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We should be men first and  
subjects afterward; copyright  
and the cultural divide

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# Summary

This thesis investigates how monopolies enabled by copyright prevent many to exercise their right to access culture, a right that is important in itself, but also as an instrument for human development. Second part of the thesis will then focus on the question whether there are really all this advantages that copyright allegedly secures that always tip the scales of balance between different rights in copyright's favour.

Keywords: access to culture, right to development, copyright

*The difference between the lack of access to medicines and the lack of access to cultural and educational materials is like the difference between dying now and dying slowly later.*

(Peter K. Yu)

*The bank is something else than men. It happens that every man in a bank hates what the bank does, and yet the bank does it. The bank is something more than men, I tell you. It's the monster. Men made it, but they can't control it.*

(John Steinbeck, *The Grapes of Wrath*)

# Abbreviations

A2K	Access to Knowledge
ACHPR	African Charter on Human and Peoples' Rights, 1981
ACHR	American Convention on Human Rights, 1969
ADRDM	American Declaration on the Rights and Duties of Man, 1948
Amsterdam Treaty	Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts, 1997
CESCR	Committee on Economic, Social and Cultural Rights
CFREU	Charter of Fundamental Rights of the European Union, 2000
CRC	Convention on the Rights of the Child, 1989
ECHR	European Convention on Human Rights, 1950
General Comment No 13	General Comment No. 13; The Right to Education (art 13 of the International Covenant on Economic, Social and Cultural Rights), 1999
General Comment No 17	General Comment No. 17; The right of everyone to benefit from the protection of the moral and material interests resulting from

	any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant on Economic, Social and Cultural Rights), 2005
General Comment No. 20	General Comment No. 20; Non-Discrimination in Economic, Social, and Cultural Rights (art.2, para 2)
General Comment No. 21	General Comment No. 21; Right of Everyone to Take Part in Cultural Life (art 15 para. 1(a) of the International Covenant on Economic, Social and Cultural Rights), 2009
HDI	Human Development Index
IACHR P1	Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 1988
ICCPR	International Covenant on Civil and Political Rights, 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights, 1966
ICT	Information and communication technologies
IHDI	Inequality Adjusted Human Development Index
ILO	International Labor Organization
IPR	Intellectual Property Rights



MDG	Millennium Development Goals
MPI	Multidimensional Poverty Index
OECD	Organization for Economic Co-operation and Development
RTD	Right to Development
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights, 1994
UDHR	Universal Declaration of Human Rights, 1948
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
VARA	Visual Artists Rights Act, 1990
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

# 1 Introduction

When one talks about human rights and the need for their protection, one rarely thinks about intellectual property and/or about the correlation between copyright and human rights. It might seem almost sacrilegious to worry whether all people have access to culture guaranteed in Article 27(1) of the Universal Declaration of Human Rights and Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights, when so many people in the world are dying daily in civil wars, out of hunger or lack of adequate health care. Who has time for such trifles one might complain?! Nonetheless, and while I do acknowledge that certain other rights may seem as much more imminent, I do think that in an utopian world, where physiological and safety needs are satisfied, access to culture will be important for human development and for the achievement of self-actualization. However, it seems that in this utopian world, through ever stricter and broader copyright laws, access to culture will be a privilege reserved only for those with enough money to pay for it.

Thus, in my master thesis, I will try to show three things: first, why and how access to culture matters, both as a right in itself but also as a facilitator of human development; second, that a lot of poor people today are denied this right which can also impair their right to fully develop; and third, that copyright, which grants monopolies that enable this excessive jacking of prices of cultural goods, is neither the best nor the only way to secure authors' moral and material interests. In other words, I will try to show that, while copyright affects negatively many people in the world today, and especially the poor, it brings very little benefits to anybody but a couple of conglomerates that came to dominate cultural industries today. Therefore, in my conclusion, I will try to argue that we should remember that laws are social constructions, and as we can make laws, nothing, but we ourselves, prevents us to also abolish laws that clearly don't function well.

My approach will be interdisciplinary since I will concentrate more on analysing reasons why we have certain laws, rather than with the laws themselves. Thus, I will be dealing a lot with sources coming from sociology, cultural studies, philosophy and economy, to name but few, as well as with legal, human rights sources.

However, I will not be dealing with intellectual property law as I feel that in that way I would delimit myself to only being able to talk about the possible reform of the copyright system, whose existence, in order to analyze it I

would then have to take for granted. Further, since my topic is how copyright monopolies prevent access to culture, I will deal, when talking about culture only with copyrightable cultural commodities and not with the culture in a broader, anthropological sense, as many perceive it today.

As for the structure of my thesis, I chose to divide it in three chapters, each being dedicate to one topic that can easily stand alone, but is connected through copyright with the other two. Thus, in my first chapter I will deal with the right to access culture and more broadly with the right to education and freedom of information through which we also access culture. In my second chapter, I will deal with the poor, i.e. how they are prevented to access culture and thus also hampered in achieving human development. In this regard, I will also deal with prevalent theories about development today in order to show how culture matters in development and that today it is generally agreed that development is much more than a GDP growth of a country. Finally, in my third chapter I will deal with justifications given for copyright system, from natural rights and human rights theories to utilitarian theory. In this regard, I will try to show that none of the validations given for copyright, when more closely inspected actually explains why we need this system. And if there is no need for copyright, than there is also no need to bear its manifold drawbacks because they are supposedly balanced with its (non-existent) benefits.

John Rawls<sup>1</sup> asked us to imagine that we are behind a veil of ignorance, not knowing who we will be in life, whether privileged academics or some illiterate kid living on few cents per day. Then, he asked us, to imagine what kind of world we would envision to live in? In this regard, I follow with the question: Would we really choose for ourselves today's copyright system?

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<sup>1</sup> Rawls, John, *A theory of justice*, Harvard University Press, Cambridge, Mass., 2005[1971], p118

# 1 Access to Culture and Cultural Rights

When one talks about culture and cultural rights there are usually two things with which everybody agrees, namely:

- a) that there is no one clear definition of what is culture and therefore also what are cultural rights<sup>2</sup>; and
- b) that cultural rights have generally been ignored both in theory and in practice by most of the states and international organizations alike<sup>3</sup>.

## 1.1 DEFINITION OF CULTURE

The term ‘culture’ derives from the Latin verb *colere*, which means ‘to cultivate’. In the beginning, the term was used to describe the act of “bestowing labour and attention upon the land for the raising of crops”<sup>4</sup>. From this agricultural meaning, the metaphysical meaning of ‘cultivating’, i.e. “formation of the mind, of the spirit or of the soul”<sup>5</sup> by teaching and learning was later derived.

It is agreed that the drafters of both the article 27 of the UDHR and of article 15(1) (a) of the ICESCR perceived culture in this way, or rather as ‘high arts’ that they wanted to make accessible and affordable to the common man<sup>6</sup>.

In that regard the UDHR in its Article 27 even made an express reference to ‘arts’ when stating that “everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific

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<sup>2</sup> Donders, Yvonne & Vladimir Volodin (ed), *Human rights in education, science and culture: legal developments and challenges*, Ashgate, Aldershot, 2007, p.234

<sup>3</sup> Yupsanis, Athanasios, *The Concept and Categories of Cultural Rights in International Law : Their Broad Sense and the Relevant Clauses of the International Human Rights Treaties*, Syracuse Journal of International Law and Commerce (2010), Vol. 37, Issue 02, p1

<sup>4</sup> Hogan, John P. (ed), *Cultural identity, pluralism, and globalization Vol. 1 Cultural pluralism and democratic freedom*, Council for Research in Values and Philosophy, Washington, D.C., 2005, p 103

<sup>5</sup> Ibid.

<sup>6</sup> Yupsanis, op.cit., p3; also Donders & Volodin, op.cit., p243

advancement and its benefits”<sup>7</sup>, although its corresponding Article 15 of the ICESCR<sup>8</sup> states only that “everyone has the right to take part in cultural life”.

Moreover, CESCR in its Guidelines<sup>9</sup> on Treaty-Specific Documents to be Submitted by State Parties under Article 15, asks states to indicate the measures taken to promote broad participation in, and access to, cultural goods, institutions and activities, including measures taken:

- (a) to ensure that access to concerts, theatre, cinema, sport events and other cultural activities is affordable for all segments of the population;
- (b) to enhance access to the cultural heritage of mankind, including through new information technologies such as the Internet;
- (c) to encourage participation in cultural life by children, including children from poorer families, and migrant or refugee children; and
- (d) to eliminate physical, social and communication barriers preventing older persons and persons with disabilities from fully participating in cultural life.

On the other hand, culture today is perceived more in a way adopted by UNESCO, who in its 'Recommendation on Participation by the People at Large in Cultural Life and Their Contribution to It', stressed that "culture is not merely an accumulation of works and knowledge which an elite produces, collects and conserves in order to place it within the reach of all" and that therefore “culture is not limited to access to works of art and the humanities, but is at one and the same time the acquisition of knowledge, the demand for a way of life and the need to communicate”.<sup>10</sup>

In this regard, the CESCR in its General comment No. 21 on the Right of Everyone to take Part in Cultural Life also stated that “culture, for the purpose of implementing article 15 (1) (a), encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions

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<sup>7</sup> *Universal Declaration of Human Rights* [Electronic Source], GA UN, December 10, 1948, <http://www.un.org/documents/udhr/index.shtml>

<sup>8</sup> *International Covenant on Economic, Social and Cultural Rights* [Electronic Source], GA UN, 16 December 1966, <http://www2.ohchr.org/english/law/cescr.htm>

<sup>9</sup> *Annex to Guidelines on treaty-specific documents to be submitted by State parties under Articles 16 and 17 of the International Covenant on Economic [Electronic Source], Social and Cultural Rights*, CESCR, 28 March 2009

[http://www.regjeringen.no/upload/UD/Vedlegg/FN/Guidelines\\_OSK\\_24mars2009.pdf](http://www.regjeringen.no/upload/UD/Vedlegg/FN/Guidelines_OSK_24mars2009.pdf)

<sup>10</sup> Yupsanis, op.cit., p3

through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives”.<sup>11</sup>

Therefore, one can generally distinguish two concepts of culture existing today:

- a) culture as capital that can be perceived either as only ‘high arts’ or, more broadly, as encompassing all creative manifestations and expressions. This view resides, according to former Deputy Director General of UNESCO Rodolfo Stavenhagen, on the presumption that there exists a ‘universal’ culture, and that “while some people are able to enjoy it, others may not have access to it”.<sup>12</sup> In this way, the right to culture would mean the right “to have equal access to this cultural capital”<sup>13</sup>; and
- b) culture in a more anthropological sense, namely as the complete way of life of a society.<sup>14</sup>

For the purpose of this thesis, I will be dealing with the culture understood in the first, narrower sense than anthropological, i.e. with culture as a capital that can be commodified and copyrighted. In this sense, culture is also narrower than the meaning of ‘knowledge’ as it does not encompass scientific knowledge. Further, when dealing with access rights, I will also cover the right to education and the right to information through which culture can also be disseminated.

