The dysfunctional relationship between copyright and cultural diversity

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This article argues that copyright's commodification of creativity has established a structure enabling the domination of cultural output by multinational media and entertainment corporations. The consequences of this are cultural filtering, homogenisation of cultural products, loss of the public domain, and failure of the development process. Thus, the international copyright system poses a direct, but apparently unacknowledged, threat to the aims of the UNESCO Convention on the Protection and Promotion of Cultural Diversity. The article concludes by calling for a more realistic approach in the Convention to the relationship between copyright and cultural diversity.

Keywords

Copyright, commodification of creativity, cultural diversity, World Trade Organization, UNESCO Convention on the Protection and Promotion of cultural Diversity.

1. The Convention on cultural diversity

The valorization of cultural diversity has been long suggested by the establishment of rights of cultural self-determination in various international treaty provisions.[1] Now the UNESCO Convention on the Protection and Promotion of Cultural Diversity gives a degree of legal recognition to this concept. The idea of culture with which the Convention is concerned is laid down in its Article 4. In this Article the Convention defines its central notion of "cultural diversity" as "the manifold ways in which cultures and groups and societies find expression", including "diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used". "Cultural content" is "the symbolic meaning, artistic dimension, and cultural values that originate from or express cultural identities". "Cultural expressions … result from the creativity of individuals, groups and societies, and … have cultural content". Article 4 also deals with the more concrete aspects of cultural expressions. It defines "cultural activities, goods and services" as those that "embody or convey cultural expressions, irrespective of the commercial value they may have". Cultural activities are, however, distinguished from cultural goods and services on the basis that they "may be an end in themselves, or they may contribute to the production of cultural goods and services". The production and distribution of these cultural goods and services may be undertaken by "cultural industries".

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1 See Charter of the United Nations, Covenant on Civil and Political Rights, Arts 1, 19 and 27; Charter of the United Nations, Covenant on Economic, Social and Cultural Rights, Art 15, Universal Declaration of Human Rights, Art 27.

The interest manifested by the Convention in the production of cultural goods and services by cultural industries suggests a clear, if unarticulated, link with copyright law. While it is clear that copyright would not apply to the full range of cultural expressions and activities with which the Convention is concerned, there is a reasonably marked overlap between those things that would appear to fall within the definition of cultural goods and services in the Convention and the range of works protected by copyright law. As is envisaged in the Convention, this also raises the question of the role of the "cultural industries" in the copyright arena. Of course, the cultural industries are not involved in the production of all the cultural goods and services protected by copyright. Indeed, on the creative side much production is done by individuals or groups that would hardly feel comfortable with the sobriquet "cultural industry". On the other hand, there are some copyright cultural goods and services that are more obviously the product of the cultural industries, the clearest example of these being films and broadcasts, which rely on the collaboration of a wide range of creative activities under the auspices of a "cultural industry". One might also argue that the production of a book or a CD in a commercially available form is a collaboration between the quintessential individual in the garret and a publisher, the latter of which might reasonably be described as being part of a cultural industry. Even where the cultural industries cannot be said to be involved in the production of copyright goods and services, they have a clear role in their distribution. These roles of the cultural industries in the production and distribution of certain types of cultural goods and services are subject to generous protection by copyright law. This protection sits alongside, often uncomfortably, the protection that copyright offers to individual creators. The ensuing tension between creative or cultural interests and business interests lies at the heart of copyright's relationship with concepts such as cultural diversity and of self-determination.

Despite this suggested relationship between copyright and the Convention, the only (almost) explicit reference to copyright occurs in the Convention Preamble, which recognizes "the importance of intellectual property rights in sustaining those involved in cultural creativity". It seems, however, that the framers of the Convention may have underestimated the potential impact of copyright on cultural diversity and cultural self-determination.

2. *Commodification* and the acquisition of private power

The international copyright system, which is now embedded in the international trading system as a consequence of the World Trade Organization Agreement on Trade-Related Aspects on Intellectual Property (TRIPs Agreement) (see Blakeney 1996), has operated at least in relation to some types of copyright protected "cultural goods and services" as a fetter on cultural diversity and self-determination. This effect has been produced by certain aspects of copyright law itself, allied with aspects of behaviour in the market for "cultural goods and services".

