

Copyright: a colonial doctrine in a postcolonial age

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I Introduction

In this article, I am interested in exploring the legal doctrine of copyright from the standpoint of a postcolonial critic. According to Shelley Wright, there is a ‘deep and continuing grip of colonial thinking on all systems currently in place, from the personal and local to the global.’¹ And the law of copyright is no exception. Like other areas of intellectual property, copyright as a Western philosophical *idea*, is deeply imbued with the values of the European Enlightenment, liberalism, and a society founded on a print-based culture. As Wright suggests, copyright continues to be one of ‘the quintessential representations of the modern, public world of bourgeois expansion, male dominance and European colonial influence in the creation of political and economic systems in Europe and the colonies.’² Indeed, the Western history of copyright is inextricably tied to the Western history of colonialism.

A major argument in this article is that copyright (like other forms of intellectual property) is not a *natural* right, but instead embodies a particular set of values and assumptions – such as the need to commodify ideas, and also the expression of those ideas. As a product of the European Enlightenment, the concept of copyright has been infused with the ideals of the liberal legal tradition, and these ideals – such as ‘private property’, ‘authorship’ and ‘possessive individualism’ – are not universal principles of property law, but instead are *Western* ones. Consequently, the supposedly universally-shared view of copyright law embodied in international agreements such as the Berne Convention and the TRIPS Agreement are not simply ‘agreements’, but rather are multifaceted projects (or dominant narratives) which are laden with values stemming from particular cultural traditions, and which have evolved from particular historical moments in Western history. However, while these values have been packaged and exported around the globe based on their apparent universality, it is significant to note that copyright remains a foreign concept in many cultures. Indeed, a number of societies take a radically different view as to ‘what constitutes property or what may rightfully be the subject of private ownership.’³ Several cultures also consider ‘copying’ or sharing ideas within a community as a sign of respect and recognition – not as piracy, or a violation of private property rights.⁴

Before moving on to explore the concept of copyright law in more detail, I should outline my reasons for wishing to scrutinise the laws in this area using a postcolonial lens. Copyright is

1 Shelley Wright, *International Human Rights, Decolonisation and Globalisation: Becoming Human* (Routledge, London and New York, 2001) 112.

2 Ibid 119.

3 Ruth L Gana, ‘Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property’ (1995) XXIV *Denver Journal of International Law and Policy* 109, 115-116.

4 For example, Janice Wickeri argues that before China’s extensive exposure to the West in the later period of the Qing dynasty, ‘authors felt more honored the more their works were read and copied by other scholars.’ See Janice Wickeri, ‘Copyright in the Chinese Context’ in Altbach (ed.) *Copyright and Development: Inequality in the Information Age* (Bellagio Publishing Network Research and Information Center, Chestnut Hill, Mass, 1995) 73-91, 73-74.

a multi-billion dollar global industry, which has increasingly become an enormous source of revenue for countries of the North.⁵ From a postcolonial perspective, the export of copyright products raises particular concerns as these items are not simply just another trade commodity, but emblematised the exporting cultures' values and traditions. In other words, Disney movies and MTV songs are not simply just another product because they represent the cultural signs and symbols of the dominant narrative.⁶ Due to the enormous volume and dominant position of Western popular culture on a global scale, critics have labeled this essentially one-way traffic as a form of 'cultural imperialism' in this postcolonial era. As Fredric Jameson suggests, the export of American culture around the globe has had a far deeper impact than earlier forms of colonisation, imperialism or simple tourism, as these cultural goods (along with agribusiness and weapons) constitute the principal economic exports for the US.⁷ Moreover, the current imbalance in global information flows is in many ways merely an extension of the exploitative colonial past. For this reason, Philip Altbach asserts that '[c]opyright must not be seen in isolation from issues of access to knowledge, the needs of Third World nations, and the broad history of colonialism and exploitation.'⁸ I also wish to examine the concept of copyright law in more detail in order to partially fill the gap in understanding of the negative impact of an overly prescriptive international copyright regime. This is important, as most of the opposition in the late 1990s to the international intellectual property regime primarily focused on the dire effects of patents for countries in the South.⁹

This article will begin by exploring the concept of copyright law as essentially a *Western* idea, and then move on to discuss copyright and the colonial process, the Berne Convention and the TRIPS Agreement as colonial (and postcolonial) constructs, and the role of international copyright law in continually othering the South in the global publishing and software industries.

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- 5 For example, the 2003 revenues for Time Warner were US\$39.6 billion. See Kathy Bowrey, *Law and Internet Cultures* (Cambridge University Press, Cambridge, 2005) 35. In this article, I will use the commonly deployed geographical indicators 'North' and 'South' as opposed to 'developed' and 'developing' or 'First World' and 'Third World' nations (or other such similar terms). I also use the term 'North' to mean Western nations (or the former colonial powers), and 'South' to mean the former colonies.
- 6 For further exploration of the idea of how signs and symbols have come to represent commodity cultures in this postmodern age, see Jean Baudrillard, *Simulations* (Semiotext(e), New York, 1983); Jean Baudrillard, 'The System of Objects' in Poster (ed.) *Jean Baudrillard: Selected Writings* (2nd ed., Polity, Cambridge, 2001).
- 7 See Fredric Jameson, 'Notes on Globalization as a Philosophical Issue' in Jameson and Miyoshi (eds), *The Cultures of Globalization* (Duke University Press, Durham and London, 1998) 54-77, 58-63, especially 60. See also Leslie Sklair, 'Social Movements and Global Capitalism' in Jameson and Miyoshi (eds), *The Cultures of Globalization* (Duke University Press, Durham and London, 1998) 291-311, 291. In an interesting postmodernist analysis of global technologies and information systems, Kathy Bowrey also traces how US cultural power remains hegemonic with its relentless dissemination around the world through the internet. See Bowrey, above n 5.
- 8 Philip G Altbach, 'The Subtle Inequalities of Copyright' in Altbach (ed.) *Copyright and Development: Inequality in the Information Age* (Bellagio Publishing Network Research and Information Center, Chestnut Hill, Mass, 1995) 1-11, 6.
- 9 As Alan Story suggests, while the impact of patents on HIV/AIDS medication in South Africa has been highly publicised, what is less well-known is that South African healthcare lecturers are often required to pay copyright royalty charges to multinational publishing companies when distributing educational material (in the print format) to their students about HIV/AIDS. This royalty fee is payable to the publishing companies, even if the information is distributed on a non-profit basis (unless of course the fee has been specifically waived). As Story suggests, if it is unethical to charge the same rates for HIV medication in Durban as is charged in New York, then surely it must also be unethical to charge Northern copyright royalty fees to South African (or Southern) consumers. See Alan Story, 'Don't Ignore Copyright, the "Sleeping Giant" on the TRIPS and International Educational Agenda' in Drahos and Mayne (eds), *Global Intellectual Property Rights: Knowledge, Access and Development* (Palgrave Macmillan, Hampshire (GB), New York, 2002) 125-143, 126. With respect to the geographical indicator 'South', see above n 5.

II The Western idea of copyright

A *The Western concept of copyright law: a postcolonial view*

The Western concept of copyright relates to the legal protection of the expression of an idea, rather than the idea itself, in a fixed tangible form. Thus, it is the expression of the ideas (or concepts, principles, knowledge, facts etc) which are copyrightable – the ideas themselves are not.¹⁰ To use Bowrey's words: 'Copyright says we can rework ideas we read in "another's" imagery but our work shouldn't look substantially similar to the "original".'¹¹ In most legal systems around the world today, copyright protection has four main requirements: copyrightable subject matter; originality; fixation;¹² and authorship and ownership.¹³ Story suggests that rights in copyright operate in similar ways to rights in private property (real or personal), with similar principles underlying its provisions in both ownership and exclusive use.¹⁴ Copyright law protects a wide range of expressions and technical manifestations of those expressions, including writings, music, films, photographs, computer programs, and so on. Copyright law also provides protection for mundane items, such as instruction manuals and telephone directories.

Although there are some 'fair dealing' or 'fair use' exceptions, the owner of the copyright (sometimes the author or composer, but often not) is granted the *exclusive right* to reproduce, distribute, adapt, perform, and display the copyrighted work. Only the copyright-holder may make a copy of the work (hence the word 'copyright'); issue copies to the public (this is usually the most lucrative right for printed works); perform or display the work in public (for example, a play or a movie); distribute the work; and adapt the work (which means, *inter alia*, to translate the work from one language into another, or to turn a book into a movie). Additional rights may also be granted to a copyrighted-work (for example, to a broadcaster of a sound recording).