### 1.1.1 UNIVERSAL CULTURE

Recently there has been a lot of discussion when talking about the right to culture about whether there is a one, ‘universal culture’ to which everybody should have access to, or whether in practice the right to culture implies ‘westernization’ that will smother indigenous culture. However, as the

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<sup>11</sup> *General Comment No. 21; Right of Everyone to Take Part in Cultural Life (art 15 para. 1(a) of the International Covenant on Economic, Social and Cultural Rights)* [Electronic Source], Committee on Economic, Social and Cultural Rights, 43rd Session, 2-20 November 2009 <http://www2.ohchr.org/english/bodies/cescr/comments.htm>

<sup>12</sup> Eide, Asbjørn, Krause, Catarina & Rosas, Allan (eds), *Economic, social and cultural rights: a textbook*, 2., rev. ed., Martinus Nijhoff Publishers, Dordrecht, 2001, p 88

<sup>13</sup> Yupsanis, op.cit., p3

<sup>14</sup> Ibid. Also, Donders & Volodin, op.cit., p256

International Conference on Education in its 43rd Session observed: “A living culture cannot be inward-looking; exchanges make it fertile”.<sup>15</sup>

Moreover, UNESCO’s ‘Declaration of the Principles of International Cultural Co-operation’ stated that “cultural co-operation, by disseminating ideas, knowledge, literature, and the arts, is essential to the enrichment of cultures and cultural life”.<sup>16</sup> In that way, American sociologist Janet Abu-Lughod points out how the global flow is not only from the global to the local, but is also the reverse.<sup>17</sup> She gives as an example world music, which has become “commercially successful in the previously monocultural world of Western popular music”<sup>18</sup>. Similarly, Julie E. Cohen, a professor at Georgetown University Law Centre, talks about this ‘boundary-crossing’ giving as an example painters that at the beginning of the twentieth century derived inspiration from traditional Japanese prints then fashionable in Paris or John Cage, who drew upon Chinese I Ching philosophy when introducing elements of randomness into his compositions.<sup>19</sup> Moreover, studies of music consumption in Latin America show that western music does not dominate domestic markets. Therefore, in Peru the chief style is chicha, in Colombia vallenato, in Puerto Rico salsa, in Argentina tango, while 65% of music in Brazil is national music.<sup>20</sup>

## 1.1.2 COMMODIFICATION

The Bloomsbury Group, and among them most notably Fry and Bell claimed that the aesthetic experience was fundamentally different from the satisfaction achieved from consumer goods and services.<sup>21</sup> This opinion seems to also be endorsed by the UNESCO’s ‘Convention on the Protection

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<sup>15</sup> Goncalves, Maria & Paola G., *A Cultural Decade; Reflections on the World Decade for Cultural Development 1988-1997* [Electronic Resource], Studies and Reports of the Unit of Cultural research and Development No 5, Unesco publ. 1998, p25 <http://unesdoc.unesco.org/images/0011/001145/114539eo.pdf>

<sup>16</sup> Voon, Tania., *Cultural products and the World Trade Organization* [Electronic Source], Cambridge University Press, Cambridge, 2010[2007], p65 <http://ssrn.com/abstract=1211605>

<sup>17</sup> Schech, Susanne & Haggis, Jane, *Culture and development: a critical introduction*, Blackwell Publishers, Oxford, 2000, p63

<sup>18</sup> Ibid, p64

<sup>19</sup> Guibault, Lucie & Hugenholtz, P. Bernt (eds), *The future of the public domain: identifying the commons in information law*, Kluwer Law International, Alphen aan den Rijn, 2006, 153

<sup>20</sup> Matarasso, Francois (ed), *Recognizing Culture: A Series of Briefing Papers on Culture and Development* [Electronic Source], Comedia & UNESCO, 2001, p14 <http://unesdoc.unesco.org/images/0015/001592/159227e.pdf>

<sup>21</sup> Ginsburgh, Victor & Throsby, David (eds), *Handbook of the economics of art and culture. Vol. 1*, Elsevier North-Holland, Amsterdam, 2006, p62

and Promotion of the Diversity of Cultural Expression’, which stated in its Preamble that cultural activities, goods and services are products of creativity and are different from other global goods and services having both an economic and a cultural nature and therefore must not be treated as solely having commercial value.<sup>22</sup>

In that regard, Arjo Klamer, professor of the economics of art and culture at Erasmus University in Rotterdam, differentiates between three types of values of cultural goods: economic, social, and cultural.<sup>23</sup> Economic refers to the prices of things, or their exchange value. Therefore, the economic value of a cultural good would be what people are willing to pay for it.<sup>24</sup> However, in the case of cultural goods, Klamer believes that satisfaction comes more from their social value.<sup>25</sup> Finally, there is their cultural value that evokes qualities exceeding those that are economic and social. These include aesthetic, spiritual, historical, symbolic, and authenticity values.<sup>26</sup>

Unfortunately, culture today is increasingly treated as just another commodity that can be mass-produced for constantly widening consumer markets. In this way, cultural assets are rapidly replacing natural assets as the primary raw material of economic growth.<sup>27</sup> Thus, in 2000 in the UK the creative industries generated revenues of about £112 billion contributing to the balance of trade more than any of the UK’s manufacturing industries.<sup>28</sup> However, as is the case with all industrial objects, culture perceived as mere commodity is then subjected only to forces of supply, demand and economies of scale.<sup>29</sup>

### 1.1.3 MARKET CONCENTRATION

Following cultural commodification and realization of its market possibilities, cultural production is increasingly becoming owned by an ever-smaller

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<sup>22</sup> Dutfield, Graham M. & Suthersanen, Uma, *Global intellectual property law*, Edward Elgar, Cheltenham, 2008, p293. Also, Voon, op.cit.,p185

<sup>23</sup> Rao, Vijayendra & Walton, Michael (eds), *Culture and public action*, Stanford University Press, Stanford, Calif., 2004, p147

<sup>24</sup> Ibid, p148

<sup>25</sup> Ibid, p150

<sup>26</sup> Ibid.

<sup>27</sup> Matarasso, op.cit.,p2

<sup>28</sup> Ibid, p5

<sup>29</sup> Venturelli, Shalini, *From the Information Economy to creative Economy: Moving Culture to the Centre of International Public Policy* [Electronic Source], Center for Arts and Culture, p5 <http://ics.leeds.ac.uk/papers/pmt/exhibits/361/PPP.pdf>



number of companies.<sup>30</sup> Thus, today, only 5 companies control 85% of media sources, 4 recording labels (Universal Music Group, Sony IBMG, Warner Music Group and EMI) control approximately 75% of the world music market<sup>31</sup>, 10 companies control half of the US newspapers' circulation, and 10 film studios receive 99% of all film revenue.<sup>32</sup> This concentration is largely being facilitated by the monopolies that copyright provides.

Moreover, as a result of this process of comodification and privatization, success in the market is becoming the primary determinant of value, hence endangering cultural diversity since there is little profit in the tastes of minority and because the wish to repeat the success of block-busters often generates just copying previously successful formulae.<sup>33</sup>

In this regard, UNDP devoted its 2004 Human Development Report to cultural diversity, pointing out that cultural products and creative activities could wither and diversity could decline if left only to the market.<sup>34</sup>

Or as former Harvard Business School professor Theodore Levitt has put it, "it makes good commercial sense in a globalized world to train taste along certain reliable routes, and the market for cultural goods and services is no different in this respect to any other"<sup>35</sup>. Hence, distribution of certain great works could be unavailable, if the market actors would judge them too risky for popular reception.<sup>36</sup> Thus, and as the economists have frequently pointed out, even when there are three television stations competing in a single market, none will adopt programming aimed at minority tastes since it is still more profitable to go for a share of, for example the 90% majority than to try to satisfy a possibly elusive 10% minority.<sup>37</sup>

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<sup>30</sup> Lessig, Lawrence, *Free culture: how big media uses technology and the law to lock down culture and control creativity*, Penguin Press, New York, 2004, p162

<sup>31</sup> Patry, William, *Moral panics and the copyright wars*, Oxford University Press, New York, 2009, p120

<sup>32</sup> Lessig, op.cit, p162

<sup>33</sup> Story, A., Darch, C., Halbert, D., et al., *The copy/south dossier : issues in the economics, politics, and ideology of copyright in the global south* [Electronic Source], Copy/South Research Group, 2006, p20 <http://www.copysouth.org/en/documents/csdoossier.pdf>

<sup>34</sup> Stamatopoulou, Elsa, *Cultural rights in international law: article 27 of the Universal Declaration of Human Rights and beyond*, Martinus Nijhoff Publishers, Leiden, 2007, p139

<sup>35</sup> Perry-Kessaris, Amanda. (ed), *Law in the pursuit of development: principles into practice?*, Routledge, Anbingdon, Oxon [UK], 2010, p76

<sup>36</sup> Bently, Lionel & Maniatis, Spyros M. (eds), *Intellectual property and ethics*, Sweet & Maxwell, London, 1998, p28

<sup>37</sup> Heilbrun, James & Gray, Charles M., *The economics of art and culture*, 2. ed., Cambridge Univ. Press, Cambridge, 2004, p361

In a way, multimedia corporations today have the power to act as a cultural filter, controlling to some extent what we can read, hear and see. Moreover, they often practice ‘push’ and not ‘pull’ marketing, creating products or services based on what they want to sell to consumers instead on what consumers want to buy<sup>38</sup>, or to put it more plainly, supply fashions demand instead of demand shaping supply.<sup>39</sup>

What is more, the Human Rights Committee charged with monitoring and enforcing of ICCPR has expressed its concern that ‘excessive concentration of the mass media’ may interfere with the enjoyment of freedom of expression guaranteed under Article 19(2).<sup>40</sup>

Moreover, excessive prices enabled by monopolies charged for access to cultural works have created significant barriers to cultural participation for many people.

