the Berne Convention, many countries had in place registration schemes, with works enjoying protection in some countries but not in others. An important motivation for eliminating these registration requirements was to break down these barriers, sparing authors from having to register their works across a patchwork of different jurisdictions.

The argument for applying the Berne Convention to any form of creation is rooted in the malleable nature of art and creative works. Applying a catch all definition avoids the potential difficulty of complex assessments of what is or is not an artistic work. It is certainly difficult to conceive of any other reason why corporate memos and government documents would be included within the ambit of a convention aimed at protecting creative works.

C. In support of narrow applicability

⁹⁶ See, for example, *Online Policy Group, et. al. v. Diebold Incorporated, et. al.*, 337 F. Supp. 2d 1195 (N.D.Cal. September 30, 2004).

⁹⁷ See “Free Speech Battle Over Publication of Federal Law”, Electronic Frontier Foundation, 22 February 2013. Available at <https://www.eff.org/press/releases/free-speech-battle-over-publication-federal-law>.

There are also disadvantages to a broadly applicable system. One general argument for applying copyright more narrowly is for the sake of greater accessibility. By granting creators a monopoly over the dissemination of their work, copyright places barriers on the ability of others to access it. In some jurisdictions, the possibility of redistribution or derivative uses of the orphan works described in Part I.6 can be denied altogether as a result of copyright restrictions. Even where works remain readily available for purchase, copyright makes it more expensive and difficult to access them. Shifting away from a system that covers everything by default and imposing some requirement for registration would generate a measure of intentionality, such that only works created with some commercial interest in mind would be subject to the restrictions of copyright, with everything else being freely accessible.

There are also factors based on digital developments and the Internet, as spelled out in Part I.5, that caution against overly broad interpretations of copyright, such as the idea that every forwarded email generates potential copyright liability. The digital age has ushered in a tremendous flowering of expression, predicated on the free exchange of information. Enforcing strict rules around what can and cannot be shared poses a threat to this open environment, both directly through its potential as a tool for stifling speech and indirectly through the chilling effect that accompanies fear of prosecution. Moreover, many creators who produce work for non-commercial reasons do not require copyright and, in some cases, would not be interested in attaching copyright to their works. They may even prefer their works to be rendered free of copyright restrictions, to facilitate the sharing of them as widely as possible. Even where authors are not interested in enforcing their copyright against those who share their works, the mere fact that copyright protection formally applies discourages the free exchange and use of those works.

It can be concluded that there are significant benefits to a broad and inclusive framework for copyright; namely, to guarantee that all creative works will be covered and to spare authors from having to deal with the bureaucratic difficulties of registering their work across multiple jurisdictions. Other factors militate in favour of narrower applicability, including broad consumer interest in greater accessibility, creators' interest in access to material for derivative uses and the need to preserve the free-flowing culture of the digital age.

D. Finding the right formula

An ideal formula for a framework which is maximally beneficial to freedom of expression would be one which fulfils the objectives underlying each of these interests. It would ensure that copyright is broadly available where it is beneficial but that it does not apply where it is an unnecessary hindrance to the open exchange of information.

In terms of mechanism, it makes sense to protect authors from having to deal with onerous registration requirements in order to protect their work, particularly in light of the globalised market in which modern creators operate. However, the way that copyright currently operates means that enormous volumes of material which neither need nor even particularly benefit from its protection are subject to copyright, such as personal correspondence, family photographs, etc.

One option to resolve this conflict would be to switch to an opt-in system for copyright protection whereby creators need to specifically assert copyright protection, but where this is simple, free and universally recognised. The current opt-out approach, as represented by the Creative Commons licensing system, could easily be transformed into an opt-in model, which would operate in essentially the exact reverse manner. Creative Commons represents a system which is straightforward and easy to understand, and which has been embraced around the world. The fact that creators already use this approach, albeit in an opt-out manner, indicates that, although it requires intentionality, it is simple and understandable enough so as not to pose a significant impediment to anyone who wants to retain ownership of their work. In other words, it would ensure that copyright remains available to anybody that wants it, without creating frivolous restrictions.

Pursuant to this approach, authors could, by attaching a particular symbol to their work, specify which copyright based limitations they wish to attach, or whether they wish to place the work entirely in the public domain. It would be important to retain the features of the current Creative Commons system, which allow users to adopt a customised level of copyright, such as a requirement for attribution but not permission. In this way, authors could choose from among different types of protection, depending on their particular interest.

The other aspect of this issue is more difficult to resolve. If copyright is understood primarily as a tool for promoting or incentivising expression, it should be limited in scope to categories of products where it has this motivational impact, or at least to works which have some inherent commercial value. Corporate or legal memos for example, are produced in order to satisfy clear and immediate business interests. These are documents that would be produced regardless of whether copyright protection was available and, at least as to their specific content,⁹⁸ have little or no value outside of their immediate business use. As a result, applying copyright in these cases provides no tangible benefit, and instead serves only to restrict expression.

The same could be said for articles in academic journals. The 2013 suicide of hacker-activist Aaron Schwartz, whose legal difficulties stemmed from an attempt to leak the JSTOR archive of scholarly material to the public, focused public attention on the question of why these materials, most of which were produced through publicly

⁹⁸ It is possible that the style or formatting of a business memorandum could contain some legitimately copyrightable elements.

funded research, remain behind paywalls in the first place.⁹⁹ Aside from the public interest arguments about how eliminating fee systems for academic works would save universities billions of dollars and promote public education, there is a core argument against copyright attaching to academic journals. Given that professors are essentially required to produce these articles as part of their research obligations, it is highly doubtful that eliminating their ability to monopolise distribution of their works would have a negative impact of the flow of research or academic articles. This is also reflected in the financial structure of academic journals, which normally does not result in any payment to the author.

The fact that much of the research contained in academic journals is, in most countries, primarily funded through government grants or carried out at publicly funded universities gives rise to an argument for openness based on the right to information. It flows from the human rights status of the right to information that an openness obligation applies whenever public resources are involved, so that any institution that receives public funds should be under an obligation to provide information to the public upon request, and generally at cost.¹⁰⁰ In the case of universities or research institutions that receive government grants, this should mean open access to research data which is substantially the result of public funding.¹⁰¹

At the same time, there is a public interest in maintaining the system of peer-reviewed academic journals, for which some sort of financial system is probably necessary. It is, in particular, important to retain the added benefit of peer review. However, the main market for these journals, namely libraries and academic specialists, would probably be largely maintained even if the material became freely available in electronic form. Alternative sources of funding to support this activity, and perhaps also alternative structures for it, could also be explored.