If these exclusive rights are allegedly infringed (for example, by photocopying an entire book for personal use – unless it is 'fair dealing'), the owner has the legal right to launch a copyright infringement action. The copyright protection arises 'automatically' upon creation – i.e. there is

- 10 The idea itself is protected by patent law. It is important to note that this distinction separating the expression of an idea from the idea itself is not unproblematic. For example, in more artistic forms of authorship, such as poetry and fiction, the style and content are sometimes indistinguishable: i.e. *what* is being said is very much part of *how* something is said (and vice versa). Moreover, the extension of copyright law to items such as maps and telephone directories obscures the distinction between ideas and expression. See Edwin C Hettinger, 'Justifying Intellectual Property' (1989) 18 *Philosophy and Public Affairs* 31, 32.
- 11 Kathy Bowrey, 'Contested Spaces: Copyright and Intellectual Property' (1998) *re/form*, Exhibition Catalogue accompanying an exhibition by the artist Richard Tipping, 'Perversions Subversions and Verse', Griffith Art Works, Griffith University, pp 28-30; available online at www.chickenfish.cc/copy/Publications/Contested.pdf, accessed on 19 December 2005. See further Kathy Bowrey, 'The Outer Limits of Copyright Law – Where Law Meets Philosophy and Culture' (2001) 12 *Law and Critique* 75.
- 12 The fixation element for copyright protection requires the work to be in a fixed tangible form of expression, from which it may be perceived and/or reproduced. This requirement is incorporated in both the TRIPS Agreement and the Berne Convention. The fixation requirement for copyright protection is highly problematic for many communities which do not maintain forms of literary expression, and primarily express their ideas through the oral tradition. This requirement of fixation in contemporary global (i.e. Western) copyright law precludes copyright protection for the large numbers of oral literatures belonging to these diverse communities. Thus, literacy, as a form of expression predominant in Euro-American cultures, has been privileged in copyright law over other forms of communication.
- 13 This uniformity reflects the international consensus expressed in the copyright treaties. For example, see Article 2 of the Berne Convention (available online at www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html, accessed on 29 December 2007); Article 1 of the *Universal Copyright Convention* (available online at: www.unesco.org/culture/laws/copyright/html_eng/page1.shtml, accessed on 29 December 2007); and Article 9 of the TRIPS Agreement (available online at www.wto.org/english/docs_e/legal_e/final_e.htm#TRIPS, accessed on 29 December 2007).
- 14 Story, above n 9, 127.

no registration requirement (as with patents and trademarks). Thus, the ability for the copyright-owner to enforce their right is crucial, as the 'benefits' of copyright protection (for the owner) usually depends on their ability to enforce it.

As noted above, the inappropriateness of Western copyright regimes for non-Western cultures has been widely acknowledged, and this point has been illustrated time and again in various cases. For example, in 1996 a German rock band (Enigma) released a song titled 'Return to Innocence'. The song was extremely successful, and was close to the top of the international pop charts for more than six months. Furthermore, the song sold more than 5 million copies worldwide, and featured as background music for advertisements promoting the 1996 Olympic Games in Atlanta. Significantly, however, 'Return to Innocence' was not Enigma's song, and had actually been appropriated from a Taiwanese tribal song. What had happened in this case was that the French Ministry of Culture invited a group of more than 30 Indigenous singers from Taiwan to perform Taiwanese tribal songs at concerts across Europe. The French Ministry recorded the concerts and released a CD. The German music entrepreneur, Michael Cretu, decided to use significant sections of this Taiwanese song in his own musical recordings, and purchased the rights to this music from the French Ministry. Further down the line, Enigma recorded this music and called the song 'Enigma's Return to Innocence.' Significantly, the Taiwanese folk-singers received neither recognition nor financial compensation for their song, and, in fact, were not even informed about any of these dealings.¹⁵

As Story suggests, the 'Return to Innocence' case illustrates the serious limitations of Western copyright law for non-Western cultures.¹⁶ Under contemporary international copyright law, both Enigma and the French Ministry acted perfectly legally. According to 'classic' copyright theory (supported by both the Berne Convention and the TRIPS Agreement – discussed below), a work cannot be protected unless it is original, fixated (i.e. written down), and created by an individual (or perhaps by joint authors). In this case, the song was not 'original' in the Western copyright sense of being able to be specifically linked to the independent work of a known individual author (or authors). It was also not written down – as it arose from an oral storytelling tradition. Furthermore, the song was the product of a communal Indigenous culture, and not the creation of an individual songwriter(s). On this point, Riley suggests that 'Indigenous works fail to fulfill individualistic notions of property rights that underlie the structure of Western law'.¹⁷ Clearly, differences in cultural production mean that Western structures and legal regimes often don't quite fit the creative processes and norms of the Other, and as the 'Return to Innocence' case illustrates, Western laws can be highly inappropriate. Nevertheless, due to the hegemonic operations of the law, Western copyright regimes continue to be imposed on the historically Othered.

In an interesting discussion on ethnomusicology and music law, Anthony Seeger suggests that due to contentious ownership issues, conflict can readily arise from certain ethnomusicological practices – such as collecting and commercially reproducing field recordings of Indigenous music.¹⁸ Although Seeger attempts to reconcile American copyright law with various forms of customary ownership, he concludes that a far more sophisticated understanding is necessary in order to be able to adequately protect the musical property of non-Western cultural regimes,

15 For further background discussion on this case, see A Riley, 'Recovering Collectivity: Groups Rights to Intellectual Property in Indigenous Communities' (2000) XVIII *Cardozo Arts and Entertainment Law Journal* 175; Story, above n 9, 138.

16 Story, above n 9, 138.

17 Riley, above n 15, 177-8.

18 Anthony Seeger, 'Ethnomusicology and Music Law' in Ziff and Rao (eds), *Borrowed Power: Essays on Cultural Appropriation* (Rutgers University Press, New Brunswick, NJ, 1997) 52-67. See also Anthony Seeger, 'Singing Other Peoples' Songs' (Summer 1991) 15-16 *Cultural Survival Quarterly* 36.

such as that of the Suyá.¹⁹

In the African context, Henry Chakava explains that African oral literatures and traditions cannot be claimed as the 'intellectual property of anybody in particular.'²⁰ With respect to the misappropriation of African cultural traditions, research undertaken in oral literatures have serious consequences for the communities involved.²¹ As Chakava points out, as soon as an area is researched and the material published by the researcher (most of whom are from the North), it becomes the researcher's copyright.²² This means that no-one can use the information without the copyright-owner's permission, even the communities from which the information was appropriated! Chakava argues strongly that as most African nations are essentially oral cultures,²³ they must be permitted to exempt their oral traditions from copyright law.²⁴ It is important to recognise that the Eurocentric framework of international copyright law significantly contributes to the serious problems of cultural preservation, misappropriation, and copyright 'rip-offs' in a wide range of art forms.

Clearly, there are serious difficulties with the imposition of Western copyright law, and its 'not quite right fit' for several cultures of the Other. However, perhaps a more significant point to note is the ideological assumption made by the West that its Other would *naturally* seek to operate under Western copyright regimes (regardless of its own cultural norms). As already discussed, colonial laws were generally exported to the colonies 'as part of the package' of colonisation. Moreover, most of the former colonies were automatically bound by the major intellectual property treaties once the treaty was ratified by the colonial power. However, even in this postcolonial era, the ideological assumption of the inherent suitability (read superiority) of Western intellectual property laws for the rest of the globe has regrettably continued.

B Copyright law, the print medium, and the colonial process

The evolution of the Western idea of copyright law is intricately connected to Johannes Gutenberg's²⁵ European development (adaptation?) of a printing press with movable type in 1450.²⁶ Prior to the emergence of the printing press in Europe in the 15th century, the illegal copying of works was not a particularly serious concern. Copying by hand was a tedious process, and books were generally confined to the educated elite: the clergy, nobility, and professional classes. Knowledge of the printing press, and printing technology more generally, gradually spread from Germany to other parts of Europe. The European Church was initially supportive

19 Seeger, 'Ethnomusicology and Music Law', above n 18. See also Anthony Seeger, *Why Suyá Sing: A Musical Anthropology of an Amazonian People* (Cambridge University Press, Cambridge, 1987); and Anthony Seeger, *Nature and Society in Central Brazil: the Suyá of Mato Grosso* (Harvard University Press, Cambridge, Mass, 1981).

20 Henry M Chakava, 'International Copyright and Africa: the Unequal Exchange' in Altbach (ed.) *Copyright and Development: Inequality in the Information Age* (Bellagio Publishing Network Research and Information Center, Chestnut Hill, Mass, 1995) 13-34, 20.

21 Ibid.

22 Ibid.

23 Chakava claims that oral literature accounts for approximately 75 per cent of the information exchange in Africa. See Ibid.

24 Ibid 29-30.

25 German printer who is believed to be the first in Europe to print using movable type, and the first to use a press (1400-1468).

26 Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (Earthscan, London, 2002) 29. However, it is important to note that the invention of the printing press, and which country is acknowledged to be the first to use it, is still highly contentious. For example, Wright suggests that China used 'printing and other technological inventions for commercial expansion and development long before Europe did and on a scale considerably exceeding that of Europe until well into the eighteenth century.' See Wright, above n 1, 113; see generally 112-119.

of printing presses as they became another means to spread Christian doctrine.²⁷ However, the Church rapidly withdrew its support when printing presses began to print heretical material which challenged the Church's authority.²⁸ The Church responded to these developments by placing printers under ecclesiastical supervision.²⁹

In England, copyright and patent law developed independently from each other, although both emerged out of a system based on privilege.³⁰ In 15th century England, the printing and production of books was conducted by a craft guild formally known as Stationers.³¹ In 1557, the guild managed to obtain a royal charter of incorporation, which gave the guild a monopoly over printing.³² The use of this 'privilege' system benefited both the Crown and the Stationers: it provided the Crown with a means to control seditious material, and provided the Stationers with a means to consolidate their London monopoly and expand their influence regionally.³³ It is interesting to note that at this stage of copyright history, the author only had a minor role, with the main players being the Crown and the printers.³⁴ Due to problems arising from the unequal distribution of privileges in the industry, the system of privileges eventually disintegrated, and was replaced by the *Statute of Anne* in 1709 – which is often said to be the first copyright legislation.³⁵

Throughout the 18th and 19th centuries, national copyright regimes were enacted, and the European idea of copyright spread across Europe – and subsequently to the colonies.³⁶ While these regimes meant more protection for authors on a national scale, the pirating of foreign works was still very common at the international level. For example, the Dutch, Irish and French were known to pirate English works; the Dutch and Spanish were known to reprint French editions; and Austrians were commonly known to pirate German works.³⁷ As is well known, the US did not participate in these bilateral and multilateral agreements, and in fact did not accede to the Berne Convention until 1989!³⁸ Moreover, piracy of foreign works was very common in the US

27 Drahos and Braithwaite, above n 26.

28 Ibid.

29 Ibid.

30 See Peter Drahos, *A Philosophy of Intellectual Property* (Dartmouth, Aldershot; Brookfield, USA, 1996) 22-33; Wright, above n 1, 114.