## 1.2 RIGHT TO TAKE PART IN CULTURAL LIFE

Right to take part in cultural life has been recognized in Article 27 of the UDHR, Article 15(1) of the ICESCR, Article 17 of the ACHPR, Article 13 of the ADRDM and Article 14 of IACHR P1. Moreover, CRC in its Article 31 protects the right of the child “to participate freely in cultural life and the arts”.<sup>41</sup>

Further, article 15 (2) of the ICESCR<sup>42</sup> obliges the States Parties to take steps to “achieve the full realization of this right” including those “necessary for the preservation, the development and the diffusion of science and culture”.

Moreover, Article 22 of UDHR provides that “everyone is entitled to the realization, through national effort and international co-operation, of the cultural rights, indispensable for his or her dignity and the free development of his or her personality”.<sup>43</sup>

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<sup>38</sup> Patry, op.cit, p6

<sup>39</sup> Bettig, Ronald V., *Copyrighting culture: the political economy of intellectual property*, Westview Press, Boulder, Colo., 1996, p92

<sup>40</sup> Voon, op.cit, p155

<sup>41</sup> Shaver, Lea Bishop, *The Right to Science and Culture*, Wisconsin Law Review, Vol. 2010, p. 177 <http://ssrn.com/abstract=1354788>

<sup>42</sup> ICESCR, op.cit.

<sup>43</sup> UDHR, op.cit.

According to UNESCO's 'Recommendation on Participation by the People at large in Cultural Life and their Contribution to It', access to culture means:

the concrete opportunities available to everyone, in particular through the creation of the appropriate socio-economic conditions, for freely obtaining information, training, knowledge and understanding, and for enjoying cultural values and cultural property.<sup>44</sup>

The 'Plan of Action' for the World Decade for Cultural Development 1988-1997, distinguishes between 'access to' and 'participation in culture', however reiterating that "they are two sides of the same coin that can be mutually reinforcing". It defines access to culture as "the concrete opportunities available to everyone, in particular through the creation of the appropriate socio-economic conditions, for freely obtaining information, training, knowledge and understanding, and for enjoying cultural values and cultural property". On the other hand, participation in cultural life encompasses "the concrete opportunities guaranteed for all - groups and individuals - to express themselves freely, to communicate, act, and engage in creative activities with a view to the full development of their personalities, a harmonious life and the cultural progress of society".<sup>45</sup>

This distinction is further developed by the CESCR in its General Comment No. 21, which identified three important components of the right to take part in cultural life, namely:

- (a) participation, which among other things means that "everyone also has the right to seek and develop cultural knowledge and expressions and to share them with others, as well as to act creatively and take part in creative activity";
- (b) access, which refers to the right of everyone "to know and understand his or her own culture and that of others through education and information, and to receive quality education and training with due regard for cultural identity; and
- (c) contribution, which covers the right of "everyone to be involved in creating the spiritual, material, intellectual and emotional expressions of the community. This is supported by the right to take part in the development of the community to which a person belongs, and in the definition, elaboration

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<sup>44</sup> Goncalves & Paola, op.cit, p43

<sup>45</sup> *World Decade for Cultural Development -Plan of Action* [Electronic Source], UNESCO, 1990, para 86 <http://unesdoc.unesco.org/images/0008/000852/085291eb.pdf>

and implementation of policies and decisions that have an impact on the exercise of a person's cultural rights."<sup>46</sup>

Additionally, CESCR stated that in order for everybody to be able to take part in cultural life on the basis of equality and non-discrimination, access to culture needs to encompass: (a) availability; (b) accessibility; (c) acceptability; (d) adaptability; and (e) appropriateness.<sup>47</sup>

Moreover, one shouldn't perceive policies regarding access to culture as voluntary or as a 'charity'; they are based on legal obligations of States.<sup>48</sup>

## 1.2.1 WHY IS ACCESS TO CULTURE IMPORTANT?

People create culture, but are also created by it<sup>49</sup>, or as somebody once said, "culture is everything we don't have to do to survive-but are compelled to do to feel human"<sup>50</sup>.

Political economists dealt early on with questions of art and culture. In the seventeenth century those activities were viewed mostly as either wasteful indulgences of the aristocracy, or as dangerous distractions for the working man. However, already in the eighteenth century some economic thinkers like Hume and Turgot started perceiving positive social benefits emerging from the arts.<sup>51</sup> Thus, Hume noted that "the increase and consumption of all the commodities, which serve to the ornament and pleasure of life, are advantages to society; because at the same time that they multiply those innocent gratifications to individuals, they are a kind of storehouse of labour, which, in the exigencies of the state, may be turned to the public service. In a nation where there is no demand for such superfluities, men sink into indolence, lose all enjoyment of life, and are useless to the public".<sup>52</sup> Moreover, for Hume, the arts, meaning both the fine arts and all forms of human inquiry, had not only positive economic externalities but were also essential to the democracy as they nurtured civic virtues.<sup>53</sup>

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<sup>46</sup> General Comment No 21, op.cit.

<sup>47</sup> Ibid.

<sup>48</sup> *Civil Society Platform on Access to Culture, Policy Guidelines* [Electronic Version], 9 June 2009, p5

[http://ec.europa.eu/culture/key-documents/doc/forum/platform\\_access\\_culture\\_july09.pdf](http://ec.europa.eu/culture/key-documents/doc/forum/platform_access_culture_july09.pdf)

<sup>49</sup> Guibault & Hugenholtz, op.cit, p147

<sup>50</sup> Matarasso, op.cit, p2

<sup>51</sup> Ginsburgh & Throsby, op.cit, p26

<sup>52</sup> Ibid, p34

<sup>53</sup> Ibid.

Nonetheless, the prevailing notion of art throughout the nineteenth century reflected that of Jeremy Bentham, who viewed art as just any other commodity. The opinion that art should be treated as more than a simple commodity re-emerged again in the twentieth century with the Bloomsbury Group who “distinguished between the artistic experience and human consumption, and between the ‘imaginative life’ of the mind and the biological activity of humans and other creatures”.<sup>54</sup> They believed that everyone, regardless of his class or economic station should be engaged in or at least exposed to the arts since the arts “were an essential element and building block in the achievement of true human civilization”.<sup>55</sup>

In the international plain, the importance of cultural rights was highlighted early on in the ‘Action Plan on Cultural Policies for Development’ adopted at the Intergovernmental Conference on Cultural Policies for Development, organized in Stockholm from 30 March to 2 April 1958. It stated that “access to and participation in cultural life is a fundamental right of individuals in all communities” and that “governments have the duty to create conditions for the full exercise of this right in accordance with Article 27 of the UDHR”.<sup>56</sup>

Moreover, the Preamble of UNESCO’s ‘Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It’, states that:

participation by the greatest possible number of people and associations in a wide variety of cultural activities of their own free choice is essential to the development of the basic human values and dignity of the individual, and that access by the people at large to cultural values can be assured only if social and economic conditions are created that will enable them not only to enjoy the benefits of culture, but also to take an active part in overall cultural life and in the process of cultural development.<sup>57</sup>

Recently, in its General Comment No 21, CESCR claimed that “culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities”.<sup>58</sup>

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<sup>54</sup> Ibid, p26

<sup>55</sup> Ibid, p61

<sup>56</sup> Nieć, Halina (ed), *Cultural rights and wrongs: a collection of essays in commemoration of the 50th anniversary of the Universal Declaration of Human Rights*, Unesco Publ., Paris, 1998

<sup>57</sup> *Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It*, UNESCO, 26 November 1976

<sup>58</sup> General Comment No 21, op.cit.

## 1.3 RELATED RIGHTS

Although ‘Vienna Declaration and Programme of Action’ adopted at the World Conference on Human Rights reiterated interdependence of all human rights, there are certain rights that are more directly related to access to culture than the others. These are:

- a) the right to education, which constitutes the central requirement for the existence of cultural rights according to former UN Secretary General Boutros Boutros Ghali<sup>59</sup>,
- b) the right to freedom of information<sup>60</sup>, and
- c) access to knowledge.

### 1.3.1 RIGHT TO EDUCATION

It is often said that education is a precondition for the exercise of human rights.<sup>61</sup> Education brings empowerment<sup>62</sup> and is increasingly a means to eliminate inequality in the exercise of all human rights.<sup>63</sup> What is more, not only does education produce a private benefit to the person receiving it, but it also produces a benefit to society at large since in a democratic society, everybody is affected by the way others vote and carry out their civic duties.<sup>64</sup>

Article 26 of the UDHR provides that “everyone has the right to education” and that “education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms”. Moreover, it states that education shall “promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace”.<sup>65</sup>

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<sup>59</sup> Yupsanis, op.cit, p6

<sup>60</sup> Ibid, p7

<sup>61</sup> *General Comment No. 13; The Right to Education (art 13 of the International Covenant on Economic, Social and Cultural Rights)* [Electronic Source], Committee on Economic, Social and Cultural Rights, 21st Session, 15 November-3 December 1999, para 1 <http://www.unhchr.ch/tbs/doc.nsf/0/ae1a0b126d068e868025683c003c8b3b?Opendocument>

<sup>62</sup> Deneulin, Séverine & Shahani, Lila (eds), *An introduction to the human development and capability approach: freedom and agency*, Earthscan, London, 2009, p208

<sup>63</sup> Ssenyonjo, Manisuli., *Economic, social and cultural rights in international law*, Hart Pub., Oxford, 2009, p357

<sup>64</sup> Heilbrun & Gray, op.cit, p224

<sup>65</sup> UDHR, op.cit.