This does not, of course, mean that researchers should lose all interest in their work. It is reasonable to maintain a right of first publication, for example, so that researchers receive credit for their work. Similarly, the moral rights of authors, such as the right to avoid having their work used in a way which compromises their creative vision, and the right of attribution, should be understood as distinct from the economic aspects of copyright. While publishing monopolies are designed to promote commercial gain, moral rights are generally a matter of artistic integrity, designed not to incentivise expression but to fulfil what are considered to be fundamental creators' rights. Because moral rights generally do not significantly infringe the use, reuse and sharing of work, there is no reason either to restrict their applicability in the same

⁹⁹ Farhad Manjoo, "How MIT Can Honor Aaron Swartz", Slate, 31 January 2013. Available at: www.slate.com/articles/technology/technology/2013/01/aaron_swartz_jstor_mit_can_honor_the_internet_activist_by_fighting_to_make.html.

¹⁰⁰ See, for example, the 2004 Joint Declaration by the special international mandates on freedom of expression. Available at: <http://www.osce.org/fom/66176>.

¹⁰¹ This approach may need to be modified in the case of works which were funded either primarily or significantly through private sources.

way or to move to an opt-in system. In short, while it is reasonable to maintain moral rights in work, such as the requirement for attribution, there are many types of expression that do not require the economic (licensing) aspects of copyright protection.

Aside from the obvious examples of academic publishing and corporate or legal memos, there are problems in attempting to spell out a comprehensive framework governing which types of works should or should not enjoy copyright protection. Art is fluid in nature, and creating an exclusive definition risks leaving out important or emergent aspects. Consequently, the best way to proceed in terms of scope of works covered is to recognise specific types of productions which do not benefit from copyright protection, while leaving it applicable to everything else.

III.2 Copyright term length

Term length is among the most controversial aspects of copyright law, particularly as a result of high-profile campaigns to extend the length of protection in Europe and the United States. In parallel to the interests identified in the previous section, there is a general creator's interest in longer-term protection in order to increase the financial value of works for the author and his or her legatees. There is also an argument that extending protections strengthens the underlying aim of copyright, to promote expression, by increasing the incentive for authors to produce. Although it may seem strange to claim that extending an author's earnings far beyond his or her death generates a significant increase in his or her incentive to create, expanding the value of an author's body of work by lengthening copyright term protection can in some instances offer immediate financial benefits. Authors who sell off the rights to their work, for example to a performance rights organisation such as SESAC,¹⁰² can demand a higher premium if the life of the copyright is longer. Intellectual property rights securitisation (otherwise known as Bowie Bonds or Pullman Bonds, after the musician and banker who pioneered the practice), whereby an author sells off bonds based on future royalties, are a more sophisticated example of how this can work.¹⁰³

On the other hand, longer protections make it more difficult and costly for consumers to access creative works by delaying their entry into the public domain. Given the rapid pace at which data storage technologies change, longer copyright terms can also lead to the loss of works that lack significant commercial value as the media on which they are recorded deteriorates or becomes obsolete. Without a financial incentive to maintain or re-release the work, rights holders may be unwilling to expend resources

¹⁰² See <http://www.sesac.com/>.

¹⁰³ Srinivasan Venkataraghavan, "David Bowie Bonds & IP Securitization", Commodity Online. Available at: www.commodityonline.com/news/david-bowie-bonds--ip-securitization-1896-3-1897.html.

to preserve them, while other interested parties who might invest in preservation, such as collectors or archivists, run into legal constraints.¹⁰⁴

Once again, there are interests pushing in different directions. However, unlike the matter of applicability, these interests directly oppose one another. There is no formula that would promote the interests of one side without detracting from the interests of the other. Consequently, in order to discover the ideal formula it is necessary to take into account broader economic and social realities.

A. The argument for open access

For consumers, it is difficult to overstate the benefits that come with open access to creative works. Rather than merely saving money, an open exchange allows users to vastly expand their cultural horizons by sampling a wide diversity of styles and formats. Where it once took considerable time, energy and resources to build an in-depth understanding of an art form, open access allows any casual hobbyist to become an aficionado.

It is possible to construct limited open access structures within the realm of copyright, but difficulties inevitably arise. For example, the music service Spotify, which provides users with access to a catalogue of 20 million songs, is supported through a mixture of subscription fees and advertising. However, many prominent bands and artists, such as the Beatles, Led Zeppelin and Pink Floyd, have refused to participate in these services.¹⁰⁵

There is also a strong point to be made that broad access to a diversity of cultural content is a powerful tool in promoting the creation of new art. “If people were passing out paints on the street every day,” noted Gregg Gillis (aka Girl Talk) in an interview, “I’m sure there would be a lot more painters out there.”¹⁰⁶ The current flowering of digital expression, driven by the spread of the Internet, would not have been possible if all content remained locked behind paywalls.

This dovetails with an argument for facilitating the creation of derivative works, a practice that is stymied by all copyright restrictions but which faces particular difficulties when dealing with older materials. Tracking down the heir or commercial successor to a work created more than a century ago can be difficult or impossible, leading to the phenomenon of “orphan works” discussed in Part I.6.

¹⁰⁴ Laura N. Gasaway, “America’s Cultural Record: A Thing of the Past?”, 2003. Available at: www.unc.edu/~uncnlg/America’s_percent20cultural_percent20record.htm.

¹⁰⁵ Kim Gilmour, “Artists and Albums Not Available on Spotify”. Available at: www.dummies.com/how-to/content/artists-and-albums-not-available-on-spotify.html.

¹⁰⁶ Quoted in “Good Copy Bad Copy”, available for download at <http://www.goodcopybadcopy.net/>.

By demonstrating the benefits of open access to creative content, all of these interests make a case for shorter copyright terms and a quicker transition into the public domain.

The chief argument for longer copyright terms revolves around incentivising the generation of content. In order to fully understand this argument, it is useful to consider the economics of copyright and content production.

B. The incentivisation question

It is difficult to argue against the proposition that incentivising the production of creative content is beneficial to the overall cultural environment. Increase the incentives for producing art and you will increase the quality and quantity of the art that is produced. But, on the issue of term length, there is unquestionably a diminishing return to extending copyright far beyond an author's natural life. This was noted over 150 years ago by British lawmaker Thomas Macaulay:

[T]he evil effects of the monopoly are proportioned to the length of its duration. But the good effects for the sake of which we bear with the evil effects are by no means proportioned to the length of its duration ... [I]t is by no means the fact that a posthumous monopoly of sixty years gives to an author thrice as much pleasure and thrice as strong a motive as a posthumous monopoly of twenty years. On the contrary, the difference is so small as to be hardly perceptible ... [A]n advantage that is to be enjoyed more than half a century after we are dead, by somebody, we know not by whom, perhaps by somebody unborn, by somebody utterly unconnected with us, is really no motive at all to action.¹⁰⁷

The same point was made by the eminent jurist Richard Posner in a 2012 blog post:

The most serious problem with copyright law is the length of copyright protection, which for most works is now from the creation of the work to 70 years after the author's death. Apart from the fact that the present value of income received so far in the future is negligible, obtaining copyright licenses on very old works is difficult because not only is the author in all likelihood dead, but his heirs or other owners of the copyright may be difficult or even impossible to identify or find. The copyright term should be shorter.¹⁰⁸

Ian Hargreaves, in a review of copyright commissioned by the government of the United Kingdom in 2010, expressed a similar idea:

¹⁰⁷ Dennis S. Karjala, "The Term of Copyright" in Laura N. Gasaway, ed., *Growing Pains: Adapting Copyright for Education and Society* (Littleton, USA: Fred B. Rothman & Co., 1997). Available at: <http://www.public.asu.edu/~dkarjala/commentary/term-of-protection.html>.