31 Drahos, above n 30, 22. See also Drahos and Braithwaite, above n 26, 30-31; Wright, above n 1, 117-119.

32 Drahos, above n 30, 22.

33 Ibid 22-23.

34 Ibid 23.

35 Drahos suggests that the *Statute of Anne* was 'revolutionary', as it recognised the existence of the public domain by limiting the term of copyright protection. Moreover, the Act had an instrumentalist goal, with the underlying purpose being to encourage writing and learning. See Ibid 23. Wright offers an alternative view, and suggests that the Lockean *Statute of Anne* enforced the worldview that the proprietary rights of authors must be protected. See Wright, above n 1, 115. Altbach also comments generally that since the beginning of copyright protection in 16th century England, copyright has been a mechanism for protecting the right of copyright owners – by 'limiting access to books and information in order to maintain order and discipline in the trade'. See Altbach, above n 8, 5.

36 Ricketson interestingly points out that:

[a]lthough the legal theories underlying copyright protection differ from country to country, the origins of this form of protection in each country were strikingly similar: the grant of exclusive printing rights of privileges which were made to printers and publishers soon after the introduction of printing in Europe in the late fifteenth and early sixteenth centuries.

See S Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (Centre for Commercial Law Studies, London, 1987) 3.

37 Indeed, piracy was 'a customary norm' in the international book trade – to the extent that King William of Holland subsidised the reprinting of foreign works in the early 19th century. See Drahos and Braithwaite, above n 26, 32.

38 See JC Ginsburg and JM Kernochan, 'One Hundred and Two Years Later: the US Joins the Berne Convention' (1988) 13 *Columbia-VLA Journal of Law & the Arts* 1.

– to the extent that the government offered little or no protection to foreign authors.³⁹ Although the US eventually made some tokenistic efforts towards copyright protection for foreign authors in the late 19th century, serious efforts were only made after the US realised that it was the biggest copyright exporter in the world.⁴⁰

In the 19th century, there was a gradual increase in the number of European countries entering into bilateral agreements with each other on the issue of foreign protection for their authors' works. As will be discussed in further detail below, these developments in Europe eventually culminated in the Berne Convention (1886). However, before discussing the colonial Berne Convention, it is important to note the significant role played by the printed word in the colonial process. As Wright suggests, the 'history of copyright is a history of the expanding hegemony of the printed word.'⁴¹ Indeed, the use of the printing press in Europe led to radical changes in the nature of European cultural and technological production. These new forms of approaching and communicating information were also explored around the globe due to the discursive practices of colonisation. Wright suggests that printing technology contributed towards the centralisation of European cultural, political, and legal power by standardising vernacular languages and legal codes, and also by recording judicial decisions.⁴² All of these elements were essential for the foundation of an imperial Europe, which would be able to transplant its political, judicial, and economic systems to its colonies. The use of printing technology also significantly contributed towards the capitalist enterprise, with the printing of notes of credit and paper money.⁴³ Most significantly, however, printing was essential for the colonial and imperial project(s) of Europe, as the empires could not have survived without 'the spread of propaganda, religious tracts, commercial documents, military instruction manuals and orders, navigational charts, maps, tide tables, and treaties with "the natives".'⁴⁴ Wright asserts further that:

The maintenance of large empires, such as the Spanish and later the French and British, relied on the printed word to create cohesiveness, uniformity and relative stability over long distances and periods of time. It assisted in the continuation of loyalty and connection to the "mother country" on the part of European soldiers, missionaries, traders and settlers. The possession of writing and, even more so, printing also allowed European colonisers to justify their actions through ideologies of technological and cultural superiority over the largely oral cultures they encountered. Literacy in a European language was, and still is, seen as a sign of civilisation and progress.⁴⁵

On this point, Altbach suggests that one of the most significant features of neocolonialism is the continued use of European languages in the former colonies.⁴⁶ As Wright suggests, European

39 See Susan K Sell, *Private Power, Public Law: the Globalization of Intellectual Property Rights* (Cambridge University Press, Cambridge, 2003) 61-62. Interestingly, Charles Dickens unsuccessfully campaigned for the rights of foreign authors in the US in 1837. See Drahos and Braithwaite, above n 26, 33.

40 For example, foreign works could gain protection in the US under an 1891 Act, if the works were published in the US simultaneously with the country of origin, and if the book was also printed in the US; see Drahos and Braithwaite, above n 26, 33.

41 Wright, above n 1, 115.

42 Ibid 114.

43 Ibid.

44 Ibid.

45 Ibid.

46 Philip G Altbach, 'Education and Neocolonialism' in Ashcroft, Griffiths and Tiffin (eds), *The Post-Colonial Studies Reader* (Routledge, London and New York, 1995 [1971]) 452-456, 454. To illustrate, Mignolo suggests that there are approximately one hundred languages for 95 per cent of the world's population. Seventy five percent of the world speaks twelve of these languages (out of the 100). Of these 12, six are colonial (their ranking by number of speakers are: English, Spanish, German, Portuguese, French, Italian). However, it is important to note that Chinese (above English) is the most spoken language in the world. Mignolo also makes the significant point that although scholars such as Samuel Huntington's (see Samuel P Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon & Schuster, New York, 1996)) main argument

languages have spread far beyond their place of 'origin' due to colonialism.⁴⁷ European languages have also remained the preferred language of many of the elite in the former colonies, and this has been reinforced through the education system as many of the privileged schools conduct the bulk of their curricula in a European language.⁴⁸ Altbach suggests that the hegemonic position of European languages in the South 'has resulted in a paucity of technical and scholarly books in indigenous languages.'⁴⁹ Wright suggests further that the hegemonic position of English (as one of the dominant colonial languages) can even be seen in its ubiquitous use on the internet.⁵⁰ Indeed, it is clear that languages and scholarship formed an integral part of the colonial civilising mission, and continue to do so in these postcolonial times.⁵¹

As a form of communication, printing (unlike oral communication) has a tendency to universalise ideas by disseminating information through identical texts in standardised languages. Particular ideas become universal and, indeed, begin to be accepted as 'truths' simply through repeated distribution and widespread dissemination of the same standardised texts. Writing, as a form of communication, is also an intensely monological process of solitary creation, in which a universality of ideas and concepts is produced (even though this totality is rarely acknowledged).

Interestingly, several of the so-called universal 'truths' which evolved during the Enlightenment period (and essentially placed European Man at the centre of history) coincided with the rise of the print medium – and subsequently, the law of copyright. Like other products of European cultural and technological development, the print form – which is predominant in Europe (although clearly not exclusively) – privileges the culture in which it is most prominent. Significantly, the print medium was used to export the 'idea' of Europe to the Other: European texts told European stories in a European language, which essentially conveyed a European world-view. This type of cultural production meant that Indian schoolchildren were very well versed in plays by Shakespeare, poems by Keats, and what it means to have 'an English summer'.⁵² However, it is important to

is to refute the notion that English is becoming a universal language, the question is not so much about the quantity of speakers. Rather, the question is about the 'hegemonic power of colonial languages in the domain of knowledge, intellectual production, and cultures of scholarship' in the world today. See Walter D Mignolo, 'Globalization, Civilization Processes, and the Relocation of Languages and Cultures' in Jameson and Miyoshi (eds), *The Cultures of Globalization* (Duke University Press, Durham and London, 1998) 32-53, 39, 41.

47 See Wright, above n 1, 127.

48 Altbach, above n 46, 454. For example, in India, these schools are commonly known as 'English-medium' schools, and all of the subjects are taught in English, while indigenous Indian languages (such as Hindi and Bengali) are offered as an elective.

49 Philip G Altbach, 'Literary Colonialism: Books in the Third World' in Ashcroft, Griffiths and Tiffin (eds), *The Post-Colonial Studies Reader* (Routledge, London and New York, 1995 [1975]) 485-490, 486. For example, in India, research on Indian languages is underdeveloped partly due to the emphasis on English, and also the high status associated with publishing in English language journals. See Altbach, above n 46, 454.

50 See Wright, above n 1, 127.

51 As Mignolo suggests, the three languages of 'high modernity' – English, German, and French – remain the dominant languages of scholarship. But, interestingly, Mignolo points out that Spain and Portugal no longer play a dominant role in colonial scholarship and languages. See Mignolo, above n 46, 37, 40. Immanuel Wallerstein also suggests:

At least 95 percent of all scholars and all scholarship from the period of 1850 to 1914, and probably even to 1945, originate in five countries: France, Great Britain, the Germanies, the Italies, and the United States. There is a smattering elsewhere, but basically not only does the scholarship come out of these five countries, but most of the scholarship by most scholars is about their own country ... This is partly pragmatic, partly social pressure, and partly ideological: *these are the important countries, this is what matters, this is what we should study in order to learn how the world operates.*

See Immanuel Wallerstein, 'Open de Social Sciences' (1996) 50 (1) *Items* 3; cited in Mignolo above at 37.