So far as copyright law is concerned the threat that it poses to cultural diversity and self-determination is a consequence of the process by which it commodifies and instrumentalises the cultural outputs with which it is concerned. There are five interdependent aspects of copyright law that have been essential to this process (see, further, Macmillan 1998, Macmillan 2002a, Macmillan 2002b). The first and most basic tool of commodification is the alienability of the copyright interest. A second significant aspect of copyright law, making it an important tool of trade and investment, is its duration. The long period of copyright protection increases the asset value of individual copyright interests (Towse 1999). Thirdly, copyright's horizontal expansion means that it is progressively covering more and more types of cultural production. Fourthly, the strong commercial distribution rights,[2] especially those which give the copyright holder control over imports and rental rights, have put copyright owners in a particularly strong market position, especially in the global context. Finally, the power of the owners of copyright in relation to all those wishing to use copyright material

2 See esp the TRIPs Agreement, Arts 11 & 14(4), which enshrine rental rights in relation to computer programmes, films and phonograms; WIPO Copyright Treaty 1996, Article 7; and WIPO Performances and Phonograms Treaty 1996, Articles 9 & 13.

has been bolstered by a contraction of some of the most significant user rights in relation to copyright works, in particular fair dealing/fair use and public interest rights. Allied to these characteristics of copyright law are the development of associated rights, in particular, the right to prevent measures designed to circumvent technological protection,[3] which has no fair dealing type exceptions and which, as we know now, is capable of a quite repressive application.[4]

Viewed in isolation from the market conditions that characterise the cultural industries, copyright's commodification of cultural output might appear, not only benign, but justified by both the need for creators to be remunerated in order to encourage them to create[5] and the need for cultural works to be disseminated in order to reap the social benefits of their creation (van Caenegem 1995; Netanel 1996). However, viewed in context the picture is somewhat different. Copyright law has contributed to, augmented, or created a range of market features that have resulted in a high degree of global concentration in the ownership of intellectual property in cultural goods and services. Five such market features, in particular, stand out (see, further, Macmillan 2006). First, is the internationally harmonized nature of the relevant intellectual property rights.[6] This dovetails nicely with the second dominant market feature, which is the multinational operation of the corporate actors who acquire these harmonized intellectual property rights while at the same time exploiting the boundaries of national law to partition and control markets. The third relevant feature of the market is the high degree of horizontal and vertical integration that characterises these corporations. Their horizontal integration gives them control over a range of different types of cultural products. Their vertical integration allows them to control distribution, thanks to the strong distribution rights conferred on them by copyright law.[7] The fourth feature is the progressive integration in the ownership of rights over content and the ownership of rights over content-carrying technology. Finally, there is the increasing tendency since the 1970s for acquisition and merger in the global market for cultural products and services (Bettig 1996, Smiers 2002). Besides being driven by the regular desires (both corporate and individual) for capital accumulation (Bettig 1996, 37), this last feature has been produced by the movements towards horizontal and vertical integration, and integration of the ownership of rights over content and content-carrying technology.

3. The significance of private power

3.1. Cultural Filtering and Homogenisation

So far as cultural diversity and self-determination are concerned, the consequences of this copyright-facilitated aggregation of private power over cultural goods and services on the global level are not happy ones. Through their control of markets for cultural products the multimedia corporations have acquired the power to act as a cultural filter, controlling to some extent what we can see, hear and read. Closely associated with this is the tendency towards homogeneity in the character of available cultural goods and services (Bettig 1996).

3 See, eg: WIPO Copyright Treaty 1996, Art 11; EU Directive on Copyright in the Information Society (2001/29), Art 6; US Copyright Act of 1976, s 1201.

4 See, eg, *Universal City Studios, Inc v Corley*, US Court of Appeals for the Second Circuit, 28 November 2001, and the discussion of this case in Macmillan 2002b.