The right to education was furthermore reiterated in a number of binding international and regional human rights treaties, namely in Article 5(1)(a) of the 1960 UNESCO Convention against Discrimination in Education, Article 13(1) of the ICESCR, Article 28 of CRC, Article 17(1) of the ACHPR, Article 12 of the ADRDM and Article 13(2) of the IACHR P1, Article 14 of the CFREU, while Article 2 of the First Protocol to the ECHR, provides a negative right stating that “no person shall be denied the right to education”.<sup>66</sup>

ICESCR’s General Comment No 13 provides that “all education, whether public or private, formal or non-formal, shall be directed towards the aims and objectives identified in article 13 (1)”, namely towards “the full development of the human personality and the sense of its dignity”, “enabling all persons to participate effectively in a free society”, and “promoting understanding among all ethnic groups, as well as nations and racial and religious groups”.<sup>67</sup> In addition, it reiterates that “education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds”<sup>68</sup>.

### 1.3.2 FREEDOM TO INFORMATION

The importance of freedom to information was recognized early on by the United Nations’ General Assembly which in its first session in 1946 adopted the ‘Resolution 59(1)’ which stated that “freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated”.<sup>69</sup>

Therefore, in 1948, a Conference on Freedom of Information was convened in Geneva with the purpose of laying down an information policy for the United Nations. However, nothing ever came of it because of the impasse “between the Western countries, arguing for a free flow of information, and the Soviet Union, arguing for a balanced flow of information”<sup>70</sup>.

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<sup>66</sup> Ssenyonjo, op.cit, p 375

<sup>67</sup> General Comment No 13

<sup>68</sup> Ibid.

<sup>69</sup> Jørgensen, Rikke Frank (ed), *Human rights in the global information society*, MIT Press, Cambridge, Mass., 2006, p54. Also: Mendel, Toby, *Freedom of Information: Comparative Legal Study* [Electronic Resource], Unesco Publ., New Delhi, 2003, p 8 <http://www.article19.org/docimages/1707.pdf>

<sup>70</sup> Jørgensen, op.cit, p54

Nevertheless, the conference did produce the text later used for Article 19 of the UDHR, adopted by 13 votes to 4.<sup>71</sup>

Article 19 of UDHR provides among other things freedom of everyone to “to seek, receive and impart information and ideas through any media and regardless of frontiers”<sup>72</sup>. The right to freedom of information is also guaranteed in Article 19 of the ICCPR, Article 13 of the ACHR, Article 9 of the ACHPR and Article 10 of the ECHR.

UNESCO’s ‘Agreement on the Importation of Educational, Scientific and Cultural Materials’, stated in its Preamble that

the free exchange of ideas and knowledge and, in general, the widest possible dissemination of the diverse forms of self-expression used by civilizations are vitally important both for intellectual progress and international understanding, and consequently for the maintenance of world peace<sup>73</sup>.

Therefore, and as Joshua Cohen, professor at Stanford University has noted, one could say that freedom to information protects two fundamental principles:

- (1) the interest in deliberation which “concerns our ability to revise and gain a deeper understanding of our individual and collectively held beliefs and commitments”<sup>74</sup>; and
- (2) the interest in knowledge which is the “fundamental interest in securing reliable information about the conditions required for pursuing one’s aims and aspirations”<sup>75</sup>.

### 1.3.3 ACCESS TO KNOWLEDGE

Today’s neoliberal concept of knowledge has its roots in the 1950s, when renowned American economist Robert Solow connected knowledge and economic growth, arguing that the vast proportion of gains in productivity in early twentieth century America could be attributed to a range of

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<sup>71</sup> Ibid.

<sup>72</sup> UDHR, op.cit.

<sup>73</sup> *Agreement on the Importation of Educational, Scientific and Cultural Materials* [Electronic Source], Florence, June 17, 1950 [http://portal.unesco.org/en/ev.php-URL\\_ID=12074&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=12074&URL_DO=DO_TOPIC&URL_SECTION=201.html)

<sup>74</sup> Mathiesen, Kay, *Access to Information as a Human Right* [Electronic Source], p9 <http://ssrn.com/abstract=1264666>

<sup>75</sup> Ibid, p10



advances in knowledge that made production more efficient, from new machines to new management techniques.<sup>76</sup> Soon, mainstream economists began to recognize its increasing importance, noting a “shift from industrial sectors to ‘information-processing’ sectors such as financial services, marketing, biotechnology, and software”.<sup>77</sup> Or rather, as electronic devices and robots accomplish more and more human tasks, the need for manual and cognitive routine skills is decreasing, while the demand for expertise and communication skills is rapidly rising.<sup>78</sup>

Sector	Change in number of jobs, 1995–2005	
	U.S.	EU15
High–medium tech manufacturing	–15.7%	–2.4%
Knowledge-based services	+27.2%	+30.7%
All knowledge-based activity	+20.9%	+23.9%
Low–medium tech manufacturing	–18.3%	–7.5%
Less knowledge-based services	+12.7%	+13.5%
All non-knowledge-based activity	+10.2%	+5.7%
Total employment	+14.0%	+12.6%

Source: Brinkley and Lee 2006.

Job Creation by Knowledge Content of Sector in the United States and Europe, 1995–2005  
Source: Building Knowledge Economies: Advanced Strategies for Development, World Bank, 2007, p13

Nowadays, nobody doubts that the knowledge is an essential resource for economic growth and development.<sup>79</sup> Moreover, theorists such as Bell and Castells, found this trend happening not only in our economies, but also in our societies, which have become increasingly knowledge intensive.<sup>80</sup>

Joseph Stiglitz, a Nobel Prize winner for economics in 2001, identified knowledge as one of the five global public goods, beside international economic stability, security and political stability, the international environment, and international humanitarian assistance.<sup>81</sup> Additionally,

<sup>76</sup> Krikorian, Gaëlle & Kapczynski, Amy (eds), *Access to knowledge in the age of intellectual property*, Zone Books, New York, 2010, p18

<sup>77</sup> Ibid, p21

<sup>78</sup> *Building Knowledge Economies* [Elektronic Source] : Advanced Strategies for Development, World Bank, Washington, D.C., 2007, p11 <http://siteresources.worldbank.org/KFDLP/Resources/461197-1199907090464/BuildingKEbook.pdf>

<sup>79</sup> Shaver, Lea Bishop and Rizk, Nagla (eds), *Access to Knowledge in Egypt: New Research on Intellectual Property, Innovation and Development* [Electronic Resource], Bloomsbury Academic, Bloomsbury Publishing, UK, USA, 2010; Hofstra Univ. Legal Studies Research Paper No. 10-48, p1 <http://ssrn.com/abstract=1729370>

<sup>80</sup> Krikorian & Kapczynski, op.cit, p21

<sup>81</sup> Shaver, *The Right to Science and Culture*, p 161

knowledge is also often cumulative, namely it acts as an input for the creation of new knowledge.<sup>82</sup>

However, throughout the last two centuries there has been a growing trend of global commodification of human knowledge. Thus, as of relatively recently, the importance of preserving access to it has also been recognized in human rights circles. For them, the concept of access to knowledge usually entails “access to data, information, tools, inventions, literature, scholarship, art, popular media and other expressions of human inquiry and understanding”<sup>83</sup>. And while this right is still not expressly recognized as such in any of the international instruments, the idea of a special, A2K Convention is growing in its momentum.

James Madison stated that “knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives”<sup>84</sup>.

## **1.4 NON-DISCRIMINATION AND ACCESS**

Non-discrimination and equality are key elements of human rights protection, which states must respect regardless of their legal traditions and their domestic law.<sup>85</sup>

Preamble of the Charter of the United Nations positions the international community’s “faith in fundamental human rights, in the dignity and worth of the human person” and “in the equal rights of men and women and of nations large and small” as a central principle of the United Nations<sup>86</sup>. Similarly, its Article 1 states that the United Nations’ mission is, inter alia, to “achieve international co-operation [...] in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”<sup>87</sup>. In this regard, Article 28 of the UDHR lays down the requirement that everyone is entitled to a social

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<sup>82</sup> Foray, Dominique, *Economics of knowledge*, MIT Press, Cambridge, Mass., 2004

<sup>83</sup> Shaver & Nagla, op.cit, p5

<sup>84</sup> Jørgensen, op.cit, p73

<sup>85</sup> Ssenyonjo, op.cit, p84

<sup>86</sup> *Charter of the United Nations* [Electronic Source], 26 June 1945, <http://www.un.org/en/documents/charter/index.shtml>

<sup>87</sup> Ibid.

and international order in which the rights and freedoms set forth in the UDHR can be fully realized.<sup>88</sup>

Furthermore, Article 2(2) of the ICESCR contains an absolute guarantee against non-discrimination in the enjoyment of the substantive rights stating that “the States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”<sup>89</sup>. As the CESCR General Comment No 20 explains, this prohibition covers de jure (or formal) discrimination, de facto (or substantive) discrimination, and direct and indirect discrimination.<sup>90</sup> The idea of progressive realization is not applicable here.<sup>91</sup>

Thus, in its General Comment No 21, “the Committee encourages States parties to make the greatest possible use of the valuable cultural resources that every society possesses and to bring them within the reach of everyone, paying particular attention to the most disadvantaged and marginalized individuals and groups, in order to ensure that everyone has effective access to cultural life”<sup>92</sup>.