52 On this point, Altbach argues that even decolonised states have largely continued the colonial school curricula, and have also maintained the colonial style of administration in education. Altbach asserts further that:

Reliance on foreign models was dictated in part by the colonial government. Indigenous

keep in mind that these cultural products were not exported or exchanged amongst 'equals', but rather, were constructed on a 'violent hierarchy'⁵³ of difference – where the dominant culture was (is) formed by the exclusion (and on top of) the subordinate one. European texts were written and exported from the metropolitan centres to the peripheries, laden with information about the superiority of the European, and why the natives needed them. As will be discussed in further detail below, these patterns and flow of information from the North to its Other, and indeed, the cultural content of the copyright industries, has not dramatically changed since colonial times: same writers, but slightly different stories.

C The Berne Convention: a colonial construct

The Berne Convention (1886) attempted to create an international system of copyright law.⁵⁴ In 19th century Europe, books became an increasingly important item of international trade. The expansion of the book trade resulted in questions relating to international jurisdictional issues, such as how can copyrighted works be protected outside national borders, and what should be the appropriate level of international copyright protection?

The Berne Convention was initiated by a number of European colonial powers, and came into force in 1887. Four major colonial powers ratified the Convention in that year: France, Germany, Spain, and the UK. Significantly, the territories, colonies, and protectorates of each of these colonial powers were included in their accession to the Convention.⁵⁵ Colonial laws also applied directly to the laws of the colonies.⁵⁶

The Berne Convention is based upon the principle of 'national treatment', which essentially means that the laws of any member state shall be no less favourable to foreigners than they are to their own nationals. Although the signatories at Berne could not agree on a global standard of copyright protection, they did agree that each member state must confer on foreign nationals the same level of protection that is conferred on their own nationals. Thus, Berne requires member states to enact certain minimum standards of copyright protection for all types of literary, artistic, musical and similar media of expression in whatever form. Berne signatories are prevented from excluding certain types of expression from protection or protection below minimum levels. This means, for example, that a member state cannot decide that textbooks should only be protected by its own domestic copyright laws for as long as the author is alive or, say, 20 years after

educational patterns were destroyed either by design or as the inadvertent result of policies which ignored local needs and traditions. Colonial powers seldom set up adequate educational facilities in their colonies and immediately limited educational opportunity and, in a sense, hindered modernization. In addition, existing facilities reflected the needs of the metropolitan power, and not of the indigenous population. The inadequacies of the modern educational system, outmoded trends in curriculum, and the orientation of the schools toward building up an administrative cadre rather than technically trained and socially aware individuals needed for social and economic development can be linked in many countries to the colonial experience.

Altbach, above n 46, 453; see also 454.

53 Jacques Derrida, *Positions* (The Athlone Press, London, 1981) 41.

54 For a detailed history of the Berne Convention, see Ricketson, above n 36.

55 For example, Butalia states that 'India's first entry into the world of international copyright was as a dominion of Britain'. See Urvashi Butalia, 'The Issues at Stake: an Indian Perspective on Copyright' in Altbach (ed.) *Copyright and Development: Inequality in the Information Age* (Bellagio Publishing Network Research and Information Center, Chestnut Hill, Mass, 1995) 49-71, 53. International copyright laws were also extended to Hong Kong as a British colony. See Wickeri, above n 4, 88.

56 For example, in the case of copyright, the *Imperial Copyright Act 1911* (UK) explicitly extended British copyright law to the colonies, including Australia, New Zealand, Canada, and South Africa. Furthermore, even after the colonies became independent sovereign nations, the copyright law continued to be based on the law of the colonising power.

publication. Article 7 of the Berne Convention prohibits the enactment of such a law. However, at the same time, signatory countries are free to create significantly higher and more extensive levels of protection.⁵⁷

During the era of decolonisation, several countries of the South critiqued specific provisions in the Berne Convention, and the Eurocentric philosophy underlying copyright more generally. Indeed, during this period, there were bitter disputes between the North and South concerning the appropriateness of the North's monopoly over knowledge.⁵⁸ Some countries of the South argued that due to the earlier history of colonial domination, the North owed them a special obligation to assist in developing their educational and scientific institutions.⁵⁹ Other Southern countries accused the North of neocolonialism, and suggested that the heavy bias in the Berne Convention towards copyright-holders (i.e. essentially Northern states) deliberately kept the South in a dependent relationship.⁶⁰ As the construction of new postcolonial identities (for example – through education) was critical for Southern nations during this era, copyright law became a critical issue.

As a response to Southern criticism of the Westcentric nature of the international copyright regime, there were some fairly modest attempts by the North to reform copyright laws. However, these have generally been unsuccessful. A discussion of some of these attempted reforms follows.

The Berne Convention was revised in 1948 to increase the overall level of protection which applied to works, and to remove most instances of the ability of countries to make 'reservations' (i.e. to register to disapply certain provisions). This had caused difficulties for many of the newly independent postcolonial states, and some, such as Indonesia, had completely withdrawn from the international copyright system. In 1952, the creation of the less onerous Universal Copyright Convention (UCC) afforded some respite to Southern states.⁶¹ However, postcolonial states that were already signatories to the Berne Convention (a position 'inherited' by their status as a colony) were precluded by a reservation clause in Berne from changing to the less rigid UCC.⁶²

There was a campaign by a number of African and Asian countries in the 1960s against the Berne Convention. Several commentators labelled this conflict between the North and the South as a 'crisis in international copyright'.⁶³ Many of these countries had recently gained political independence from colonial rule, and placed mass education, literacy, and economic development as national priorities. These postcolonial states proposed a number of reforms to the Eurocentric models of international copyright law. Southern nations argued that given the scope of its subject-matter, the reform of copyright law presented enormous opportunities for social transformation, and increased equitable access to educational materials on a global scale. The South's two main criticisms with respect to the international copyright regime were: first, the inability of Southern publishers to acquire rights to translate books and materials into their own national languages;

57 Story suggests that this 'freedom' has recently taken on great significance with regard to the duration of copyright protection. The issue of duration raises questions about how long a copyright-protected work should exist as private property before it enters the public domain. See Story, above n 9, 132.

58 See Altbach, above n 8, 4.

59 Ibid 4.

60 For example, some argued that publishers in the North preferred to export a limited number of books to the South, instead of granting reprint rights, as greater profits could be achieved from direct exports. See Ibid 4.

61 The UCC is available online: www.unesco.org/culture/laws/copyright/html_eng/page1.shtml, accessed on 1 January 2008.

62 For further information, see Gary Lea, 'Digital Millennium or Digital Dominion? The effect of IPRs in Software on Developing Countries' in Drahos and Mayne (eds), *Global Intellectual Property Rights: Knowledge, Access and Development* (Palgrave Macmillan, Hampshire (GB), New York, 2002) 144-158, 149.

63 For further information on this 'crisis', see CF Johnson 'The Origins of the Stockholm Protocol' XVIII (1970) *Bulletin of the Copyright Society of the USA* 91; cited in Story, above n 9, 143 (n 28).

and second, their inability to acquire licences and reprint rights to publish books that were originally published elsewhere but not distributed in Asia or Africa, or were too expensive.⁶⁴ Southern countries argued that gaining concessions on both these demands would assist the severely underdeveloped publishing sector in the South, and would also make materials more accessible to students and teachers.

The Berne Convention was revised again at Stockholm in 1967. A Protocol was developed during the revisions, which gave countries of the South a number of concessions on the copyright protection they were required to offer.⁶⁵ However, the Protocol never came into force because of opposition from a number of Northern countries. According to Lea, this precipitated a near-collapse in international copyright relations, and also resulted in the further revision to the Berne Convention at Paris in 1971.⁶⁶ The Protocol was replaced by an Appendix, known as the Paris Act.⁶⁷ The aim of the Appendix was to overcome, in a limited way, several of the previous access and use problems faced by countries of the South. The heavily conceded Appendix permitted, for example, compulsory licensing for translation or reproduction in the original language, although under fairly restrictive circumstances.⁶⁸ In relation to these reforms in 1971, Ricketson suggests that, 'It is hard to point to any obvious benefits that have flowed directly to developing countries from the adoption of the Appendix.'⁶⁹ In fact, according to Lea, very few nations of the South had actually taken advantage of the concessions provided for under the Appendix.⁷⁰ There was also no further assistance available to the South under the UCC, which was revised along with the Berne Convention in Paris in 1971.⁷¹

Lea suggests that all of the reform proposals during the 1970s to assist the economies in the South in copyright law (and also in patents and technology transfer) have largely been unsuccessful.⁷²

64 See Story, above n 9, 137.

65 Lea states that the following concessions were developed in the Protocol: a reduced period of copyright protection; limited term for translation rights (unless the rights are being used); compulsory licences granted for translation purposes (subject to certain conditions); reproductions in the original language to be permitted, without authorisation, for 'educational or cultural purposes' (subject to certain conditions); broadcasts of works to be permitted, without authorisation (subject to certain conditions); compulsory licences to be granted for educational research or study. See Lea, above n 62, 149.

66 Ibid 150. See also Story, above n 9, 137.

67 See generally Dina Nath Malhotra, 'Copyright: a Perspective from the Developing World' in Altbach (ed.) *Copyright and Development: Inequality in the Information Age* (Bellagio Publishing Network Research and Information Center, Chestnut Hill, Mass, 1995) 35-48, 40-42.