¹⁰⁸ Richard Posner, "Do patent and copyright law restrict competition and creativity excessively?", The Becker-Posner Blog, 30 September 2012. Available at: www.becker-posner-blog.com/2012/09/do-patent-and-copyright-law-restrict-competition-and-creativity-excessively-posner.html.

Economic evidence is clear that the likely deadweight loss to the economy exceeds any additional incentivising effect which might result from the extension of copyright term beyond its present levels. This is doubly clear for retrospective extension to copyright term, given the impossibility of incentivising the creation of already existing works, or work from artists already dead.

Despite this, there are frequent proposals to increase term, such as the current proposal to extend protection for sound recordings in Europe from 50 to 70 or even 95 years. The UK Government assessment found it to be economically detrimental. An international study found term extension to have no impact on output.¹⁰⁹

An exemplification of the absurdity of the current copyright term is Bobby “Boris” Pickett. While not a particularly famous musician, Pickett will be familiar to millions around the world as the composer and primary vocalist for the song “Monster Mash”. Written over the course of half an hour in the 1960s, the song is a ubiquitous presence on radio stations across North America every Halloween. Asked in 2004 whether his annual royalties amounted to more than six figures each year, Pickett merely replied that the song “has paid the rent for 43 years”.¹¹⁰ Because Pickett died in 2007, if the song retains its seasonal popularity his children and grandchildren can expect that it will continue to pay their rent until 2077.

To argue that this level of incentivisation is necessary to spurring creative production simply does not comport with reality. This sort of economic windfall will also appear unjust to many independent observers. It defies logic to suggest that dropping the term of copyright protection from seventy years after an author’s death to fifty years or even five years after their death will lead authors to quit the business. While some artists, like David Bowie, have found alternate ways of monetising long-term protections, these options are generally only available to the top tier of content creators, while those at the bottom, who presumably would be most sensitive to changes in the incentivisation structure, earn comparatively little from copyright protections.

It is also important to understand the place of resources flowing from copyright in the larger economic environment for different types of authors. A 2013 survey of 5000 musicians in the United States found that only 6 percent of their total revenue came from recorded music sales. An additional 6 percent comes from songwriting and composing, which is also impacted on by copyright. However, by far the largest slices come from touring and live performances (28 percent), teaching (22 percent) and salaries through work with a band or symphony (19 percent). The same study revealed that intellectual property related earnings make up a far higher proportion of earnings among the top income tier of musicians, whereas those at the bottom rely

¹⁰⁹ Ian Hargreaves, note 28, p. 19.

¹¹⁰ “The Monster Mash Man”, *Washington Post*, 29 October 2004. Available at: <http://www.washingtonpost.com/wp-dyn/articles/A2534-2004Oct27.html>.

more heavily on income from live performances.¹¹¹ In other words, it is primarily very successful musicians, who almost by definition have derived very substantial economic benefits from their work, that benefit from longer copyright terms.

This math is not surprising considering that, in sales of recorded music, a comparatively small amount of the purchase price actually makes it to the artists. Typically, musicians will only pocket USD1.33 on a CD that retails for USD18.98.¹¹²

The vast majority of creative works enjoy only a relatively short period of high profitability. Although a few hits, like “Monster Mash”, withstand the test of time, modern culture moves quickly. The standard theatrical release for major Hollywood films is 16.5 weeks, after which studios focus on DVD sales as a revenue source.¹¹³ After six to nine months the films are often sold on to online video streaming services such as Netflix.¹¹⁴ Thus, after less than a year, their profitability for the studios has substantially dried up. Of course, the price that online streaming services pay is contingent on having exclusive access for a period beyond that. Given how new this market is, it is difficult to approximate a film’s value to streaming services over time, although it is safe to expect that the value declines fairly rapidly. As a comparator, a 2001 report found that television syndication periods for films (the duration of time in which broadcast networks were willing to pay to air them) typically lasted around five years.¹¹⁵

Software enjoys an even briefer window of profitability. Sales of computer games tend to drop off precipitously after the first year and often dwindle to nearly zero within two to five years.¹¹⁶ Programs that are fifteen or twenty years old are often so obsolete that they cannot even run on modern systems. There is some evidence, on the other hand, that the economic shelf-life of books is rather longer than videos or software.

C. Finding the right formula

It is not possible, within the scope of this Report, to propose a precise best practice formula for copyright duration. This would require specific research into the economics of the various content producing industries. But while a specific number is difficult to pin down, it is safe to say that the current structure runs for far too long.

¹¹¹ Peter C. DiCola, “Sound Recording Just 6 percent of Average Musician’s Income” (2013), Arizona Law Review, Forthcoming; Northwestern Law & Econ Research Paper No. 13-01. Available at: <http://ssrn.com/abstract=2199058>.

¹¹² See <http://www.cippic.ca/file-sharing>.

¹¹³ “Studios Unlock DVD Release Dates”, *Wall Street Journal*, 12 February 2012. Available at <http://online.wsj.com/article/SB10001424052748704337004575059713216224640.html>.

¹¹⁴ Ingrid Lunden, “HBO Inks Exclusive, 10-Year Deal With Universal To Keep Content Out Of Netflix’s Hands”, Tech Crunch, 6 January 2013. Available at: <http://techcrunch.com/2013/01/06/hbo-inks-exclusive-deal-with-universal-to-keep-content-out-of-netflixs-hands/>.

¹¹⁵ See <http://www.pbs.org/wgbh/pages/frontline/shows/hollywood/business/windows.html>.

¹¹⁶ See <http://www.vgchartz.com/>.

It is also far too rigid, applying in exactly the same way regardless of the nature of the genre to which it applies.

One of the earliest copyright laws, the Statute of Anne, enacted in Great Britain in 1710, provided protection for only fourteen years, renewable once for an additional fourteen. 300 years later, the pace of popular culture has increased exponentially, yet term protections have moved in the opposite direction, and continue to be extended. These extensions are particularly puzzling inasmuch as they are normally applied retroactively to cover the existing artistic canon. Obviously, there is no potential for further incentivisation for works that have already been created.

The concept of extending copyright protections beyond the life of the author is also curious when viewed in a modern context. Originally, the framework was designed to ensure that the (presumably male) creator could continue to provide for his wife and children after his death. The notion that an author's wife and children would continue to require maintenance fifty or seventy years after his death seems curious even by nineteenth century standards but this economic model has become increasingly archaic globally.