5 See, however, Towse 2001, esp chs.6 & 8, in which it is argued that copyright generates little income for most creative artists. Nevertheless, Towse suggests that copyright is valuable to creative artists for reasons of status and control of their work.

6 Through, eg, Berne Convention for the Protection of Literary and Artistic Works of 1886, the TRIPs Agreement, Arts 9-14, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty.

7 For a discussion of the way in which the film entertainment industry conforms to these features, see Macmillan, "The Cruel ©", n 6 *supra*.

Towards the close of the last century, Ann Capling conducted a study of the operation of the contemporary music market in Australia (Capling 1996), which was then controlled by six[8] international entertainment corporations. The companies in question were CBS (Sony), WEA (Time Warner), Polygram (NV Philips), EMI (Thorn EMI), BMG (Bertelmanns Music Group) and Festival (News Limited). All of these corporations operated as international conglomerates, some with substantial media interests, and between them they then controlled 70 per cent of the world's recorded music market (Capling 1996, 22). Furthermore in Australia they also had, and continue to have, control of the distribution system (Capling 1996, 21). Despite their control of the global market for music, they only released around twenty per cent of their available repertoire in Australia. Not only does this mean that these corporations acted as a cultural filter, controlling what could be heard, it also meant that the music offered for retail sale had "about as much cultural diversity as a Macdonald's menu" (Capling 1996, 22):[9]

> *The domination by these global entertainment corporations of the Australian market facilitates the globalisation of a mass culture of mediocrity in a number of ways. It ensures, for instance, the prevalence of the top sellers to the detriment of other less mainstream overseas music … The import restrictions also make it much more difficult for local Australian performers and composers to get airplay within Australia. Pop and rock account for close to ninety per cent of the Australian music market and, with the exception of a handful of Australian acts which have won an international following, this market is overwhelmingly dominated by North American and British artists. (Capling 1996, 22)*

And, of course, Australia is hardly likely to be the only market where this happens. The processes that produce cultural homogenity and mediocrity are global.[10] It makes good commercial sense in a globalized world to train taste along certain reliable routes, and the market for cultural goods and services is no different in this respect to any other (Levitt 1983). It is interesting to note that one of the arguments that is made on behalf of the activities of MP3 Internet music file trading services, such as Napster, is that they give exposure and airplay to smaller artists and small independent labels.[11] If this is so, then it is a benefit likely to be lost if the major labels gain a distribution grip over the online music provi-ders (Macmillan 2002a).

It is not just the music industry where the corporate sector controls what filters through to the rest of us. For example, the control over film distribution that is enjoyed by the major media and entertainment corporations means that these corporations can control to some extent what films are made, what films we can see, and our perception of what films there are for us to see. The expense involved in film production and distribution means that without access to the deep pockets of the majors and their vertically integrated distribution networks, it is difficult, but not impossible, to finance independent film-making and distribution. This, naturally, reduces the volume of independent film-making. The high degree of vertical integration that characterises the film industry, especially the ownership of cinema chains, means that many independent films that are made find it difficult to make any impact on the film-going public. This is mainly because we don't know they exist. The control by the media and entertainment corporations of the films that are made is also a consequence of their habit of buying the film rights

8 Such is the process of merger and acquisition in this industry that in less than a decade the six are now three with most recent merger affecting this market being that between Sony & Bertelsmann.

9 The issue of release & promotion of recorded music is a big issue for many popular composers and performers. Eg, popular music composer Michael Penn is quoted as saying: "People disappear in this business not through drug abuse but because record companies sign them and then mess them around… They're very vengeful people. If you protest, like George Michael & Prince did, you're a whining rock star. In our case you're simply a loser… Epic put my album out but they won't spend a cent on promotion. The business is incredibly narrow now. The opportunities for flukes are zero. To escape this multinational hell, your only recourse is stuff like MP3": *The Evening Standard*, London, 12 July 2000.