68 See Lea, above n 62, 150. India was one of the countries that led the negotiations in 1971 to incorporate compulsory licensing provisions within the international copyright treaties for educational purposes. This meant that governments and publishers in the South could obtain a licence to print certain educational texts in the country concerned, at locally affordable prices. The compulsory licence would only be granted if the original copyright holder was unable to produce such a text in the relevant country. A heavily conceded agreement on compulsory licensing eventually emerged. Nevertheless, Butalia asserts that compulsory licensing was in many ways an ideological victory for the South, correcting what was perceived to be a historical inequity. See Butalia, above n 55, 53-54. For further discussion on some of the pre-requisite conditions necessary before a compulsory licence can be obtained under the 1971 Paris revisions to the Berne Convention and Universal Copyright Convention, see Lynette Owen, 'Copyright: Benefit or Obstacle?' in Altbach (ed.) *Copyright and Development: Inequality in the Information Age* (Bellagio Publishing Network Research and Information Center, Chestnut Hill, Mass, 1995) 93-108, 94-95. Note that as a publisher in a multinational publishing company, Owen is fairly critical of compulsory licensing, and also offers some alternatives; see Owen at 94-98.

69 Ricketson, above n 36, 663.

70 Only eight of the 148 members of the Berne Convention had made use of these concessions as of 15 July 2001. See Lea, above n 62, 150.

71 As Lea notes, the concessions offered by the UCC as a result of the 1971 revisions are virtually identical to the concessions that were offered by Berne. See Ibid.

72 For example, Lea suggests that in response to the inadequate availability of patentable technologies (without onerous licence agreements) had led the United Nations Conference on Trade and Development (UNCTAD) to create an international Code on Technology Transfer in 1976. The purpose of the Code, inter alia, was to control or eliminate certain practices of royalty pricing and restrictive terms which had substantially hindered countries

The situation became more dire in the 1980s and 1990s, due to the increasing reliance by the North on revenues available from intangible goods, such as intellectual property and services in trade (this issue will be discussed in further detail below). Indeed, this recognition of the enormous revenues to be gained from intellectual property goods has been the underlying catalyst for the creation of the multilateral TRIPS Agreement, which has inextricably linked trade with rights in intellectual property.

The underlying purpose of copyright law is to attempt to maintain an appropriate balance between the rights of copyright owners and the rights of copyright users. Nevertheless, despite these ideologically sound aims, there is clearly a fundamental imbalance between copyright owners and users within contemporary global power structures.⁷³ Countries of the South are primarily copyright users rather than owners, and, as already discussed, most attempts to redress the imbalances in favour of the users have been strongly opposed by the rights holders.⁷⁴

As Story suggests, the two major treaties for global copyright protection (the TRIPS Agreement and the Berne Convention) are essentially both charters for rights' holders, and users are generally in a very weak position to challenge this status quo.⁷⁵ Moreover, domestic courts also generally tend to uphold the rights enshrined in the international copyright treaties, thereby yet again championing the rights of copyright owners.⁷⁶ In a pattern that is becoming fairly regular, the US has recently pursued its 'TRIPS Plus' agenda, where certain nations have been coerced into adopting its life plus 70 years formulation.⁷⁷ Indeed, TRIPS is but the latest example of the failed attempt to reform the international copyright regimes, where the rights of the owners of knowledge are generally prioritised. The specific provisions of the TRIPS Agreement as it relates to copyright law will be discussed in the following section.

D The TRIPS Agreement and copyright law: a postcolonial construct

The Western liberal idea of intellectual property law has now been globalised through the Agreement on Trade-Related Aspects of Intellectual Property Rights or TRIPS.⁷⁸ The TRIPS Agreement was established as part of the World Trade Organization (WTO) regime that came into operation on 1 January 1995. TRIPS is one of the number of agreements which make up the WTO, and links intellectual property rights to WTO obligations. This international legally binding

of the South from using advanced technologies. However, work on the Code ceased in 1985 due to opposition from countries of the North. As a result, not only were old licensing practices retained, but were increasingly placed within a strictly commercial rather than humanitarian framework. See Lea, above n 62, 151.

73 It is interesting to note that both the TRIPS Agreement and the Berne Convention contain provisions for 'minimum standards', but do not include any prohibitions against enacting 'maximum standards'. For example, the Berne Convention (Article 7(1)) requires that the copyright term for most types of work be protected for a period of the life of the author, plus a further fifty years. However, Story suggests that legislators in the US and the European Union have viewed this period as 'too short', and during the past eight years have changed their laws to increase the copyright term to life of the author plus seventy years. See Story, above n 9, 142, (n 20). Australia has also recently extended its copyright term to life of the author plus seventy years as a result of the Australia–United States Free Trade Agreement. The Agreement is available online: www.dfat.gov.au/trade/negotiations/us_fta/final-text/index.html, accessed on 1 January 2008.

74 In relation to the international publishing industry, Altbach comments that there 'is a kind of OPEC of knowledge in which a few rich nations and a small number of multinational publishers have a great deal of control over how and where books are published, the prices of printed materials, and the nature of international exchange of knowledge.' See Altbach, above n 8, 5.

75 Story, above n 9, 134.

76 Philip G Altbach, 'Introduction' in Altbach (ed.) *Copyright and Development: Inequality in the Information Age* (Bellagio Publishing Network Research and Information Center, Chestnut Hill, Mass, 1995) 1-2.

77 See Story, above n 9, 134.

78 The full text of the TRIPS Agreement can be found on the WTO website at www.wto.org/english/docs_e/legal_e/final_e.htm#TRIPS, accessed on 2 January 2008.

agreement establishes minimum standards for intellectual property rights, which members of the WTO must implement through national legislation. Under TRIPS, the 151 members of the WTO (at 27 July 2007) are required to give effect to a set of basic minimum principles and rules covering copyright, trademarks, patents, layout-designs of integrated circuits, geographical indications, industrial designs, and protection of undisclosed information. There are also uniform remedies available for the enforcement of these rights. In many cases, nations are applying higher standards than were previously applied in their domestic law. For example, longer terms of protection, fewer exceptions to the scope of rights, and sometimes new rights. While the Agreement has only been in force for thirteen years, it has been heavily criticised by Southern nations as essentially a neocolonial instrument – privileging the colonial view over the postcolonial ambitions of the Other.⁷⁹ Copyright protection is provided for in Articles 9–14 of the TRIPS Agreement. These provisions are discussed briefly below.

Relation to Berne Convention (Article 9)

The TRIPS Agreement adopts the well-established principles of copyright protection enshrined in the Berne Convention. Article 9(1) of TRIPS provides that all signatories must comply with the key sections of the Berne Convention (1971), namely Articles 1–21 and the Appendix, but does not require compliance with Article 6*bis* of the Convention (the provision relating to the protection of moral rights).⁸⁰

Article 9(2) simply confirms the conventional interpretation of copyright protection as extending to ‘expressions’, but not actually protecting the ‘ideas, procedures, methods of operation or mathematical concepts as such’.⁸¹

Computer Programs and Compilations of Data (Article 10)

Article 10(1) extends copyright protection to computer programs (whether in source code or object code) to the type of subject matter to be treated as ‘literary works’ under the Berne Convention (1971). The language of this section implies that all computer software is necessarily copyright-protected. Article 10(2) extends the scope of the Berne Convention by granting copyright protection to ‘Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations’.⁸² However, it is clear that the protection granted by Article 10(2) shall only extend to intellectual creations, and *not* to the data or material itself.⁸³

79 See Peter Drahos and Ruth Mayne (eds), *Global Intellectual Property Rights: Knowledge, Access and Development* (Hampshire (GB), New York: Palgrave Macmillan, 2002).

80 Individual members may, however, implement a system of moral rights nationally (outside the scope of the TRIPS Agreement) as part of their general obligations under the Berne Convention. For further discussion, see Michael Blakeney, *Trade-Related Aspects of Intellectual Property Rights: a Concise Guide to the TRIPS Agreement* (Sweet & Maxwell, London, 1996) 52.

81 See above n 78.

82 See *Ibid.* During the TRIPS negotiations, Northern countries and global corporations argued that due to technological progress, it is necessary to extend traditional notions of what is meant by ‘literary works’ within the meaning of the Berne Convention. This resulted in Article 10 of TRIPS explicitly including computer programs, and also compilations of data (or other material) within the scope of copyright protection. See generally Lea, above n 62.

83 The final sentence of Article 10(2) reads: ‘Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.’ It is worthwhile to note that computer programs are not included as one of the exceptions to the grant of patents under Article 27 of the TRIPS Agreement, which states that patents are to be granted for ‘inventions ... in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.’ See above n 78.

Rental Rights (Article 11)

Article 11 of TRIPS permits authors (and their successors in title) of computer programs and cinematographic works the right to authorise, or prohibit, the commercial rental to the public of their copyrighted works.⁸⁴ However, Article 11 also states that with respect to cinematographic works, 'a Member shall be excepted from this obligation ... unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title.'⁸⁵ Article 11 also states in relation to computer programs that 'this obligation does not apply to rentals where the program itself is not the essential object of the rental.'⁸⁶

Term of Protection (Article 12)

Article 12 of the TRIPS Agreement stipulates that when the term of copyright protection for a work (other than a work of applied art or a photographic work) is not calculated on the basis of a life of a natural person, such a term will 'be no less than 50 years from the end of the calendar year of authorized publication', or in the absence of such authorised publication, '50 years from the end of the calendar year of making.'⁸⁷ Article 12 of TRIPS clarifies Article 7(1) of the Berne Convention,⁸⁸ which does not specify the status of a copyright work where a natural person cannot be identified on which to calculate the period of copyright protection.

Limitations and Exceptions (Article 13)

Under Article 13, members are required to 'confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.'⁸⁹

Protection of Performers, Producers of Phonograms (Sound Recordings) and Broadcasting Organisations (Article 14)

Article 14 stipulates the rights relating to sound recordings, performers' control of fixation, reproduction, and broadcasting of performances.⁹⁰ Due to extensive lobbying by corporate

84 Ibid.

85 Ibid.

86 Ibid.

87 Ibid.

88 Article 7(1) of the Berne Convention states that the term of protection for copyright works is the life of the author plus an additional 50 years.