As a response to this problem, ARTICLE 19's *Principles on Freedom of Expression and Copyright in the Digital Age* proposes that copyright term lengths should never extend beyond the life of the artist.¹¹⁷ While it is certainly true that modern terms are too long, the life of the artist itself is a curious yardstick to use, since it means that works created near the end of an artist's life enjoy a far shorter window of protection than those created early in his or her life. Limiting the term of protection to the life of the artist would mean that certain creations would enjoy a period of protection of weeks or even days. In addition, a substantial amount of content which is generated today is owned by corporate entities, compounding the arbitrariness of the creator's lifespan as a unit of measurement. In terms of clarity and reliability, a fixed-term for copyright's economic aspects would be far preferable. Once again, however, it is important to separate out copyright's economic elements from its moral ones, the latter of which should remain in place at least for the life of the author and perhaps, at least as regards attribution, beyond that.

International standards require restrictions on freedom of expression to be carefully tailored so as to achieve their goals of protecting other interests without unduly impacting on the free flow of information and ideas. This quality is signally absent in the blunt rules of modern copyright, which apply a uniform period of protection to every work, regardless of its medium, style or window of profitability. The economics underlying the different content-producing industries should be examined with an eye to developing a more subtle approach, providing for different timeframes depending on the commercial realities of the genre.

¹¹⁷ *The Right to Share: Principles on Freedom of Expression and Copyright in the Digital Age* (London: Article 19, 2013). Available at: <http://www.article19.org/data/files/medialibrary/3716/13-04-23-right-to-share-EN.pdf>.

Alternatives should also be explored. One intriguing proposal is to dramatically shorten the duration of economic copyright, but to allow rights-holders to extend it by paying a fee, which might escalate with each renewal.¹¹⁸ This approach would ensure that only works with sustained commercial viability remained protected, allowing the public free access to everything else.

III.3 Derivative works

A. Global approaches to derivative works

A third major area that warrants re-examination is the regime of exceptions to copyright. There is presently no accepted international standard governing how States should address the issue of exceptions to copyright. Article 9(2) of the Berne Convention describes in general terms what has come to be known as the three-part test for exceptions to copyright:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.¹¹⁹

This, however, leaves wide scope to States to craft very different regimes of exceptions, and in practice they have adopted significantly different approaches, particularly with regard to the creation of derivative works. This can be extremely problematical for authors because what is considered to be a perfectly legal, non-copyright protected use in one country may be a breach of copyright in another, with potentially uncertain implications.

Requiring an author to obtain permission before creating a derivative work can be a significant obstacle to the creative process, since it effectively grants the original creator a veto over the work's reuse and the fees demanded for the license can be prohibitively expensive.

The United States' framework is among the most liberal with regard to derivative uses, a standard that has been roughly followed by several other States, such as Israel and South Korea. In the United States, determining "fair use" of copyrighted material

¹¹⁸ Derek S. Khanna, "Three Myths About Copyright Law and Where to Start to Fix it", Republican Study Committee, 16 November 2006. It is worth noting that this report, which was proposed by a think tank connected to a political party in the United States, was retracted within hours of its release, and its author fired, after heavy pressure from content-producing lobbies. The report has been deleted from the Republican Study Committee website, but it remains available at: http://www.publicknowledge.org/files/withdrawn_RSC_Copyright_reform_brief.pdf.

¹¹⁹ See also Article 13 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, 1869 UNTS 299, 33 ILM 1197. Available at: http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm.

is based on four factors: the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the proportion taken; and the effect of the use upon the potential market. Functionally, the overarching factor in determining if a parody is legitimate in the United States is whether or not the work could be considered “transformative” of the original content. The Supreme Court of Canada has crafted a largely analogous set of factors to be taken into account in determining whether use of a work is considered to be “fair dealing”, which is an exception to copyright protection:

The following factors help determine whether a dealing is fair: the purpose of the dealing, the character of the dealing, the amount of the dealing, the nature of the work, available alternatives to the dealing, and the effect of the dealing on the work.¹²⁰

Some States provide for a limited right for authors to create parodies without permission from the original author, but many do not. For example, a right of parody is not recognised in Ireland, Greece, Hungary or the United Kingdom.¹²¹ Luxembourg and Belgium allow for a right of parody, but only on the condition that it be humorous or created for the purpose of making fun of the original. Kenya’s copyright law prohibits the unauthorised reproduction of copyrighted material under any commercial circumstances,¹²² while Mexico’s Copyright Law makes no allowance for parody.¹²³

In contrast to earlier issues, which involved an interplay between the interests of creators and consumers, the primary tension here is between the interests of differently placed creators (i.e. original and derivative creators). Once again, there is an issue of incentivisation, and a concomitant argument for maintaining restrictions which allow authors to claim licensing fees. On the other hand, in this case the fees are coming from other authors, in as far as they are using previous works to create new ones, which also operates as a disincentive to creation. In some instances, authors’ moral rights to maintain the integrity of their works as originally conceived will also need to be taken into account. In order to discover the best balance, it is useful to examine the role that borrowing and adapting plays within the broader creative process.

¹²⁰ *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13.

¹²¹ Guido Westkamp, “The Implementation of Directive 2001/29/EC in the Member States”, Queen Mary Intellectual Property Research Institute, February 2007. Available at: http://www.ivir.nl/publications/guibault/InfoSoc_Study_2007.pdf. However, the British government announced in early 2013 that, as of October 2013, an exception for parody will be incorporated into UK law: <http://www.taylorwessing.com/news-insights/details/uk-government-announces-significant-reform-of-copyright-exceptions-2013-01-14.html>.

¹²² Kenya Copyright Act 2001, Law No. 12 of 2001. Available at: http://portal.unesco.org/culture/en/files/30229/11416612103ke_copyright_2001_en.pdf/ke_copyright_2001_en.pdf.

¹²³ Federal Law on Copyright (as last amended on January 27, 2012). Available at: <http://www.wipo.int/wipolex/en/details.jsp?id=11495>.

B. Borrowing and adapting in the creative process

In *The Taming of the Shrew*, William Shakespeare depicted a husband employing a series of abusive tactics in order to break the spirit of his headstrong wife. Even by Elizabethan sensibilities, the play was controversial, and around 20 years after its performance another playwright, John Fletcher, authored a response entitled *The Woman's Prize*, in which the protagonist has remarried and his new wife uses similar tactics in order to "tame" him.