In view of that, in my next Chapter I will deal more specifically with discrimination of a particular social group, namely the poor, and how their right to culture, education and development is impaired. I will try to show both why access to culture is particularly important for the poor, and how high prices of cultural goods often caused by copyright prevent them in that access. Accordingly, I will also deal with different visions of development today, and the fact that although they may differ in their strategies and goals, they all acknowledge, at least implicitly, the role that culture can play in this development.

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<sup>88</sup> UDHR, op.cit.

<sup>89</sup> ICESCR, op.cit

<sup>90</sup> Ssenyonjo, op.cit, p87

<sup>91</sup> Donders & Volodin, op.cit, p238

<sup>92</sup> General Comment No 21, op.cit.

# 2 Access to Culture, Poverty and the Human Development

## 2.1 POVERTY

While the term ‘poverty’ is not mentioned as such in any of the international human rights treaties, one could say that through various phrases like ‘social progress’, ‘development’, ‘social justice’ or ‘higher standard of living’, poverty alleviation has been set down as an overarching goal of the United Nations, on equal footing with peace and security and respect for human rights and fundamental freedoms.<sup>93</sup> Thus, the common Preamble of the ICESCR and ICCPR ascertain that, “in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights”.<sup>94</sup> Further, Article 11(1) of the ICESCR provides for the right of everyone to an adequate standard of living, which is often interpreted as the direct linkage of the international human rights framework and poverty.<sup>95</sup>

More explicitly, the CESCR has noted that “although the term [poverty] is not explicitly used in the International Covenant on Economic, Social and Cultural Rights, poverty is one of the recurring themes in the Covenant and has always been one of the central concerns of the Committee. The rights to work, an adequate standard of living, housing, food, health and education, which lie at the heart of the Covenant, have a direct and immediate bearing upon the eradication of poverty”.<sup>96</sup> It continued by saying that “in the light of experience gained over many years, including the examination of numerous States parties’ reports, the Committee holds the firm view that poverty constitutes a denial of human rights”.<sup>97</sup>

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<sup>93</sup> Picod, Agnes, *Approaches to Poverty; A Note from the Human Rights Perspective* [Electronic Source], paper presented on researcher’s meeting organized by International Council on Human Rights Policy, 24-25 November 2004, p1 [http://www.ichrp.org/files/papers/145/121\\_Picod.pdf](http://www.ichrp.org/files/papers/145/121_Picod.pdf)

<sup>94</sup> Ibid, p2

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid, p3

In this regard, the United Nations General Assembly in 1991 and 1992 also issued resolutions entitled ‘Human Rights and Extreme Poverty’, highlighting that extreme poverty constitutes an obstacle to the exercise of all human rights.<sup>98</sup>

Moreover, the 1993 World Conference on Human Rights held in Vienna described poverty as “one of the major obstacles hindering the full enjoyment of human rights”.<sup>99</sup> In its ‘Vienna Declaration and Programme of Action’ it stated that “the existence of widespread extreme poverty inhibits the full and active enjoyment of human rights”, setting alleviation and eradication of extreme poverty as a high priority of the international community.<sup>100</sup>

The Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression in its Report noted that people affected by chronic extreme poverty risk becoming socially excluded from full participation in the society in which they are living.<sup>101</sup>

Moreover, the Commission on Human Rights, in its Resolution 1997/11, reaffirmed that “in accordance with the Vienna Declaration and Programme of Action, it is essential for States to foster participation by the poorest people in the decision-making process in their communities, in the promotion of human rights and in efforts to combat extreme poverty”.<sup>102</sup>

Additionally, Limburg Principles on the Implementation of the ICESCR provide also that particular attention should be given to improve the standard of living of the poor and other disadvantaged groups.<sup>103</sup>

Finally, United Nations Millennium Declaration stated “we will spare no effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected. We are committed to making the right to development a reality for everyone and to freeing the entire human race from want”<sup>104</sup>.

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<sup>98</sup> Ibid, p6

<sup>99</sup> Ibid, p7

<sup>100</sup> Ibid

<sup>101</sup> *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development* [Electronic Source]; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression Franc La Rue on 11th Session of Human Rights Council, 30 April 2009 <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.4.pdf>

<sup>102</sup> Ibid.

<sup>103</sup> Stamatopoulou, op.cit, p243

<sup>104</sup> Picod, op.cit., p1

In 1995 at the United Nations World Summit on Social Development, two definitions of poverty were agreed, one of absolute and the other of overall poverty.<sup>105</sup> Absolute poverty is thus defined as a condition characterized by a severe deprivation of basic human needs, including food, safe drinking water, sanitation facilities, health, shelter, education and information, depending not only on income but also on access to services. On the other hand, overall poverty encompasses lack of income, hunger and malnutrition, ill health, limited or lack of access to education and other basic services, increased morbidity and mortality from illness, homelessness and inadequate housing, social discrimination and exclusion, lack of participation in decision-making and in civil, social and cultural life. More importantly, it was acknowledged that poverty occurs in all countries.<sup>106</sup>

However, while today everybody agrees that poverty is morally unacceptable, there is still strong reluctance to consider it as creating legal obligations to act.<sup>107</sup>

## 2.2 POVERTY AND ACCESS TO CULTURE

The World Bank in one of its Development Reports rather poetically stated that “knowledge is like light. Weightless and intangible, it can easily travel the world, enlightening the lives of people everywhere. Yet billions of people still live in the darkness of poverty-unnecessarily”<sup>108</sup>.

Likewise, Amartya Sen, a Nobel Prize winner for Economics in 1998, said that the issue is not whether culture matters but how it matters, i.e. how it may influence development.<sup>109</sup> Therefore, in July 1968 UNESCO organized its first international conference on cultural rights according to which, “cultural rights were important because culture enabled persons to maintain and perpetuate life”.<sup>110</sup> Moreover, the Human Rights Caucus claims that rights with specific information content are a precondition for other rights with a broad developmental content such as “education, citizen empowerment, democratic participation, equal opportunities, cultural and

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<sup>105</sup> Townsend, Peter & Gordon, David. (eds), *World poverty: new policies to defeat an old enemy*, Policy Press, Bristol, 2002, p59

<sup>106</sup> Townsend & Gordon, op.cit, p59

<sup>107</sup> Picod, p10

<sup>108</sup> Schech & Haggis, op.cit, p210

<sup>109</sup> Ginsburgh & Throsby, op.cit, p402

<sup>110</sup> Donders & Volodin, op.cit, p 233

linguistic diversity, economic development and innovation, leading to overall social wealth”.<sup>111</sup> What is more, global cultural products can expose people to other ways of living and being relativizing familiar local ways of thinking and resulting possibly sometimes also in a more critical reception of official line.<sup>112</sup> As Kevin Bacon has said, “knowledge is power”.

The prevalent model today however, is that of selling access to cultural works for a standard fee, which creates significant barriers to cultural participation for the poor, especially in developing countries.<sup>113</sup> And this disparity in access, reinforces and perpetuates already existing social and class inequalities.<sup>114</sup> Moreover, even with the new internet revolution, the gap still persists, with majority of users of ICT and owners of PCs living in the United States, Canada, and western Europe. Therefore, in 2003, while out of 10,000 Africans only 149 used the Internet, and out of 100 persons only 1.38 had a PC, in the United States, out of 10,000 persons, more than 5,000 were Internet users, and out of 100 persons, 66 had PCs.<sup>115</sup> Accordingly, the World Bank has noted that “if knowledge gaps widen, the world will be split further, not just by disparities in capital and other resources, but by the disparity in knowledge. Increasingly, capital and other resources will flow to those countries with the stronger knowledge bases, reinforcing inequality. There is also the danger of widening knowledge gaps within countries, especially developing ones, where a fortunate few surf the World Wide Web while others remain illiterate.”<sup>116</sup>

CESCR in its General Comment No 21 stated that “in practice, poverty seriously restricts the ability of a person to exercise the right to take part in, gain access and contribute to, on equal terms, all spheres of cultural life”<sup>117</sup>. It continued by saying that “culture as a social product must be brought within the reach of all, on the basis of equality, non-discrimination and participation” and that the obligation to fulfil requires that States parties to “provide all that is necessary for fulfilment of the right to take part in cultural life when individuals or communities are unable, for reasons outside their control, to realize this right for themselves with the means at their

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<sup>111</sup> Jørgensen, op.cit, p293

<sup>112</sup> Schech & Haggis, op.cit, p206

<sup>113</sup> Shaver, Lea Bishop & Sganga, Caterina, *The Right to Take Part in Cultural Life: On Copyright and Human Rights*, Wisconsin International Law Journal, Vol. 27, p. 648, 2009 <http://ssrn.com/abstract=1437319>

<sup>114</sup> Krikorian & Kapczynski, op.cit., p61

<sup>115</sup> Jørgensen, op.cit, p230

<sup>116</sup> *Integrating Intellectual Property Rights and Development Policy* [Electronic Source], Commission on Intellectual Property Rights, London, 2002, p. 99 [http://www.iprcommission.org/papers/pdfs/final\\_report/CIPRfullfinal.pdf](http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf)

<sup>117</sup> General Comment No 21, op.cit.

disposal”<sup>118</sup>. Furthermore, CESCR continued by saying that the obligation of a State to protect this right is to be understood as “requiring States to take measures to prevent third parties from interfering in the exercise of [this] rights” and furthermore that “particular attention should be paid to the adverse consequences of globalization, undue privatization of goods and services, and deregulation on the right to participate in cultural life”.<sup>119</sup>

Right of everyone to take part in cultural life is today recognized in many international and regional human rights treaties (see previous Chapter on Access to Culture and Cultural Rights). “Everyone” in this regard should be understood to include the poor as well as the wealthy, or rather all social classes as is asserted also in relevant articles on non-discrimination of the above mentioned treaties.<sup>120</sup> This was also confirmed in CESCR’s General Comment No 21, paragraph 16(b) where it said that “accessibility consists of effective and concrete opportunities for individuals and communities to enjoy culture fully, within physical and financial reach for all in both urban and rural areas, without discrimination”<sup>121</sup>.