89 See above n 78.

90 Under Article 14(1), performers have the right to prevent the unauthorised fixation of their unfixed performances, and the reproduction of such a fixation. Performers also have the right to prohibit the broadcasting and communication to the public of their live performance. Under Article 14(2), producers of phonograms have 'the right to authorize or prohibit the direct or indirect reproduction of their phonograms.' Article 14(3) accords broadcasters the right to prevent the unauthorised fixation, reproduction of fixations, and the rebroadcasting of their broadcasts. According to Article 14(4), if a member has in place 'a system of equitable remuneration of right holders in respect of the rental of phonograms' on 15 April 1994 (the date of the conclusion of the GATT Uruguay Round), it may maintain this system 'provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders.' This type of 'material impairment' refers to the unauthorised copying of rented works. See Blakeney, above n 80, 48. Article 14(4) also states that Article 11 (in respect to computer programs) 'shall apply *mutatis mutandis* to producers of phonograms and any other right holders in phonograms as determined in a Member's law.' As with other forms of copyright works, under Article 14(5) the term of protection accorded to performers and producers of phonograms is at least 50 years, calculated from the end of the calendar year in which the performance took place or the fixation was made. Article 14(5) also provides that the term of protection granted to broadcasters is

actors in the international music and recording industries, Article 14 of the TRIPS Agreement extends copyright protection to take into account not only the copyright concerns of the rights of performers, but also the neighbouring rights of producers and broadcasting organisations. By reinforcing the rights of performers, producers and broadcasters, Article 14 of TRIPS essentially obliges members to comply with the terms of the Rome Convention (1961).⁹¹

Until recently, international copyright law was a rather arcane and 'soft' area of law. Rights holders had a very limited ability to extraterritorially enforce their copyright, and to commence legal proceedings in the event of an alleged infringement occurring within the boundaries of another country. However, the law of copyright is 'now universally accepted – if not practiced.'⁹² And, what originally began as an *idea* from the European Enlightenment now has the status of public international law through the TRIPS Agreement. However, far from its apparently universal appeal, it is important to keep in mind that the philosophical underpinnings of legal agreements such as TRIPS are firmly grounded in the Western liberal tradition which considers *all* expressions to be (usually exclusively) the private property of their 'owners' (who are often not the actual creators of the work), commodities and items of international trade and commerce, and also legally binding. Altbach suggests that the expansion of copyright as a legitimate *right* to be enforced is highly significant, as it was only a few decades ago when several countries of the South refused to 'subscribe to the international copyright treaties' on public policy grounds.⁹³

The following section will discuss further the ways in which the South continues to be marginalised by international copyright law in two specific sectors: the publishing and computer software industries.

III The continual othering of the South in this postcolonial age and the role of copyright law: the publishing and computer software industries

The distribution of copyright products in this postcolonial world is fundamentally asymmetrical. As discussed above, not only is most of the 'knowledge' packaged in the West, the flow of information is also essentially a one way trade from the North to its Other. For several centuries, the *same* countries have controlled the *modi operandi* of information distribution. These *same* countries have continued to control the global publishing houses, the print and broadcast media, software laboratories, film studios, and so on. These *same* countries have also benefited from their control over the distribution of knowledge, and have often used their hegemonic position to the detriment of the Other countries. The Other countries (i.e. not these *same* countries) have been relegated to the periphery of the international knowledge system due to historical, economic, and political reasons. Moreover, due to the enormously difficult position (both economically and technologically) of being a former colony, these Other countries have largely been unable to improve their infrastructures for better information dissemination. In short, the distribution of knowledge, and, indeed, knowledge itself, is an inextricable part of the history of colonialism.

at least 20 years, again calculated 'from the end of the calendar year' in which the broadcast was made. Finally, Article 14(6) makes explicit reference to the conditions, limitations, exceptions and reservations for granting copyright protection to the extent permitted by the Rome Convention. Article 14(6) also refers to the analogous Article 18 of the Berne Convention (1971), and states that it will 'apply, mutatis mutandis, to the rights of performers and producers of phonograms'. See above n 78.

91 The full title of the Convention is the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961). The Convention is available online at www.wipo.int/treaties/en/ip/rome, accessed on 2 January 2008.

92 Altbach, above n 76.

93 Ibid.

Indeed, as Urvashi Butalia suggests, it is impossible to separate the world of copyright law from the world of politics, as knowledge and access to information 'is inextricably tied in with power, power with money and both of those with history.'⁹⁴ Altbach suggests further that due to the complex matrix of economic, political, and cultural factors which have existed since colonialism, knowledge has become an integral component of the neocolonial relations governing the North and South.⁹⁵

The asymmetry between the North and its Other in global copyright products will be discussed in further detail below using two contemporary examples: (i) the publishing industry; and (ii) the computer software sector.

A *The global publishing industry*

There is clearly an enormous inequity in trade relations between the North and the South in several sectors of the global economy, and the publishing industry is no exception.⁹⁶ As will be discussed in further detail below, Altbach suggests that in the publishing industry, books are simply 'exported from the West to the Third World ... There is very little traffic in the other direction.'⁹⁷ Moreover, '[a]ll of the cards are in the hands of the Western publishers. They control the international copyright treaties, which were, after all, established by them and with their interests in mind.'⁹⁸

The publishing industry in the South faces enormous difficulties – largely due to the legacies of colonialism. After gaining independence, a major aim for several decolonised states was to improve the levels of education in their populations. To this end, countries of the South sought to establish their own educational systems, and develop local publishing industries which would be able to provide locally affordable textbooks, and other print materials. However, this fairly modest goal (at least in development terms) proved to be very difficult. As Butalia points out, due to 'the systematic depletion of resources, both material and intellectual, by the colonial powers, very few countries were in a position to do this and to develop local authorship.'⁹⁹ Indeed, even today, several countries of the South simply do not have the technological infrastructure available to produce textbooks and other print material on a mass scale.¹⁰⁰ Interestingly, there was also cultural baggage associated with foreign publishers, who 'were often seen as "better" and "more prestigious" than locally written and produced books.'¹⁰¹ For example, Butalia suggests that in British India, the imperial regime had a conscious policy 'to present English books as "superior"

94 Butalia, above n 55, 50.

95 See Altbach, above n 49, 488.

96 For example, Chakava cites the UNESCO *Statistical Year Book 1993*, and states that while 'Africa has 12% of the world's population, it produces only 1.2% of its books, and that this percentage is declining. Comparatively, Europe produces 53% of the world's books, compared to Asia (27%) and North America (13%).' Significantly, Africa 'controls only about 0.4% of the world's intellectual property'. See Chakava, above n 20, 17, 19.

97 Altbach, above n 8, 10.

98 Ibid 11.

99 Butalia, above n 55, 53.

100 In the African context, Kenyan publisher, Henry Chakava asserts that: 'Africa's leading fiction writers are published in the North, mostly in Britain, France and the United States. The majority of them sprang into prominence in the 1950's and 1960's when the African publishing industry was either at its nascent stage, or did not exist at all. They continue to be published in those centers partly because local African industries are not yet sufficiently developed to provide maximum exposure to their works, or because they are still bound by contractual obligations to their original publishers ... [This is] a sad reality for the 34 African countries that subscribe to the Berne Convention and constitute the largest bloc of members from any continent.' See Chakava, above n 20, 19.

101 Butalia, above n 55, 53.

and “more reliable” than Indian ones.’¹⁰² As discussed above, a complex set of economic and historical factors has also ensured the continuing dominant position of colonial languages in the publishing world.¹⁰³

There are several reasons which can explain the difficulties faced by Southern publishers. In the post-independence period, there was (and still is) intense competition from the very well-established foreign publishing houses, who were unwilling to relinquish the growing markets of the rapidly decolonising South. In the African context, Story suggests that multinational publishers, particularly British ones, often expect African publishers to be their local agents and salespersons, not ‘real publishers’.¹⁰⁴ Obtaining reprint and translation rights remains a very complex process. According to Chakava, ‘[i]n the few exceptional cases where European publishers grant rights to their African counterparts, this is usually done on harsh and unfavorable terms.’¹⁰⁵

In comparison to Northern publishers, Southern publishers generally lack a worldwide distribution network, the advantage of foreign capital, and also technical expertise and experience in issues surrounding international publishing. On this point, Chakava suggests that many publishers in the South are unfamiliar with the complexities of the international copyright system – largely due to their lack of exposure to it, and suggests that training by Northern publishing companies would greatly assist their Southern counterparts.¹⁰⁶

It is clearly in the best interests of Northern publishers to assist in the development of a solid Southern publishing sector, as a self-sufficient industry is likely to be a far better customer and long-term partner. Altbach outlines a number of ways in which the South may be assisted in the area of publishing: differential treatment of copyright-protected products; compulsory licensing of a limited selection of educational and scientific resources (which would permit Southern publishers to reprint and/or translate materials more economically); access to texts and scientific journals for limited periods of time at subsidised prices; and collaborative arrangements between the global publishing industry – which would facilitate the exchange of Northern expertise and products (and perhaps even capital) for greater access to Southern markets.¹⁰⁷ In an earlier work, Altbach also suggests that foreign scholars working in the South should also publish their findings in the country in which the research is undertaken.¹⁰⁸ This would not only contribute relevant information to the domestic intellectual market, it would also significantly strengthen the local publishing industry.¹⁰⁹ It should be noted that the type of assistance proposed by Altbach certainly does not involve breaching any of the fundamental principles of copyright law.