This type of dialogue, where an author or artist responds to an earlier work, is a common feature of the creative process. For example, a track on the Charles Mingus album *Mingus Ah Um* is entitled, "Open Letter to Duke" [Ellington]. Writers frequently borrow characters, plotlines and ideas. In addition to appropriating Shakespeare's characters, *The Woman's Prize* also features a group of women collectively agreeing to withhold sex from their husbands, an idea taken from Aristophanes' *Lysistrata*. Indeed, Shakespeare himself was a consummate borrower. *Othello*, *Romeo and Juliet*, *Macbeth* and *King Lear*, among others, all feature plotlines and characters taken from earlier sources. T.S. Eliot even cited a writer's ability to borrow effectively as a mark of his or her talent:

One of the surest of tests is the way in which a poet borrows. Immature poets imitate; mature poets steal; bad poets deface what they take, and good poets make it into something better, or at least something different. The good poet welds his theft into a whole of feeling which is unique, utterly different from that from which it was torn; the bad poet throws it into something which has no cohesion. A good poet will usually borrow from authors remote in time, or alien in language, or diverse in interest. Chapman borrowed from Seneca; Shakespeare and Webster from Montaigne.¹²⁴

Although it is most noticeable in written works, borrowing is also prevalent in other media. The influence of artists like Claude Monet, Stanley Kubrick or Kurt Cobain are measured by the impact that they had on their contemporaries, but also their impact on future generations of creators, many of whom adapted their styles, themes or messages. US filmmaker Quentin Tarantino is famous for inserting shot-for-shot remakes of scenes from earlier films into his productions, what might be considered the visual equivalent of sampling.¹²⁵

Music, with its highly evolutionary development and culture, is also heavily dependent on adaptation. "The words are the important thing," Woody Guthrie once noted. "Don't worry about tunes. Take a tune, sing high when they sing low, sing fast when they sing slow, and you've got a new tune." This philosophy was evident in much of the folk singer's body of work. The melody to his signature hit, "This Land is My Land" is a slightly adapted version of "The World's on Fire" by the Carter Family, a melody that they themselves borrowed from "Oh, My Loving Brother", a traditional

¹²⁴ T.S. Eliot, *The Sacred Wood* (New York: Alfred A. Knopf, 1921). Available at: <http://www.bartleby.com/200/sw11.html>.

¹²⁵ See <http://www.everythingisaremix.info/coming-soon/>.

Baptist gospel hymn.¹²⁶ Similarly, when Bob Dylan was accused of plagiarising earlier musicians he did not attempt to deny the charges but merely asserted that “in folk and jazz, quotation is a rich and enriching tradition.”¹²⁷

The centrality of adaptation to the creative process means that it is vital that copyright provide a formula that allows authors to incorporate earlier work into their products, while still protecting the original author.¹²⁸

C. Issues in the current approach

Although the United States is among the most liberal jurisdictions in the world with regards to reuse and adaptation, the legal framework there still presents significant impediments to authors seeking to create innovative derivative products. Part I.6 provides examples of this, but it is worth looking specifically at the work of J.D. Salinger as a case study.

Salinger, author of *The Catcher in the Rye*, was known for being fiercely protective of his work. His last legal action was in 2009,¹²⁹ when he filed suit against the author of a purported sequel to his book entitled *60 Years Later: Coming Through the Rye*, in which an aging Holden Caulfield, the main protagonist of the original novel, escapes from a nursing home to pursue further adventures in New York. The suit resulted in a settlement the terms of which included a North American publication ban, a change to the book’s title and the removal of a note dedicating the work to Salinger. Although the case was settled out of court, it is significant to note that the defendant was forced to claim his work was a literary commentary, rather than a sequel.¹³⁰ It is also noteworthy that the character of Holden Caulfield is itself copyrightable under United States law.¹³¹ This poses a serious impediment to the ability of modern writers to engage in the sort of literary dialogue found in *The Woman’s Prize*. Salinger had previously forced the cancellation of a United States screening of an Iranian film that was “loosely based” on another of his books, *Franny and Zooey*.¹³²

¹²⁶ Kirby Ferguson, “Borrowing ideas is a vital part of the creative process”, TED, August 2012. Available at: http://www.ted.com/talks/kirby_ferguson_embrace_the_remix.html. Ironically, the Richmond Organization, a music publisher which claims copyright over the song, has launched lawsuits as recently as 2004 to prevent its use by other musicians.

¹²⁷ “Bob Dylan rejects ‘plagiarism’ claims”, BBC News, 13 September 2012. Available at: <http://www.bbc.co.uk/news/entertainment-arts-19586129>.

¹²⁸ See <http://www.youtube.com/watch?v=t-SCGNOieBI&feature=related>.

¹²⁹ Salinger died in January 2010.

¹³⁰ “Sequel to *Catcher in the Rye* ‘banned in US’”, BBC News, 13 January 2011. Available at: <http://www.bbc.co.uk/news/entertainment-arts-12181223>.

¹³¹ Ashby Jones, “A Closer Look at the J.D. Salinger Lawsuit”, Wall Street Journal Blog, 2 June 2009. Available at: <http://blogs.wsj.com/law/2009/06/02/a-closer-look-at-the-jd-salinger-lawsuit/>.

¹³² Jesse McKinley, “Iranian Film Is Canceled After Protest By Salinger”, *New York Times*, 21 November 1998. Available at: www.nytimes.com/1998/11/21/movies/iranian-film-is-canceled-after-protest-by-salinger.html.

Over the years, Salinger has also refused multiple offers to turn *The Catcher in the Rye* into a film, largely because he felt it would adapt poorly:

I keep saying this, and nobody seems to agree, but *The Catcher in the Rye* is a very novelistic novel. There are readymade “scenes” – only a fool would deny that – but, for me, the weight of the book is in the narrator’s voice... Not to mention, God help us all, the immeasurably risky business of using actors.¹³³

Salinger’s protective attitude towards his creations raises some significant questions about the role of copyright in the creative process. On the one hand, an author’s moral right to control the presentation of his work is legitimate, if such a presentation would harm the work or the author’s artistic integrity. However, it is quite another thing to fence off a work from the normal creative process, whereby creations are taken, absorbed, reworked and adapted into new creations. The ability of an author to shut down attempts to create sequels, film adaptations, responses or refutations of his or her ideas runs contrary to the understanding of art as a conversation.

Consequently, in dealing with derivative works, there remains a need to conceptually separate the economic aspects of copyright from the creator’s moral rights. An author’s ability to maintain his or her moral integrity, and the moral integrity of his or her direct work, can be understood as a legitimate freedom of expression interest, and promotional insofar as it protects the creative process against denigrating influences. However, the economic aspects of copyright, as they impact derivative use, are another matter entirely. In this case, the positive impact on expression is limited to the income (and incentivisation) that it provides to authors, which must be measured against the considerable negative impacts (disincentivisation) which licensing schemes have on adaptation of works as part of a process of future or ongoing creation.

D. Finding the right formula

All creators, as well as the public at large, have an interest in maintaining the integrity of authors and their work, although the ability of creators to apply their moral rights in this way should be interpreted strictly in accordance with real threats to their integrity.