However, and as Arts’ economics also observed, performing arts audiences were, and still are usually the ‘elite’ in terms of income, education and profession.<sup>122</sup> Therefore, a survey from the United States Bureau of the Census from 1997 showed that “attendance rises with income per capita and education, reaching maxima of 35% for those with annual incomes above \$100,000 and 45% for persons who have attended graduate school”.<sup>123</sup> Likewise, a Canadian survey on theatre attendances in Montreal from 1989 showed that 54% of audience were university graduates, 45% earned more than \$40,000 per year, and only 11% were employed in primary (manufacturing or construction) industries.<sup>124</sup>

Beside attendances, CDs and DVDs remain also luxury items in most middle- and low-income households. This is especially so in developing and least developed countries where the price/income ratios are much higher than those of US and European markets.<sup>125</sup>

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<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

<sup>120</sup> Shaver & Sganga, op.cit, p646

<sup>121</sup> General Comment No 21, op.cit.

<sup>122</sup> Ginsburgh & Throsby, op.cit, p 419

<sup>123</sup> Ibid, p141

<sup>124</sup> Ibid, p419

<sup>125</sup> Karaganis, Joe (ed), *Media Piracy in Emerging Economies*, SSRIC books, 2011, p58



Therefore, when retail prices and comparative purchasing power prices were used in 2008 on popular CDs and DVDs, the results looked like this:

Coldplay: Viva la Vida (CD)

Country	Price	Comparative Purchasing Power
United States	\$17	-
Russia	\$11	\$55
Brazil	\$14	\$80
South Africa	\$20.5	\$164
India	\$8.5	\$385
Mexico	\$14	\$80.5

The Dark Night (DVD)

Country	Price	Comparative Purchasing Power
United States	\$24	-
Russia	\$15	\$75
Brazil	\$15	\$85.50
South Africa	\$14	\$112
India	\$14.25	\$641
Mexico	\$27	\$154

Source: Karaganis, Joe (ed), *Media Piracy in Emerging Economies*, SSRN books, 2011, p57

Software prices reflected similar situation:

Microsoft Office 2007

Country	Price	Comparative Purchasing Power
United States	\$149	-
Russia	\$149	\$745
Brazil	\$109	\$621
South Africa	\$114	\$912
India	\$100	\$4500
Mexico	\$155	\$883

Source: Karaganis, Joe (ed), *Media Piracy in Emerging Economies*, SSRN books, 2011, p63

And while it may not seem alarming to charge a person in India \$14.25 for a Dark Knight DVD, probably everybody would see it as ludicrous if a person living in the US was supposed to pay for that same DVD \$641 (which in Indian terms is exactly the same value as \$14,25 in the USA).

Moreover, in countries with high income inequality, it is more profitable to sell products at high prices to a wealthy few than to lower the prices in order to raise sales volume.<sup>126</sup> Beside higher profits, high retail prices also prevent parallel imports across borders and help to create certain expectations about how much a good should cost and thus how much one can charge for licensing deals.<sup>127</sup>

Unfortunately, in most of the international debates, this inability of the poor to access cultural goods is marginalized both by the rich (who are disinterested because they are unaffected), but also by the poor. In this regard, Adam Smith argued that the vested interests tend to win because of their "better knowledge of their own interest".<sup>128</sup> Mill, further considered that "the uncultivated cannot be competent judges of cultivation. Those who most need to be made wiser and better, usually desire it least, and, if they desire it, would be incapable of finding the way to by their own lights".<sup>129</sup> He thought that those who are "equally acquainted with, and equally capable of appreciating and enjoying both, do give a most marked preference to the manner of existence which employs their higher faculties" and thus "few human creatures would consent to be changed into any of the lower animals for a promise of the fullest allowance of a beast's pleasures, no intelligent human being would consent to be a fool, no instructed person would be ignoramus, even though they should be persuaded that the fool or the dunce are better satisfied with his lot than they are with theirs".<sup>130</sup> He concluded that "if the fool, or the pig are of a different opinion, it is because they only know their own side of the question".<sup>131</sup> Similarly, French sociologist and philosopher Pierre Bourdieu noted that "as cultural deprivation increases, the awareness thereof actually decreases".<sup>132</sup>

## 2.2.1 MASLOW AND SELF-ACTUALIZATION

In addition to Darwin's survival values, American professor of psychology Abraham Maslow advocated also 'growth values' needed for the person to grow "toward full humaneness, toward actualization of potentialities,

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<sup>126</sup> Krikorian & Kapczynski, op.cit, p461

<sup>127</sup> Karaganis, op.cit.,53

<sup>128</sup> Sen, Amartya K., *Development as freedom*, [New ed.], Oxford University Press, Oxford, 2001, p122

<sup>129</sup> Ginsburgh & Throsby, op.cit., p1185

<sup>130</sup> Moore, Adam D. (ed), *Information ethics: privacy, property, and power*, University of Washington Press, Seattle, 2005, p48

<sup>131</sup> Ibid, p50

<sup>132</sup> Krikorian & Kapczynski, op.cit, p77

toward greater happiness, security, peak experience, toward transcendence, toward richer and more accurate cognition of reality”<sup>133</sup>. He considered an individual as an integrated whole influenced by a certain need as a whole. Therefore, when for example, individuals are hungry, not only do their gastrointestinal functions change, but also their perceptions (food is perceived more enthusiastically), their memories (they are more prone to remember a good meal), their emotions (there is more tension and nervousness) and so on.<sup>134</sup> Or rather, “when people are hungry, they are hungry all over; they are different as individuals from what they are at other time”<sup>135</sup>. Further, he saw this need gratification as a relative or one-step-at-the-time process, and moreover, as being hierarchal.<sup>136</sup> Thus, for example, the human being who is missing everything in life is most likely to be motivated by physiological needs rather than with anything else.<sup>137</sup> His hunger will thus influence his whole vision of his future making his Utopia simply a place where there is plenty of food.<sup>138</sup> Other, higher needs will not even appear in his consciousness until this lower one is satisfied.<sup>139</sup> But, if all physiological needs of an individual are satisfied, there will then emerge a new set of needs, which Maslow called the safety needs meaning security, stability, dependency, protection, and so on. At this point the only important thing for that individual will become safety and protection while physiological needs will become underestimated.<sup>140</sup> After both the physiological and the safety needs are gratified, need for love, affection and belongingness will emerge.<sup>141</sup> On a forth level, Maslow positioned the esteem needs<sup>142</sup> while on the fifth and final level Maslow put the self-actualization need, a need of an individual to do what he or she is fitted for or rather, “what humans can be, they must be”<sup>143</sup>. However, Maslow noted that higher needs are subjectively less urgent and therefore they can disappear permanently.<sup>144</sup> They are also harder to be recognized and according to Maslow, one needs a considerable psychological achievement to be able to recognize one’s own needs.<sup>145</sup>

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<sup>133</sup> Maslow, Abraham H., *Motivation and personality*, 3. ed., Harper & Row, New York, 1987, p61

<sup>134</sup> Ibid, p3

<sup>135</sup> Ibid, p4

<sup>136</sup> Ibid, p7

<sup>137</sup> Ibid, p15

<sup>138</sup> Ibid, p17

<sup>139</sup> Ibid, p41

<sup>140</sup> Ibid, p18

<sup>141</sup> Ibid, p20

<sup>142</sup> Ibid, p21

<sup>143</sup> Ibid, p22

<sup>144</sup> Ibid, p57

<sup>145</sup> Ibid.

Moreover, Maslow claimed that when we desire, we desire for that which might conceivably be actually accomplished. Hence, for example, with the increases in income people find themselves actively wishing for and striving for things that they never dreamed of beforehand.<sup>146</sup> Therefore, what poor people yearn for might very well differ from what richer people yearn for, but only because of the predominance of unsatisfied lower needs and disbelief that certain things can conceivably be achieved.<sup>147</sup>

Thus, I believe, that once the physiological needs are satisfied, in order for an individual to achieve self-actualization, that individual will need among other things also access to culture. Conversely, this access is becoming ever more expensive and reserved for less and less people who can afford it. As Maslow noted when talking about the desire to know and to understand, while an individual does not have to be thought to be curious, he or she may be taught by institutionalization not to be curious.<sup>148</sup>

## 2.2.2 PIERRE BOURDIEU AND CULTURAL CAPITAL

Bourdieu saw capital in three fundamental guises, namely as economic capital; as cultural capital; and as a social capital.<sup>149</sup> Hence, he found it “impossible to account for the structure and functioning of the social world unless one reintroduces capital in all its forms and not solely in the one form recognized by economic theory”.<sup>150</sup> Further, he also distinguished three forms of cultural capital. Accordingly, cultural capital can exist in its embodied state, namely as a competence or skill that cannot be separated from its bearer and can only be acquired through longer investment of time<sup>151</sup>; in the objectified state, namely as cultural goods like pictures, books, instruments, and so on; and in the institutionalized state.<sup>152</sup> This last form of cultural capital happens by means of establishments, such as schools, which by certifying individuals’ competencies and skills through credentials give embodied cultural capital an objective value.<sup>153</sup>

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<sup>146</sup> Ibid, p12

<sup>147</sup> Ibid, p25

<sup>148</sup> Ibid.

<sup>149</sup> Szeman, Imre & Kaposy, Timothy (eds), *Cultural theory: an anthology*, Wiley-Blackwell, Oxford, 2011, p82

<sup>150</sup> Ibid, p81

<sup>151</sup> Wininger, Elliot B. & Lareau Annette, *Cultural Capital* [Electronic Resource], The Collage at Brockport, retrieved May 6, 2011 [http://www.brockport.edu/sociology/faculty/Cultural\\_Capital.pdf](http://www.brockport.edu/sociology/faculty/Cultural_Capital.pdf)

<sup>152</sup> Szeman, op.cit, p82

<sup>153</sup> Wininger & Lareau, op.cit.