In her discussion on the Indian publishing industry, Butalia significantly cautions against homogenising the position of either the ‘developed’ or ‘developing’ countries in the international

102 Ibid.

103 See also Altbach, above n 49, 486-488.

104 Story, above n 9, 138.

105 Chakava, above n 20, 22.

106 Ibid, see especially 27. See further Malhotra, above n 67, 37.

107 Altbach also makes the important point that it is not merely countries from the South, but also countries from the former Soviet bloc, who would greatly benefit from a more flexible copyright regime. See Altbach, above n 8, 6-10. In the African context, Chakava suggests that there is clearly a strong case for African countries to expand and strengthen rules relating to exemptions for research and educational purposes. Moreover, these countries must be permitted to enact local laws which permit compulsory licensing, simplify copyright assignment clauses, and generally reduce the term of copyright protection. See Chakava, above n 20, see especially 31. Dina Malhotra also suggests that: ‘Authors anywhere in the world always want their works to be published in as many countries as possible. Most are happier with the lower rate of royalty from a low-priced book sold in a developing country, than by not allowing his work to be published there at all, or restricted to the export of a few high-priced copies.’ See Malhotra, above n 67, 47.

108 See Altbach, above n 49, 490.

109 Ibid.

world of copyright law, and suggests that it is merely simplistic in today's world to categorise one as the offending bloc, while the other adopts the position of 'the high moral ground.'¹¹⁰ This approach ignores the complexities of the debate which surrounds this area of law. Moreover, the assumption that the 'First World or developed countries ... have a wealth of literature to sell', and the 'Third World or developing countries ... have nothing of their own but are waiting to take, illegally, what the developed countries have to offer' is simply misplaced.¹¹¹

The publishing industry offers significant prospects for development in the South. Accessibility to the printed word is still an essential component for improving the levels of education, as most of the population in the South simply do not have the resources available to buy computers (and computers are, of course, subject to copyright restrictions). On a more general note, education is also fundamental for improving the social welfare and economic development prospects for populations in the South. While it is clearly important to acknowledge the negative impact of copyright infringement in the South (and also in the North) for the profitability of publishing houses,¹¹² an ethical redistribution of global resources in the knowledge industry is necessary in order to lessen the continuing historical divide in this area. Indeed, this is particularly important in this postcolonial era, as the TRIPS Agreement has simply consolidated the hegemony of Northern nations further.¹¹³

B The computer software industry

There is a great global 'digital divide' between countries of the North and South. There are several reasons for this: economic disparity between the two blocs; balance-of-payment pressures on the South to repay their foreign debt; significant limitations in the electrical and telephone infrastructures of the South; the high costs of computer hardware and software, to name only a few. Several of these contemporary disparities can be traced to the colonial era.

Nevertheless, greater equity in the global software industry provides the South 'a historic window of opportunity that enables them to create national wealth and break the cycle of poverty and dependence they have been caught in and leverage their wealth of human resources finally to secure a rightful place for themselves in the Global Village.'¹¹⁴ Lea suggests that heavy investment in information technology (IT) by the South could result in a gross domestic product (GDP)

110 Butalia further asserts that the Indian publishing industry is significantly more advanced than those of its neighbours – Pakistan, Bangladesh, and Nepal. Moreover, issues in copyright law relating to piracy and compulsory licensing are as relevant to India (as a major producer of knowledge) as they are to Northern countries. Indeed, as Butalia suggests (at 58), 'Much more than pirating material from the West, India needs to worry about the threat of piracy from within, and sometimes from across borders.' Nevertheless, despite India's relatively developed publishing industry, it continues to be perceived as a piracy threat by the West. Butalia (at 57) argues that this belief is based more on the assumption 'that only the West has intellectual property to offer that is worth pirating than on any ground reality.' As India has been a major market for US and British publishing houses, several Indian publishers suggest that India's continual portrayal as a piracy threat is perhaps more to do with the fear of losing the Indian market, than on the unethical acts of piracy. See Butalia, above n 55, 49, 57-60, 65-66.

111 Ibid 52-53.

112 See generally Owen, above n 68.

113 See Altbach, above n 8, 2-3.

114 This was promulgated in the 'Bangalore Declaration', which was a conference on 'Information Technology for Developing Countries in the Global Village' on 4 November 1998, held under the auspices of the United Nations Industrial Development Organization. It is important to note that the Bangalore Declaration also recognised a number of possible disadvantages for Southern countries developing computer technology, such as increases in debt, social/technical dislocation, loss of cultural diversity, loss of privacy, and increased national security risks (see Resolutions 24-28). The 'Bangalore Declaration' is available online at www.csa.iisc.ernet.in/bangit/bangdec/bangdec.html, accessed on 3 January 2008.

growth of between 0.5 and 1 per cent per annum.¹¹⁵ According to Lea, this would contribute as significantly to the economy as electricity has done in previous decades.¹¹⁶ Given the significant potential provided by the software industry for educational, economic and social development in the South, the case for greater global equity in IT should be taken seriously.

In terms of access to technology, it is certainly not difficult for most Southern countries to acquire software. Indeed, unauthorised copies (or non-proprietary software)¹¹⁷ is readily available, often for free or a small fee.¹¹⁸ The internet has also significantly contributed towards the easy accessibility of software, where numerous programs can simply be 'downloaded' for no cost at all. The digital age poses enormous challenges to conventional copyright law, as copying and manipulating data (in digital format) has become easier and far more common. A number of scholars have suggested that traditional intellectual property law is neither effective nor appropriate in this digital age of the internet.¹¹⁹ Northern actors generally regard unauthorised copies of software as straightforward 'piracy', and a fundamental breach of their intellectual property rights which results in enormous loss of revenue.¹²⁰ Countries of the South respond to this allegation by asserting that this form of piracy is an absolutely necessary (if not legitimate) form of technology transfer, as the recommended retail price for legal software is simply unrealistic for local consumers to pay.

The use of proprietary software creates a series of problems for development prospects for countries of the South. Full ownership of proprietary software remains with a company (such as Microsoft), where the user only receives a licence to utilise the software on terms set by the specific corporation. Given the dominant position in the operating systems market of a company such as Microsoft, the possibilities for users to access alternative software or negotiate licensing terms are almost non-existent.¹²¹ Microsoft's expensive licensing fees must usually be paid or renewed annually, and fees are charged depending on the type of institution using the software. For example, in the case of a university, the licensing fee is normally determined by the number of 'desks' (using computers) at that institution. Significantly, the 'per desk' licensing cost may be the same whether the institution is an Ivy League university in the US, or a poorly funded university in the South.¹²² Interestingly, Bowrey suggests that proprietary software companies such as Microsoft frequently respond to software piracy 'strategically', in ways 'that tie-in users

115 Lea, above n 62, 144.

116 Ibid.

117 In fairly simplistic terms, there are essentially two forms of software: (i) proprietary software (i.e. software owned exclusively by a software owner during its copyright life, with the owner controlling all aspects of its pricing and use); and (ii) non-proprietary software (i.e. software which permits various types of sharing/cooperative usage of the source code and improvements to the software; or in some cases, self-ownership and hence potential copyright protection by a subsequent developer, but not the 'original' developer). The best-known examples of proprietary software are Windows and Word, the operating and word-processing packages of Microsoft. The best-known examples of non-proprietary software include 'open source' software, Linux and 'freeware'. See Story, above n 9, 135. For a cultural studies perspective on proprietary and non-proprietary software, and open source technology such as Linux, see Bowrey, above n 5, especially 81-134. Bowrey specifically discusses Linux at 81-100.

118 For example, according to the International Intellectual Property Alliance's (IIPA) 2000 Report to the US Trade Representative, approximately 97 per cent of the software used in Vietnam was unauthorised in 1999. The Report is cited in Lea, above n 62, 145.

119 See, for example, Lawrence Lessig, *Code and Other Laws of Cyberspace* (Basic Books, New York, 2000).

120 For a cultural studies perspective on these issues, see Bowrey, above n 5, especially 101-169.

121 For an interesting discussion on the hegemonic position of Microsoft in the global software industry, see Bowrey, *ibid*, 101-134.

122 For example, in 2001, the Microsoft sales office in Vietnam quoted a similar 'per desk' licensing fee for software at a Vietnamese university as is charged for similar software in the US. See Story, above n 9, 142 (n 21). It is worthwhile to note that there has been heavy criticism of Microsoft's global dominance in computer software. See generally Bowrey, *ibid*; Lea, above n 62, 158.

to Microsoft.¹²³ To illustrate, when Uruguay's national phone company, Antel, disclosed in 1995 that it had pirated software to the value of \$100,000, the US Business Software Alliance (an anti-piracy lobby group heavily funded by Microsoft) discontinued its law suit, and eventually decided to settle the matter out of court.¹²⁴ The matter settled with Antel agreeing 'to replace all of its software with Microsoft products.'¹²⁵

Proprietary-based software companies also generally retain exclusive control and use of the important underlying source code, which is copyright-protected and essentially considered a trade secret.¹²⁶ Bowrey explains this further:

Historically copyright has been used to control the circulation of works and maximise income streams through enforcing limited, exclusive private use rights to the code that makes up a computer work. With respect to the copyright in the source code associated with a computer program, the law allows owners to sell access to the program, but to keep the source code hidden.¹²⁷

The stringent copyright protection of source codes by proprietary-based software companies has attracted intense criticism. For example, commentators such as Alan Story suggest that modifying, improving, and integrating source codes contributes greatly towards computer innovation.¹²⁸ Moreover, it would be particularly useful for countries of the South (given that they operate in such a vastly different economical and technological environment), to be able to 'tailor' their software needs more specifically. A university in Bangladesh will almost certainly use computers quite differently to a university in Sweden – for both educational and administrative reasons.