10 Cf Moran 1998.

11 See, eg, n 9 *supra*.

attached to the copyright in novels, plays, biographies and so on. There is no obligation on the film corporations to use these rights once they have acquired them but, of course, no-one else can do so without their permission. Similarly, the film corporations may choose not to release certain films in which they own the exclusive distribution rights or only to release certain films in certain jurisdictions or through certain media. All these things mean that the media and entertainment corporations are acting as a cultural filter (see, further, Macmillan 2002b, 488-489). The problem of cultural filtering with respect to films appears to have received recent acknowledgement in the UK in the form of the UK Film Council's Digital Screen Network under which grants were made to cinemas for the installation of digital cinema technology on the condition that they show a wider variety of specialised films. It seems a pity that public money raised for good causes through the National Lottery must be used to remedy a privately created distortion.

A further example of the filtering function, if one is needed, is provided by the publishing industry. The economic power of publishers has, in its wake, conferred a broader power on publishers to determine what sort of things we are likely to read. Richard Abel is eloquent on this topic:

> *Book publishers decide which manuscripts to accept; form contracts dictate terms to all but best-selling authors; editors 'suggest' changes; and marketing departments decide price, distribution and promotion. Sometimes publishers go further … The Japanese publisher Hayakawa withdrew a translation of* The Enigma of Japanese Power *because the Dutch author had written that the Burakumin Liberation League 'has developed a method of self-assertion through "denunciation" sessions with people and organizations it decides are guilty of discrimination'. Anticipating feminist criticism, Simon and Schuster cancelled publication of Bret Easton Ellis's* American Psycho *a month before it was to appear. (Abel 1994a, 52).*[12]

There are a number of other examples of the same phenomenon in publishing. For example, it was reported that HarperCollins (UK), a member of the Murdoch Group, declined to publish Hong Kong Governor Chris Patten's memoirs in breach of contract because it was alleged the memoirs included commentary on the Beijing government that might threaten Murdoch's substantial business interests in China.[13] It has also been suggested that the takeover of the British publisher, Fourth Estate by HarperCollins (UK) was in some way related to a biography of Rupert Murdoch contracted to be published by Fourth Estate. The biography was not published by Fourth Estate.[14] On the other hand, a development that may have the effect of breaking down some of the power of publishers is the advent of electronic self-publishing. It seems, however, that any inroads that this makes in the power of publishers will be confined to publications by the very few authors who command sufficient market power to dispense with the promotional services of the publishers.[15]

3.2. Loss of the Commons

So the media and entertainment industry controls and homogenises what we get to see, hear and read. In so doing it is likely that it also controls the way we construct images of our society and ourselves.[16] The scope of this power is

12 Ironically, in attempting to publish the monograph in which this passage appears, Abel himself was to feel the brunt of his publisher's attempt at censorship. He has subsequently defined this as an attempted exercise of private power to control speech: see Abel 1994b, 380.

13 Londoner's Diary, *The Evening Standard*, 11 July 2000.

14 *Ibid*.

15 In 2000 Stephen King decided to by-pass the electronic publishing division of his publishers, Simon & Schuster, & self publish his novel, *The Plant*, on the Internet: see "King writes off the middleman", *The Weekend Australian*, 22-23 July 2000. King later abandoned this project: see *Metro* (London), 30 November 2000.

16 See further, eg, Coombe 1998, pp.100-129, which demonstrates how even the creation of alternative identities on the basis of class, sexuality, gender and race is constrained & homogenised through the celebrity or star system.

reinforced by the industry's assertion of control over the use of material assumed by most people to be in the intellectual commons and, thus, in the public domain. The irony is that the reason people assume such material to be in the commons is that the copyright owners, in their relentless pursuit of ubiquity, have force-fed it to us as receivers of the mass culture disseminated by the mass media. The more powerful the copyright owner the more dominant the cultural image, but the more likely that the copyright owner will seek to protect the cultural power of the image through copyright enforcement. The result is that not only are individuals not able to use, develop or reflect upon dominant cultural images, they are also unable to challenge them by subverting them (Chon 1993, Koenig 1994, Macmillan Patfield 1996). This is certainly unlikely to reduce the power of those who own these images.