Bourdieu further continued by developing an idea of ‘habitus’, i.e. the context through which we understand the world and acquire beliefs, values and knowledge.<sup>154</sup> He considered that obtaining of cultural capital in this way may be quite unconscious.<sup>155</sup> And, exactly because of this, “the social conditions of its transmission and acquisition are more disguised than those of economic capital” making it “predisposed to function as symbolic capital, i.e. to be unrecognized as capital and recognized as legitimate competence”<sup>156</sup> validated by the educational system which in return seems to award its honours solely according to natural qualities of individuals.<sup>157</sup>

And as the educational qualifications become increasingly the condition for legitimate access to a growing number of positions, particularly the dominant ones<sup>158</sup>, this new way of succession of power, one that on the surface looks fair and objective is therefore growing in relevance<sup>159</sup>.

After Bourdieu first introduced it, the idea of ‘cultural capital’ has been defined and analyzed by many. Moreover, cultural capital was extended to encompass also possible correlations to subjective changes in individual well-being.<sup>160</sup>

Thus, Sharon Jeannotte, Senior Fellow at the University of Ottawa, showed that cultural activities facilitate social participation, while independent researcher and writer François Matarasso showed that extensive involvement in artistic activities has not only “a positive effect on social cohesion, community empowerment, self-determination, local images, identity, and so forth”, but also on personal development, imagination, and vision building.<sup>161</sup> Moreover, Professor Fred Coalter from University of Stirling argued that visiting a museum directly facilitates self-respect, self-confidence, and subjective well-being.<sup>162</sup>

Lastly, in a study on the effect of various cultural experiences on life satisfaction and happiness, Seoyong Kim from Ajou University and Hyesun Kim from Korea University claim that, the mean scores of life satisfaction, measured on four-point scales, are higher in the group who had some cultural experiences than in the non-experienced group regardless of the

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<sup>154</sup> Barker, Chris, *The Sage dictionary of cultural studies*, SAGE, London, 2004, p81

<sup>155</sup> Wininger & Lareau, op.cit

<sup>156</sup> Szeman, op.cit, p84

<sup>157</sup> Ibid, p 90

<sup>158</sup> Ibid

<sup>159</sup> Wininger & Lareau, op.cit.

<sup>160</sup> Kim, Seoyong & Kim, Hyesun, *Does Cultural Capital Matter?: Cultural Divide and Quality of Life* [Electronic Resource], Social Indicators Research, Vol 93, No 2, p297

<sup>161</sup> Ibid, p297

<sup>162</sup> Ibid, p298

type of cultural activity<sup>163</sup> and even if the cultural experience happened just once.<sup>164</sup> Cultural experiences they deemed as cultural capital for this study were literature activities, paintings/exhibits, classic music concerts or opera performances, plays, dance performances, movies, other types of music concerts, and entertainment shows.<sup>165</sup>

	Life satisfaction (mean)			Happiness (mean)		
	Non-experienced	Experienced	F-value (p-value)	Non-experienced	Experienced	F-value (p-value)
1. Literature activities	2.83	3.00	2.94 (0.086)	2.85	3.13	6.88 (0.009)**
2. Painting exhibits	2.82	2.91	3.95 (0.047)*	2.85	3.02	13.50 (0.000)**
3. Classical music or opera performance	2.82	2.92	2.60 (0.107)	2.85	3.04	10.26 (0.001)**
4. Traditional art performance	2.82	3.07	14.30 (0.000)**	2.85	3.07	10.63 (0.001)**
5. Plays	2.82	2.91	4.65 (0.031)*	2.85	2.96	7.97 (0.005)**
6. Dance performances	2.83	2.94	0.90 (0.344)	2.86	2.94	0.48 (0.497)
7. Movies	2.73	2.87	35.24 (0.000)**	2.75	2.91	44.87 (0.000)**
8. Music concerts or entertainment shows	2.83	2.86	0.51 (0.477)	2.85	2.95	4.88 (0.027)*
Overall	2.73	2.87	32.95 (0.000)**	2.74	2.91	46.63 (0.000)**

\*  $p < 0.1$ ; \*\*  $p < 0.05$ ; \*\*\*  $p < 0.01$

Source: Kim, Seoyong & Kim, Hyesun, *Does Cultural Capital Matter?: Cultural Divide and Quality of Life*, p301

Further, they classified all respondents in four groups: those who had never experienced cultural activities ('nonexperienced'); those who had experienced them once or twice (Group 1); those who had experienced them three to five times (Group 2); and those who had experienced them over six times (Group 3).<sup>166</sup> They discovered that as the frequency of cultural experience goes up, life satisfaction or happiness also increases.<sup>167</sup>

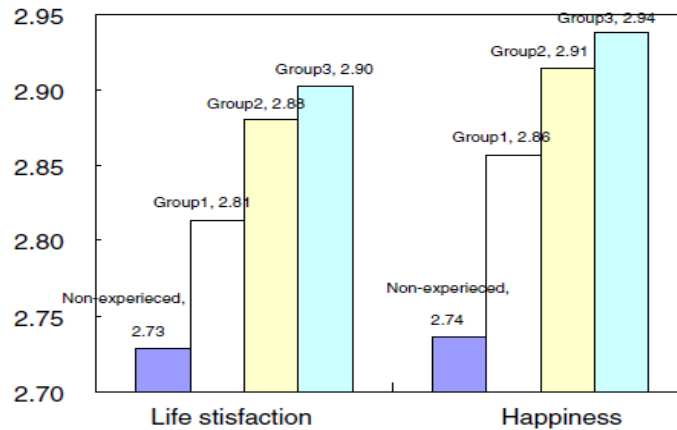
<sup>163</sup> Ibid, p 300

<sup>164</sup> Ibid, p301

<sup>165</sup> Ibid, p297

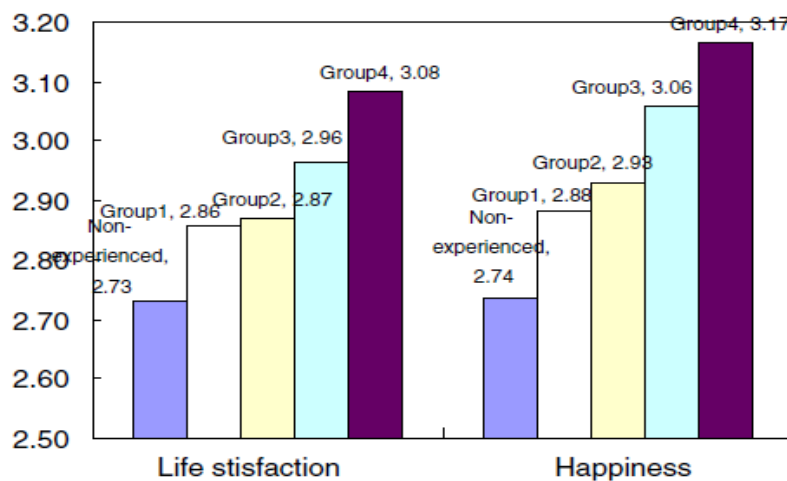
<sup>166</sup> Ibid, p302

<sup>167</sup> Ibid



Source: Kim, Seoyong & Kim, Hyesun, *Does Cultural Capital Matter?: Cultural Divide and Quality of Life*, p 303

Moreover, they also divided respondents into five groups regarding the degree of diversity of cultural experiences. Thus, nonexperienced were the group that have never experienced any of eight cultural activities; Group 1 were respondents who have experienced one type of activity; those having experienced two types of activities were classified as Group 2; group that have experienced three types of activities was classified as Group 3; while Group 4 comprised of those who experienced no less than four types of activities. Results showed the more diverse experiences the groups had, the higher their life satisfaction.<sup>168</sup>

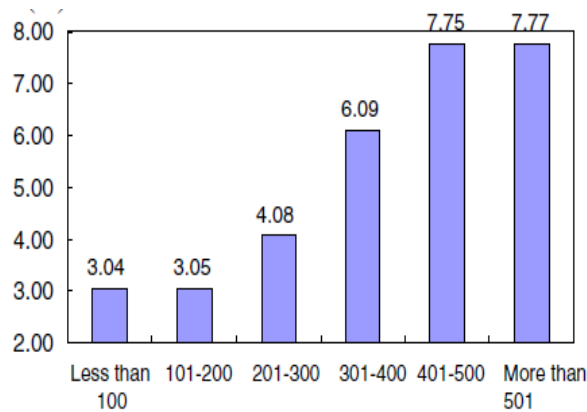


Source: Kim, Seoyong & Kim, Hyesun, *Does Cultural Capital Matter?: Cultural Divide and Quality of Life*, p 303

Finally, they also found exponential correlation between income and cultural experience, namely that those with higher income also enjoy more cultural experiences.<sup>169</sup>

<sup>168</sup> Ibid.

<sup>169</sup> Ibid, p309



Amounts in won/mean score of cultural experience

Source: Kim, Seoyong & Kim, Hyesun, *Does Cultural Capital Matter?: Cultural Divide and Quality of Life*, p 310

### 2.2.3 EUROPE, ACCESS TO CULTURE AND SOCIAL EXCLUSION

Despite the relative wealth of EU countries, and the redistributive effects of their welfare states, there are still high levels of poverty in many of them.<sup>170</sup>

According to EUROSTAT (table below), almost sixty million people in the EU have an income of less than half the average and are therefore considered poor.