The argument for controlling derivative uses in order to provide income for creators is, as noted, a different matter. Although authors whose work is more clearly derivative, such as mashup musicians, have the most obvious stake in broad exceptions to copyright, the importance of borrowing and adaptation within the creative process generally make this an issue that impacts on every creator. As Richard Posner noted:

¹³³ Matt Goldberg, “1957 Letter from J.D. Salinger Explains Why CATCHER IN THE RYE Wouldn’t Work as a Movie”, Collider, 23 February 2012. Available at: <http://collider.com/catcher-in-the-rye-movie-rejection-jd-salinger/>.

Intellectual creativity in fact if not in legend is rarely a matter of creation ex nihilo; it is much more often incremental improvement on existing, often copyrighted, work, so that a narrow interpretation of fair use can have very damaging effects on creativity. This is not widely recognized.¹³⁴

The focus here needs to be on how to encourage borrowing and adaptation that leads to new creations, while preventing activity that harms or freeloads on the original work. All current formulations grant creators too much power over the future use of their works, allowing them to demand exorbitant fees which functionally prevent creative borrowing, and even to refuse to permit derivative or adaptive works entirely. The incentivisation argument is based on the idea that granting authors a strong measure of control over the future use of their works will promote the creation of content. This fails in cases where that control is used to stifle the natural creative process. This is not to say that licensing should be abandoned entirely, as it represents an important revenue stream. But the exception for derivative uses should be recognised as an integral aspect of copyright. All countries should amend their frameworks to allow for derivative uses, which should be broadly defined to accommodate the natural creative process of borrowing, reuse and adaptation.

III.4 Sanctions

How to punish copyright infringers continues to be a controversial area within the discourse. The perceived need to bolster copyright enforcement was at the core of the SOPA and ACTA proposals. Proponents of stronger legislation point to the massive scale at which piracy is taking place as evidence of a need to enhance sanctions, in order to foster a climate of respect for the law.

Given copyright's role in promoting expression, both creators and consumers have a broad interest in maintaining respect for the law. However, it is recognised that overly harsh sanctions for breach of laws which limit free speech are themselves a breach of the right to freedom of expression because of the chilling effect they can have on legitimate speech.¹³⁵ Several States have passed copyright laws which, in addition to impacting by their nature on freedom of expression, also involve excessive sanctions. Revisions to South Korea's Copyright Act, which allow users found to be infringing copyright to have their Internet access cut off, are a prime example. Similar provisions have been passed in France and the United Kingdom, though in both cases the governments were forced to back down in terms of implementation.

Finding the right point along the spectrum from weak to strong restrictions requires some understanding of the impact of piracy on the content creation industries.

¹³⁴ Richard Posner, note 108.

¹³⁵ See *Goodwin v. the United Kingdom*, 27 March 1996, Application no. 17488/90 (European Court of Human Rights).

A. Healthy business outlooks

Rights holding lobbies generally claim to be under mortal threat due to the impact of piracy, as a way of justifying harsh sanctions. The Recording Industry Association of America (RIAA), a trade organisation representing recording industry distributors, has said that piracy “undermines the future of music”.¹³⁶ This line of thinking was echoed in a recent interview by popular rapper Andre “Dr. Dre” Young, who claimed that file sharing would mean the death of rap, as the expectation that their music would be pirated would dissuade any future generations from picking up a microphone.¹³⁷ This is not the first time that the content producing industries have employed extreme rhetoric. At a 1982 hearing on the spread of home recording technology, Jack Valenti, then the head of the Motion Picture Association of America (MPAA), claimed that, “the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone.”¹³⁸ Alarmist attitudes about the threat that technology poses to artists can even be traced back to the dawn of recorded music. In 1906, composer John Philip Sousa told a hearing of the United States Congress:

These talking machines are going to ruin the artistic development of music in this country. When I was a boy, in front of every house in the summer evenings, you would find young people together singing the songs of the day or old songs. Today you hear these infernal machines going night and day. We will not have a vocal cord left. The vocal cord will be eliminated by a process of evolution, as was the tail of man when he came from the ape.¹³⁹

Statements that portray the content producing industries as being near death do not comport with reality. Although figures vary, estimates suggest that content-producing industries are, broadly speaking, enjoying robust growth. Total media and entertainment spending around the world increased by 6.4 percent overall from 2002 to 2008, according to the World Association of Newspapers and News Publishers.¹⁴⁰ Between 2000 and 2010, total consumer spending on entertainment media in North America and Europe jumped from USD138.8 to 244.8 billion, an increase of 69 percent, according to IHS Inc., a market research firm.¹⁴¹ In the United States, where

¹³⁶ See <http://www.riaa.com/faq.php>.

¹³⁷ Ewan Morrison, “Throwing out Acta will not bring a free internet, but cultural disaster”, *The Guardian*, 5 July 2012. Available at: <http://www.guardian.co.uk/commentisfree/2012/jul/05/throwing-out-acta-cultural-disaster>.

¹³⁸ Full transcript available at: <http://cryptome.org/hrcw-hear.htm>.

¹³⁹ See <http://spotlightonmusic.macmillanmh.com/n/teachers/articles/composers-and-lyricists/john-philip-sousa>.

¹⁴⁰ Joe Karaganis, *Media Piracy in Emerging Economies*, note 29, pp. 40-41.

¹⁴¹ Tony Gunnarsson, “Entertainment Media Spending in Western Countries Booms Over Last Decade”, IHS, 19 May 2011. Available at: <http://www.isuppli.com/media-research/news/pages/entertainment-media-spending-in-western-countries-booms-over-last-decade.aspx>. It is unclear whether these numbers are adjusted for inflation. Similar broad, upward

the complaints against piracy are often loudest, there was overall growth across copyright-based industries in 2008, including film, business software, entertainment software, book publishing and music.¹⁴² In the United Kingdom, the music and book industries both grew significantly from 2008 to 2009.¹⁴³

A closer look at each industry further discounts the impression that content creation is under threat. The number of Hollywood films produced annually increased from between 370 and 460 in the 1990s to between 450 and 928 in the 2000s.¹⁴⁴ The Indian film industry, the world's second largest in terms of content creation, enjoyed 13 percent growth in 2008. Paying audiences have also expanded worldwide, from 1.29 billion theatre tickets sold in 2011 to approximately 1.36 billion in 2012.¹⁴⁵ IHS Inc.'s figures have consumer spending on cinema in North America and Europe growing from USD13.7 billion in 2000 to USD20.4 billion in 2010,¹⁴⁶ a healthy 49 percent.

Television also remains enormously profitable¹⁴⁷ and, in the United States, is regarded as currently going through a "renaissance" of high quality, big budget programming.¹⁴⁸ Across North America and Europe, revenue from cable and satellite TV in 2010 reached USD139.2 billion, up from USD56.1 billion in 2000, with net growth since 2000 of 148 percent. Over the same time period, the market for self-published and print-on-demand books grew over 8400 percent.¹⁴⁹

For the book industry, profits have not been as impressive, but the past few years have still seen at least marginal growth, both in revenues and in units sold.¹⁵⁰ The number of traditional book titles produced in 2010 was 5 percent higher than in 2009, and ISBN registrations of traditional books grew by 47 percent between 2002 and 2012.¹⁵¹

trends are noted in Michael Masnick & Michael Ho, "The Sky is Rising: A Detailed Look at the State of the Entertainment Industry", Floor 64, January 2012. Available at:

<https://s3.amazonaws.com/s3.documentcloud.org/documents/562830/the-sky-is-rising.pdf>. See also http://www.deloitte.com/assets/Dcom-Lebanon/Local/percent20Assets/Documents/TMT/u_tmt_werethetruegrowthlies_200910.pdf.