As an example of this type of concern Waldron (1993) uses the case of *Walt Disney Prods v Air Pirates*.[17] In this case the Walt Disney Corporation successfully prevented the use of Disney characters in *Air Pirates* comic books. The comic books were said to depict the characters as "active members of a free thinking, promiscuous, drug-ingesting counterculture" (Waldron 1993, 753, quoting Wheelwright 1976, 582). Note, however, that the copyright law upon which the case was based does not prevent this depiction only, it prevents their use altogether. Waldron comments:

> *The whole point of the Mickey Mouse image is that it is thrust out into the cultural world to impinge on the consciousness of all of us. Its enormous popularity, consciously cultivated for decades by the Disney empire, means that it has become an instantly recognizable icon, in a real sense part of our lives. When Ralph Steadman paints the familiar mouse ears on a cartoon image of Ronald Reagan, or when someone on my faculty refers to some proposed syllabus as a "Mickey Mouse" idea, they attest to the fact that this is not just property without boundaries on which we might accidentally encroach … but an artifact that has been deliberately set up as a more or less permanent feature of the environment all of us inhabit. (Waldron 1993, 883)*

Coombe describes this corporate control of the commons as monological and, accordingly, destroying the dialogical relationship between the individual and society:

> *Legal theorists who emphasize the cultural construction of self and world –the central importance of shared cultural symbols in defining us and the realities we recognize– need to consider the legal constitution of symbols and the extent to which "we" can be said to "share" them. I fear that most legal theorists concerned with dialogue objec-tify, rarefy, and idealize "culture", abstracting "it" from the material and political practices in which meaning is made. Culture is not embedded in abstract concepts that we internalize, but in the materiality of signs and texts over which we struggle and the imprint of those struggles in consciousness. This ongoing negotiation and struggle over meaning is the essence of dialogic practice. Many interpretations of intellectual property laws quash dialogue by affirming the power of corporate actors to monologically control meaning by appealing to an abstract concept of property. Laws of intellectual property privilege monologic forms against dialogic practice and create significant power differentials between social actors engaged in hegemonic struggle. If both subjective and objective realities are constituted culturally –through signifying forms to which we give meaning– then we must critically consider the relationship between law, culture, and the politics of commodifying cultural forms.(Coombe 1998, 86)*

If copyright has any hope of answering a criticism this cogent then a key aspect of copyright law is the fair use/fair dealing defence. It is this aspect of copyright law that permits resistance and critique (Gaines 1991, 10). Yet the fair dealing defence is a weak tool for this purpose and becoming weaker (see, further, Macmillan 2006).

3.3. Copyright and Development?

The utilitarian/development justification for copyright is overwhelmingly familiar. The general idea underlying this rationale is that the grant of copyright encourages the

17 581 F 2d 751 (9th Cir, 1978), *cert denied*, 439 US 1132 (1979).

production of the cultural works, which is essential to the development process.[18] However, the consequences of copyright's commodification of creativity, as described above, seem to place some strain on this alleged relationship between copyright and development. This argument may be illustrated by reference to the World Commission on Development and Culture's concept of development as being about the enhancement of effective freedom of choice of individuals (World Commission on Culture and Development 1996).[19] Some of the things that matter to this concept of development are "access to the world's stock of knowledge, … access to power, the right to participate in the cultural life of the community" (World Commission on culture and Development 1996, Introduction: see, further, Macmillan 1998 and Macmillan 2002a). The edifice of private power that has been built upon a copyright law that seems to care more about money than about the intrinsic worth of the cultural product it is protecting, has deprived us all to some extent of the benefits of this type of development. As Waldron comments, "[t]he private appropriation of the public realm of cultural artifacts restricts and controls the moves that can be made therein by the rest of us" (Waldron 1993, 885). It seems worth noting briefly that increases in the duration of copyright protection, such as that which has occurred in the European Union countries[20] and in the United States[21] are hardly helping.