The software dispute between the North and South is essentially symbolic of the fundamental contradiction inherent within the international debate of copyright law. On one hand, everyone agrees that the barriers to knowledge should be removed, and information be made easily accessible. On the other hand, however, it is also clear that 'knowledge cannot be transmitted in some pure form: it comes packaged as a product, with a price, with certain conditions on its sale, and that is where the problems begin.'¹²⁹

Proprietary and non-proprietary software systems are based on fundamentally different principles – economically, technically, and philosophically. The focus of non-proprietary software is generally based on public interest values such as access to knowledge, and greater equity in information dissemination. It is hardly surprising that non-proprietary software is a far more attractive option for countries in the South, given the economic and technological challenges faced by them.

Software development is indeed another area in the copyright industries which poses some serious challenges for countries in the South. These countries face the possibility of intellectual property infringement involving several rights,¹³⁰ greater likelihood of cross-border lawsuits (due

123 Bowrey, above n 5, 109.

124 Ibid 110.

125 Ibid.

126 For example, Microsoft licences do not permit making any improvements or modifications to the source code.

127 Bowrey, above n 5, 82.

128 Story, above n 9, 135-136.

129 Butalia, above n 55, 50.

130 Although a breach of intellectual property law in relation to software mainly involves two kinds of rights – copyright, and patents (excluding trademark issues which arise in relation to packaging or labeling) – it is important to note how these rights 'accumulate'. For example, Lea suggests that the following TRIPS provisions would relate to software: Article 10(1): computer programs to be treated as literary works under Berne. Article 10(2): compilations of data and other material to be accorded copyright if, by reason of selection or arrangement, they are 'intellectual creations'. Copyright under this head does not extend to the data/material and does not affect any other copyright(s) therein. Article 11: copyright to be extended to provide a rental

to multilateral agreements such as TRIPS), and minimal (indeed shrinking) trade and other concessions, despite their 'developmental' status.¹³¹

Lea suggests that if some concessions are not granted to Southern countries in the software sector, such as pricing reform and technology transfers, these nations will have little choice but to adopt non-proprietary software.¹³² Moreover, Northern actors must address the causes underlying so much piracy: pricing.¹³³ He suggests that if software producers were prepared to offer cheaper prices to the South, in return for proper monitoring and preventive work, the problem may begin to dissolve.¹³⁴ Software producers should also combine forces with hardware producers to provide 'low-cost second-user systems and software' as part of an aid scheme.¹³⁵

It is interesting to note that computer software was not protected as intellectual property when it was first being developed, and these were the most creative and collaborative days in the history of software. However, the general historical trend has been towards a dramatic increase in eligible subject matters for copyright protection. Indeed, lobbying by large computer companies soon led to changes in the law.¹³⁶ As discussed earlier, computer programs are protected as 'literary works'

(control) right in the case of, inter alia, computer programs. Finally, Article 27: patents to be granted for 'inventions ... in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.' As Lea notes, the TRIPS exclusions did *not* expressly include computer programs. There has also been an increase in software protection using patent law. Beginning with the US Supreme Court decision in *Diamond v Diehr* 450 US 175 (1981), the US authorities have gradually lowered the barrier to patenting software-related inventions (SRIs). By the time of *State Street Bank & Trust Co v Signature Financial Group* 149 F.3d 1368 (Fed. Cir., 1998), and *AT&T Corporation v Excel Communications Inc* 172 F.3d 1352 (Fed. Cir., 1999), as long as the SRI in question was not a pure idea, pure discovery, or pure mathematical formula, it could be patented. Previously barred subject matter, such as e-business method patents and applied mathematical techniques, had by then become patentable. Another major concern for countries of the South is the extraterritorial effect of US law in relation to software patents. The internet and other international networks makes it possible for a person to infringe a law of a country without even being in the jurisdiction. See Lea, above n 62, 145-146, 152, 156-157.

131 Ibid 157.

132 Ibid 157-158.

133 Ibid.

134 Ibid. It is also important to note that 'second-generation' computer software companies, such as Sun Microsystems, have called for a more balanced approach in the setting of copyright standards, and have taken an active role in specialist areas, such as licensing issues. See Public Policy Position Papers, available at www.sun.com/aboutsun/policy, accessed on 14 November 2005. Please note that it is beyond the scope of this thesis to discuss the various policies of computer software companies, and their respective positions on issues such as open source, the free software movement, piracy, and so on. For a discussion of some of these issues, see Bowrey, above n 5, especially 81-169.

135 Lea, above n 62, 158.

136 In the early 1980s, software was first protected by domestic copyright legislation (the source code was controversially considered 'a literary work' and in the same conceptual category as a novel or poem), and then later by patent laws in countries such as the US and Japan. See Story, above n 9, 134-135. Indeed, historically the situation has been complex for computer programs and databases because of their uncertain classification status. While domestic laws of countries began to treat computer programs as literary works from the beginning of the 1980s, it was not clear what the position was under Berne or the UCC. This ambiguity was not entirely resolved until the 1990s. When the Berne Convention was being revised in Paris in 1971, programs and databases were not dealt with because it was unclear at that stage whether existing intellectual property rights would be adapted to embrace them, or whether new *sui generis* forms of protection would be created. Lea asserts that in a way, this did not matter as computer programs – being a core part of any software product – were excluded from the scope of the patent system in the 1970s. The Rules of the Patent Cooperation Treaty 1970 put in place a filing, search, and preliminary examination system for applications from a number of countries. The Rules initially stated that applications involving computer programs did not have to be searched or examined to the extent that the relevant international authority did not have the ability to do so. Following the US, however, countries and regional patent groupings increasingly began to exclude programs from patentability *per se* (see European Patent Convention 1973, Article 52). Lea claims that the main difficulty here was that any limitations on the role of patents or copyright in relation to computer program protection had no bearing on whether software technologies were actively being made available. Moreover, this did not mean that

under Article 10(1) of the TRIPS Agreement. Indeed, copyright protection for software is now mandatory, and has been globalised with the TRIPS Agreement. On this point, Butalia suggests that the opening-up of global markets will simply result in the old patterns of domination and control – i.e. the flow of information from the copyright-owners (the North) to the copyright-users (the South).¹³⁷ With respect to copyright law, this monopoly of information for the South means a lack of access to texts, software, and other teaching materials. Indeed, if open markets are to be genuinely ‘open’, there should be greater equality in the ownership of global resources.¹³⁸

IV Conclusion

In the words of Altbach:

Copyright, after all, is a moral and ideological concept as well as a legal and economic one. There is no recognition that the legacy of colonialism and the power of the multinationals has, to a significant extent, created the current highly unequal world knowledge system. It is, of course, much easier for the “haves” to cling to the economic and legal underpinnings of a system that has given them a virtual monopoly over the world’s knowledge products.¹³⁹

As Altbach suggests, ‘rights’ in intellectual property are not *natural* rights, but rather, stem from specific historical, ideological, and economic traditions. As noted earlier, the law of copyright – as a Western philosophical *idea* – is deeply imbued with the values of the Western liberal legal tradition. Nevertheless, although copyright has historically been a product of European economic and cultural development, its status as a legal right is now universally recognised.¹⁴⁰ Indeed, even in non-capitalist economies, there has been an ideological shift towards accepting copyright (and also other forms of intellectual property), as a necessary prerequisite for global trade.¹⁴¹

Western nations have essentially continued their hegemony in the global copyright industries in this postcolonial era. Countries of the North are not only the main owners of copyright in the world today, their control over copyright-protected material is actually increasing. Indeed, for the historically Othered, the *cumulative* effects of systematic exclusion from the copyright monopolies may have far greater social and economic ramifications than access to a piece of land, or other forms of tangible property.¹⁴² It is important to note that as the law functions to maintain certain relations of power, copyright law (like other forms of intellectual property) has essentially been used to further the interests of the dominant group(s). Moreover, copyright provides an excellent illustration of the way in which the law legitimises (and delegitimises) forms of cultural property.

The purpose of this article was simply to question the apparent universality of copyright law by

there were other forms of IP relating to software as a whole which could not be licensed. For example, copyright in training manuals, trade secrets/know-how for use or development. See Lea, above n 62, 150-151.

137 Butalia, above n 55, 68.

138 Ibid.

139 Altbach, above n 8, 6.

140 See Altbach, above n 76, 1-2.

141 For example, in the Chinese context, Wickeri notes that: “There is no debate at an official level, at least, in China over the appropriateness of copyright law, unless it would be among “die-hard leftists” who might see copyright as an incursion into the public domain ... Copyright law is not seen on an abstract or idealistic plane as a limitation on access to knowledge, but pragmatically as a necessity in international business relationships important for modernization.” See Wickeri, above n 4, 74-75.

142 Indeed, the copyright term in a work commonly subsists as private property for well over 100 years (i.e. after the creation of the work). For example, there has been a recent extension of the duration of the copyright term from life of the author plus 50 years to life of the author plus 70 years in some jurisdictions (including Australia). See further Story, above n 9, 142 (n 20).

exploring its thoroughly Eurocentric foundations. For too long, the law in this area has taken for granted some primary categories and presumptions, and presented itself as representing some kind of shared human experience – when its principles are firmly based in the *Western* philosophical tradition. Given the historical (and continuing) marginalisation caused by copyright law globally, it is important to remind ourselves of its past in order to gauge the appropriateness of its omnipotent status as a universal truth in this postcolonial world.