¹⁴² Joe Karaganis, *Media Piracy in Emerging Economies*, note 29, pp. 40-41.

¹⁴³ Ian Hargreaves, note 28, pp. 70-74.

¹⁴⁴ Joe Karaganis, *Media Piracy in Emerging Economies*, note 29, pp. 40-41.

¹⁴⁵ Brooks Barnes, "Hollywood Rebounds at the Box Office", *New York Times*, 23 December 2012. Available at: http://www.nytimes.com/2012/12/24/business/media/hollywood-rebounds-at-the-box-office.html?_r=2&hp=&adxnnl=1&adxnnlx=1356347292-pCVcFew1l3ZLcpIvOqaQIw&.

¹⁴⁶ Tony Gunnarsson, note 141. It is unclear whether these numbers are adjusted for inflation.

¹⁴⁷ "The winning streak", *The Economist*, 20 August 2011. Available at: <http://www.economist.com/node/21526314>.

¹⁴⁸ Mark Colvin, "Mad Men' creator on American TV's renaissance", ABC News, 17 November 2009. Available at: <http://www.abc.net.au/pm/content/2009/s2745489.htm>.

¹⁴⁹ Tony Gunnarsson, note 141. It is unclear whether these numbers are adjusted for inflation.

¹⁵⁰ Michael Masnick & Michael Ho, note 141, pp. 16-22.

¹⁵¹ *Ibid.*

Even in the music industry, where the negative impact of piracy has apparently been most pronounced, things are not as dire as industry claims would suggest. Global sales of recorded music have fallen significantly, from industry highs of USD27.8 billion in 1999 to USD16.5 billion in 2012. Despite this, the number of new music albums released in the United States more than doubled from 35,516 in 2000 to 79,695 in 2007, possibly because the declines in revenues for recorded music have been offset by significant growth in concert revenues, which tripled from 1998-2008.¹⁵² Moreover, sales of recorded music appear to have stabilised. In 2012, the recorded music industry reported its first increase in sales in fifteen years. Although the increase was slight, the figures are sufficient for Frances Moore, the chief executive of the International Federation of the Phonographic Industry (IFPI), to declare that, “the industry is on the road to recovery.”¹⁵³ The IFPI’s estimates for the total value of the music industry in 2005 were USD132 billion, while by 2010 the estimate had risen to USD168 billion.¹⁵⁴

B. Alternative revenue streams

The reason for the broad growth experienced among creative industries is that, although there are indications that piracy has eaten into sales of certain goods, such as DVDs, across every industry the rise of the Internet has led to the discovery of alternative revenue streams which have helped make up for the losses. These can be broadly divided into two categories: compensatory revenue sources and new revenue sources.

The industry has effectively been able to compensate for the parts of its business that have suffered heavy losses by marketing its content in new ways digitally, albeit at less profitable rates. Within the realm of film and television, for example, online streaming video services such as Netflix in Europe and the Americas and BIGFlix in India have been established as thriving new markets based on subscription services. Free streaming services such as Hulu allow easy access to television shows online, while still bringing in some advertising revenue. The music industry has also seen a high profile shift, stopping losses to piracy through cheap and convenient services like iTunes which, if less profitable per transaction, reach out more broadly to consumers. E-books continue to be a major point of growth in the book industry. There is thus a trend that suggests that cheap online services can compete with free piracy, since many consumers will still be willing to pay for a service which is legal, as long as it is convenient and not unduly expensive.

¹⁵² Joe Karaganis, *Media Piracy in Emerging Economies*, note 29, p. 42. It is unclear whether these numbers are adjusted for inflation.

¹⁵³ Adam Sherwin, “Music industry ‘on the road to recovery’ as it records growth for first time in 15 years”, *The Independent*, 26 February 2013. Available at: <http://www.independent.co.uk/arts-entertainment/music/news/music-industry-on-the-road-to-recovery-as-it-records-growth-for-first-time-in-15-years-8511592.html>.

¹⁵⁴ Michael Masnick & Michael Ho, note 141, p. 25. These numbers are likely not adjusted for inflation.

Completely new revenue streams have also evolved. In 2012, PSY, a South Korean musician, became a global sensation after the video of his song “Gangnam Style” became a viral hit, logging well over a billion views on YouTube in just over five months. As of December 2012, PSY had earned over USD8 million from the song, including USD870,000 in YouTube ad revenue.¹⁵⁵ It is significant to note that, although the song is freely available on YouTube, it was also purchased 2.9 million times in the United States alone. Moreover, the total value of “Gangnam Style” goes far beyond the direct revenues that PSY earned. The free publicity of having a viral video established PSY as a global brand. The song’s popularity led to lucrative endorsement deals with companies including Samsung and LG as well as, somewhat improbably, an eightfold increase in the stock price of a small semi-conductor company part-owned by PSY’s father, uncle and grandmother (the artist’s grandmother netted USD65,000 as a result).¹⁵⁶

PSY’s experience is exceptional, but he is far from the only emerging artist to have found fame through YouTube. YouTube’s second most viewed video, the song “Baby” by Canadian performer Justin Bieber, has been viewed nearly 900 million times.¹⁵⁷ Bieber, one of the world’s best paid performers, was himself first discovered through a YouTube video his mother uploaded.¹⁵⁸ The Internet’s power to create exposure for performers like PSY and Bieber generates enormous potential for future earnings for a wider range of artists, including through offline revenue streams such as the growing live performance industry, in part spurred on by online exposure.

Another alternative mode of revenue has been pioneered by Amanda Palmer and the Grand Theft Orchestra, who raised money for a recent album directly from fans. Using the website Kickstarter, Palmer promised a variety of gifts to donors depending on how much they gave, from copies of the album to themed art books to chances to party with the band when it visited their city. Initially aiming to raise USD100,000, Palmer’s project ended up raising USD1.2 million.¹⁵⁹ Palmer later gave a prominent speech on the future of music, “The Art of Asking”, that touted the Internet’s ability to help musicians connect directly with fans, allowing for direct support akin to busking on a mass scale.¹⁶⁰

¹⁵⁵ Derek Thompson, “How Much Are 1 Billion YouTube Hits Worth? Only \$870,000 (Just Ask Psy)”, *The Atlantic*, 6 December 2012. Available at: <http://www.theatlantic.com/business/archive/2012/12/how-much-are-1-billion-youtube-hits-worth-only-870-000-just-ask-psy/266020/>.