Things look no better if we focus on the World Commission on Culture and Development's fundamental approach to culture, which is the handmaiden of its wide concept of development. A fundamental approach to culture means valuing cultural output as an end in itself, a commitment to diversity and multiculturalism, and the control of power in the form of cultural domination (World Commission on Culture and Development 1996, Analytical ch.9). Not only has copyright failed to effect these things in relation to cultural output, it is arguable that it has effected their opposite. Since copyright law dominates the production and distribution of many forms of creativity, its failure to take a fundamental approach to the cultural products that fall within its purview may be regarded as a factor in our failure to achieve development in the wide sense. What is more, the unaccountable and self-reinforcing power of the media and entertainment conglomerates suggests that this process of development failure is accelerating.

4. Is cultural diversity just a nice idea?

Given the foregoing, it is somewhat of a mystery why the UNESCO Convention takes a largely positive attitude to the role of intellectual property rights in securing cultural diversity. This is particularly so since the evolution of the Convention seems to indicate that the framers had something of a change of heart in relation to this issue. The original UNESCO Declaration,[22] upon which the Convention was based, included in its action plan the need to ensure the protection of copyright but "at the same time upholding a public right of access to culture, in accordance with Article 27 of the Universal Declaration of Human Rights".[23] The Declaration also drew a parallel in its Article 1 between biological diversity and cultural diversity. In the light of this, it is interesting to note that the framers of the Convention on

18 For a good example of a statement of this rationale, see the Preface to World Intellectual Property Organization 1978. For discussion of this rationale, see, eg, Waldron 1993, 850ff; & Macmillan Patfield 1997.

19 For a detailed and persuasive account of this approach to development, see Sen 1999.

20 As a result of Council Directive 93/98/EEC, 1993 OJ L290/9.

21 As a result of the Bono Copyright Term Extension Act 1998, recently held to be constitutionally valid in *Eldred v Ashcroft* 123 S Ct 769 (2003).

22 UNESCO Universal Declaration on Cultural Diversity, Adopted by the 31st Session of UNESCO's General Conference, Paris, 2 November 2001.

23 Note 22 *supra*, Main Lines of an Action Plan for the Implementation of the Universal Declaration on Cultural Diversity, para 16.

Biological Diversity were far more anxious about the role of intellectual property in securing biological diversity. Its Article 16.5 provides:

> *The Contracting Parties, recognizing that patents and other intellectual property rights may have an influence on the implementation of this Convention, shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives.*

Various reasons might be postulated for the blinkered approach in the UNESCO Convention to the dangers that copyright poses to cultural diversity. Perhaps it is a consequence of a desire to appease the US. The hardline position taken by the US on the enforcement of intellectual property rights internationally seems to make it hypersensitive to the presence of any draft treaty provisions that it views as undercutting the enforcement of the provisions of the TRIPs Agreement. However, since the gestation and birth of the UNESCO Convention was motivated by the intention to compensate for the lack of a cultural exception in the WTO agreements generally it was always bound to fly in the face of US perceptions of national interest (Beat Graber 2006, 554-555; Hahn 2006, 515-520). It should have been obvious all along that a positive Convention position on intellectual property rights was hardly likely to be sufficient in US eyes to compensate for this counter-offensive to the WTO. In the end, this was proved to be the case since the US opposed the Convention and placed diplomatic pressure on other countries in an attempt to prevent it coming into force. Another possible explanation for the UNESCO Convention's positive view of intellectual property rights is that it is a consequence of the ascendancy of the argument (strongly asserted in some quarters) that copyright protection is essential to cultural diversity and self-determination. Indeed, the Preamble to the Convention embraces a version of this idea. However, as this article has sought to demonstrate, even if copyright is capable of serving this function, something has gone drastically awry and we need again to look at the shape of copyright law and consider whether there are parts that we might want to jettison or change dramatically in order to make it serve the objectives of cultural diversity and self-determination (see, further, Macmillan 2006).

Under the circumstances, the UNESCO Convention should adopt a more confrontational approach to the role of intellectual property rights in relation to cultural diversity. Even a version of the relatively inoffensive approach in the Convention on Biological Diversity would be a step in the right direction. Alone, such an approach cannot redeem the situation, but it can help to create a consensus around the need for reform, if not reconstitution, of the international copyright system. Without it, cultural diversity will remain nothing more than a nice idea.

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