¹⁵⁶ “1 billion Gangnam views earn riches for PSY”, *Associated Press*, 5 December 2012. Available at: <http://www.cbc.ca/news/business/story/2012/12/05/youtube-psy-korea-money.html>.

¹⁵⁷ See http://www.youtube.com/charts/videos_views?gl=US&t=a.

¹⁵⁸ Samreen Hayat, “Justin Bieber’s YouTube rise to fame”, *Gulf News*, 13 April 2010. Available at: <http://gulfnews.com/arts-entertainment/music/justin-bieber-s-youtube-rise-to-fame-1.611894>.

¹⁵⁹ Joshua Clover, “Amanda Palmer’s Accidental Experiment with Real Communism”, *The New Yorker*, 2 October 2012. Available at: <http://www.newyorker.com/online/blogs/culture/2012/10/amanda-palmers-kickstarter-scandal.html>.

¹⁶⁰ Amanda Palmer, “The Art of Asking”, TED, February 2013. Available at: www.ted.com/talks/amanda_palmer_the_art_of_asking.html.

Rather than leading to the death of the music industry, the spread of the Internet has led to a shift in emphasis away from intellectual property related earnings and towards other sources of revenue. In contrast to the apocalyptic rhetoric, content producing industries around the world continue to thrive.

C. Finding the right formula

The comparative health of the content producing industries in the face of growing piracy presents a strong argument that the negative impacts of extreme anti-piracy sanctions, such as severing users' Internet access, vastly outweigh their benefits. Moreover, the success of digital content services such as Netflix and Spotify are strong indications that, despite the ready availability of pirated material, many users are willing to pay for access to online content if it is offered at a reasonable price.

Representatives of content producing industries are often quoted expounding on the need to foster broader respect for copyright as a justification for harsh sanctions. However, there is no evidence that stiff penalties have ever been effective as a deterrent to piracy. This is demonstrated by the scale of ongoing piracy in the face of the harsher sanctions which have sometimes been applied. Given the scale of piracy, the application of sanctions will always be somewhat arbitrary, as they will touch only a tiny percentage of all of those acting in breach of the law. While this is not necessarily a complete argument against such sanctions, it further highlights their inappropriateness.

While some harsher measures, such as criminal sanctions, may be appropriate if applied to pirates who operate on a commercial-scale, in the absence of a dire threat to the ability of content creators to stay in business it is difficult to justify the application of harsh sanctions to users whose infringing action is for personal use.

A better way forward would be to correct the inherent absurdities of the current system, by drawing up defensible boundaries for copyright, which could then legitimately be enforced. The modern system of copyright is clearly out of date, and until it is brought into line with the realities of the digital age, it is unreasonable to expect to foster a culture of respect for authors' intellectual property.

Recommendations

This Report comprehensively demonstrates the need for major reform of the rules relating to copyright, internationally and in every country. As a primary recommendation, we urge the community of nations to work together to reform international treaties governing copyright to ensure that the recommendations set out below, which are directed towards individual States, are also reflected in

international law. Only in this way can consistency and coherence be ensured at the national level, an objective which is of great importance to both original and derivative authors, as well as the general public.

We encourage all States to consider the following reforms:

1. States should ensure that their national laws governing copyright are as clear and precise as is possible, while also recognising the need to maintain some flexibility regarding exceptions to take into account future, unforeseen but legitimate uses of otherwise copyright protected material.
2. The current system whereby copyright protection attaches automatically to all works should be replaced by an opt-in system, whereby economic forms of copyright protection would apply only when, and to the extent, that the author specifically asserts that protection.
3. National laws should include a clear list of categories of content in relation to which the economic protection afforded by copyright does not apply. This should cover categories of content where incentivisation is unnecessary, including personal correspondence, academic and other substantially publicly funded works, government documents and the content of business and legal memoranda.
4. The system for setting the duration (term length) of economic copyright protection should be substantially revised to reflect the following:
 - a. The duration should not be pegged to the life of the author.
 - b. Specific periods, which are substantially shorter than the current periods, should be established for different types or genres of works. These periods should be reasonable, and based on actual market conditions (for example, the period after which the average author's earnings in a certain genre drops below a certain threshold percentage of initial period earnings).
 - c. Consideration should be given to alternative approaches to the duration of copyright protection, such as a system whereby protection is set for a relatively short period, after which authors may extend it by paying a fee.
 - d. The duration of copyright protection should never be extended retroactively.
5. All States should establish a regime of exceptions to copyright which includes both a specific list of exceptions and a flexible exception based on established factors or principles.
6. Works which involve substantial creative innovation which effectively transforms an existing work or works into a new work should not be treated as a violation of copyright.

7. Individuals should never face the loss of Internet access as a penalty for piracy.
8. No system for enforcement of copyright should be adopted which impacts negatively on the effective functioning of the Internet.
9. Criminal sanctions should not be available for users who infringe on copyright protection only for personal use.

Conclusion

The recommendations in this Report are radically different from the major reforms that have been proposed in recent laws and treaties, such as ACTA and SOPA. This is largely because the most prominent proposals have been heavily influenced by major lobbying groups, most of whom are funded by content-producing industries with a vested interest in strengthening copyright protection. Rather than seeking to promote or protect the interests of any particular group or stakeholder, the conclusions of this Report are based on promoting respect for freedom of expression. This includes the public interest in promoting the production of creative and cultural content by ensuring that authors are able to earn a reasonable living from their work, the common good of allowing creative works to be enjoyed as broadly as possible, the need to facilitate the creation of derivative works in order to allow a creative dialogue to flourish and the need to safeguard the value of the Internet as a free and open medium of communication.

An objective analysis of copyright from a freedom of expression perspective, as set out in this Report, demonstrates that the existing system signally fails to provide a legitimate balance between protecting the various freedom of expression interests at stake, and is instead largely geared towards protecting the commercial interests of major rights holding industries and, to a lesser extent, original authors. The fact that the rules apply in a rigid and uniform manner to every genre of creation, without the slightest regard to the massive differences between them, alone demonstrates that they do not represent a carefully crafted system for creating an appropriate balance between the competing freedom of expression interests.

Furthermore, the system of copyright protection is simply not working in practice. Non-compliance with copyright law is probably greater than any other system of legal rules in history. It makes little sense to suggest that large percentages of the population are engaged in criminal behaviour; one must instead assess what has caused such widespread lack of respect for the law.

Freedom of expression is a core human right, and one that must be zealously defended against any attack. The mobilisation of people around the world against the passage of SOPA and ACTA were important victories but they are only temporary.

There are, for example, indications that similarly problematic measures are set to be included in the *Trans-Pacific Partnership*, a new treaty which, at the time of publication of this Report, is being negotiated in secret. Instead of ongoing battles over attempts to lever up copyright protection and enforcement, what is needed is a broad reconsideration of copyright as a whole to bring it into line with the realities of the digital age.