**Table 3.1: Number and percentage of the population living on incomes below half the average in 14 European countries (1994)**

Country	Number of people below half average income	% of the population below half average income
UK	11,426,766	20
Germany	11,327,673	14
Italy	9,321,853	17
France	7,949,907	14
Spain	7,196,406	19
Portugal	2,424,533	25
Greece	2,041,923	20
Belgium	1,474,158	15
Netherlands	1,275,048	8
Austria	1,108,082	14
Ireland	837,490	23
Denmark	386,015	7
Finland	192,153	4
Luxembourg	56,734	14

<sup>170</sup> Abrams, Dominic, Christian, Julie & Gordon, David (eds), *Multidisciplinary handbook of social exclusion research*, John Wiley, Chichester, 2007, p201



Lack of finance can affect access to cultural services in a number of ways: (i) a preoccupation with survival on a day to day basis can lead to little time or energy being available to access and participate in cultural services and activities; (ii) exclusion from social networks can lead to a lack of knowledge of cultural activities; (iii) it may not be possible to afford transport to access cultural activities, especially for those living in rural areas; and (iv) the cost of attending or participating in cultural activities can be just too high to be affordable.<sup>171</sup>

Thus, improving access to culture for groups of society whose financial and educational background would imply less or none has been on the agenda across Europe for more than 50 years.<sup>172</sup>

However, the specific thing with European policy and access to culture is its tying the access to culture with social exclusion of certain groups which out of various reasons don't have access to it. Social exclusion happens when individuals or groups for one or more reasons are prevented from participating in and benefiting from the society in which they find themselves.<sup>173</sup> Therefore, social exclusion is not only about the lack of resources, but also about the processes by which some individuals and groups become marginalized in society.<sup>174</sup>

Accordingly, in 1995 at the Social Development Summit in Copenhagen it was stated that "a socially inclusive society based on the principle of equality of all rights for all people forms the basis of the definition of social inclusion".<sup>175</sup> Further, in 1998 in its paper 'In from the Margins', Council of

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<sup>171</sup> *Report of a thematic study using transnational comparisons to analyze and identify cultural policies and programmes that contribute to preventing and reducing poverty and social exclusion* [Electronic Version], The Centre for Public Policy, 2004, p 48 [http://ec.europa.eu/employment\\_social/social\\_inclusion/docs/studyculture\\_en.pdf](http://ec.europa.eu/employment_social/social_inclusion/docs/studyculture_en.pdf)

<sup>172</sup> Inkei, Peter, *The Issue of Access to Culture in Today's Europe* [Electronic Resource], paper presented during the meeting on The contribution of culture in combating poverty and social exclusion, organized by EU in Brussels, 17-19 2010, p1 [http://www.culture.be/fileadmin/sites/culture/upload/culture\\_super\\_editor/culture\\_editor/documents/Relations\\_IntNat/P. Inkei - BudObs- Article.pdf](http://www.culture.be/fileadmin/sites/culture/upload/culture_super_editor/culture_editor/documents/Relations_IntNat/P._Inkei_-_BudObs- Article.pdf)

<sup>173</sup> Report of a thematic study, op.cit, p214

<sup>174</sup> Abrams, Christian & Gordon, op.cit, p2

<sup>175</sup> *Realising Human Rights for Poor People* [Electronic Source], Target Strategy Paper by the UK Department for International Development, DFID, London, 2000, p14 [http://www2.ohchr.org/english/issues/development/docs/human\\_rights\\_tsp.pdf](http://www2.ohchr.org/english/issues/development/docs/human_rights_tsp.pdf)

Europe stated that “the denial of opportunity impoverishes us all. It should be countered by the adoption of policies of inclusion”.<sup>176</sup>

Moreover, after the Articles 136 and 137 of the Amsterdam Treaty extended the European Union’s powers to combat poverty and social exclusion, European social inclusion strategy was launched in March 2000 at the Lisbon summit of the European Council<sup>177</sup>. Additionally, in autumn of the same year, during Nice Summit, the European Council adopted four key objectives for overcoming poverty and social exclusion, one of which was “facilitating access to resources, rights, goods and services for all”.<sup>178</sup> Further, in its ‘Draft Joint Report on Social Inclusion’ from 2001, it stated that “access to and participation in cultural activity is a core part of human existence” and is “important tool in the activation and reintegration of those individuals and groups who are most distant from the labor market and who have the lowest levels of participation in society”.<sup>179</sup>

Finally, only last year the Council of the European Union adopted ‘Conclusions on the role of culture in combating poverty and social exclusion’, in which it states that “everyone has the right to have access to cultural life and to participate in it, to aspire to education and lifelong learning, to develop his/her creative potential, to choose and have his/her cultural identity and affiliations respected in the variety of their different means of expression”.<sup>180</sup> It continued by stating that “access to culture and participation in and education in culture can play an important role in combating poverty and in promoting greater social inclusion in that they can encourage, amongst other things individual personal fulfilment, expression, critical consciousness, freedom and emancipation, enabling people to take an active part in social life” and help “the social integration of isolated groups, such as the elderly, and groups experiencing poverty or social exclusion, and raising awareness of and combating stereotypes and prejudice against particular social and cultural groups”.<sup>181</sup> It therefore invited Member States to remove all obstacles to access to culture by among other things “promoting greater awareness within the cultural sector of the need to welcome all types of public and recognize their different needs”,

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<sup>176</sup> Report of a thematic study, op.cit, p19

<sup>177</sup> Abrams, Christian & Gordon, op.cit, p 197

<sup>178</sup> Report of a thematic study, op.cit, p 12

<sup>179</sup> Ibid.

<sup>180</sup> *Council Conclusions on the Role of Culture in Combating Poverty and Social Exclusion* [Electronic Source], Official Journal of European Union, C 324/16, 1.12.2010, p16 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:324:0016:0017:EN:PDF>

<sup>181</sup> Ibid.

“pursuing policies designed to cut the cost of access to culture for specific target groups” and “pursuing policies in the field of literacy, including digital literacy, basic skills and learning national languages”.<sup>182</sup>

## 2.3 DEVELOPMENT AND THE POOR

Since different ways of understanding what development is and therefore should improve lead to different policies and consequences<sup>183</sup>, it is very important to start with the definition of the word. The word development can have many meanings. Thus, while for some, development means more economic prosperity, others see it as a new word for neo-colonialism. Still, some are more prone to see it in a more holistic way as encompassing personal and social progress.<sup>184</sup>

Moreover, different approaches to development also perceive poverty differently: (1) monetary approaches impute a monetary value to poverty and see it as either income-based or consumption-based<sup>185</sup>; (2) capability approaches see poverty as the failure to achieve certain minimal or basic capabilities<sup>186</sup>; (3) social exclusion approach sees poverty as excluding individuals and groups of people to participate in society and the shaping of that society and the benefits derived from it<sup>187</sup>; while (4) participatory poverty approaches focus on how poor people articulate what poverty means for them, and how they should respond<sup>188</sup>.

In international arena, for the most part, development was, and still is “a top-down, ethnocentric, and technocentric approach”, which treats people and cultures as abstract, statistical figures “to be moved up and down in the charts of ‘progress’”.<sup>189</sup> This approach usually equates development with economic growth, presuming that by raising people’s income, their quality of life will also increase. Thus the official line of thinking usually goes

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<sup>182</sup> Ibid, p 17

<sup>183</sup> Deneulin, Séverine & Shahani, Lila (eds), *An introduction to the human development and capability approach: freedom and agency*, Earthscan, London, 2009 , p6

<sup>184</sup> Ibid, p3

<sup>185</sup> Ibid.

<sup>186</sup> Ibid, p4

<sup>187</sup> Ibid, p5

<sup>188</sup> Ibid, p6

<sup>189</sup> Escobar, Arturo, *Encountering development: the making and unmaking of the third world*, Princeton University Press, Princeton, 1995, p44

something like this: “if only the poor countries could get their economies to grow and modernize, they would become wealthy and developed”.<sup>190</sup>

However, in 1950s and 1960s, when many developing nations did reach their economic growth targets without automatically improving the level of living for the majority of their people, it became apparent that something was not quite right with this narrow definition of development.<sup>191</sup> Worse still is the fact that the global growth is becoming less effective at reducing poverty. Therefore, while in the 1980s it took \$45 of global economic growth, to achieve just \$1 of progress in reducing poverty, in the 1990s this figure has risen to \$166.<sup>192</sup>

Today, more than 1.2 billion people live on less than \$1 per day at purchasing power parity, and more than 2.8 billion, i.e. almost half the world’s population live on less than \$2 a day.<sup>193</sup> There are people in sub-Saharan Africa living on less than three cents per day.<sup>194</sup>

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<sup>190</sup> Edelman, Marc & Haugerud, Angelique (eds), *The anthropology of development and globalization: from classical political economy to contemporary neoliberalism*, Blackwell Pub., Malden, MA, 2005, p369

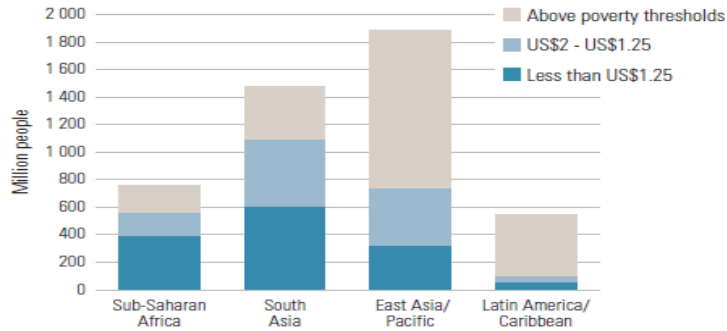
<sup>191</sup> Todaro, Michael P. & Smith, Stephen C., *Economic development*, 9. ed., Pearson/Addison Wesley, Harlow, 2006, p16

<sup>192</sup> Green, Duncan & Sen, Amartya K., *From poverty to power: how active citizens and effective states can change the world*, Oxfam GB, Oxford, 2008, p181

<sup>193</sup> Todaro & Smith, op.cit, p 193

<sup>194</sup> Drahos, Peter & Mayne, Ruth (eds), *Global intellectual property rights: knowledge, access, and development*, Palgrave, Basingstoke, 2002, p92

**Figure 3.22: Mapping global poverty**  
Selected poverty indicators by region, 2005



**Population living on less than US\$1.25 a day**

	Sub-Saharan Africa	South Asia	East Asia/Pacific	Latin America/Caribbean
Incidence of poverty (%)	51	40	17	8
Average consumption (2005 US\$)	0.73	0.93	0.95	0.77

Notes: 'Incidence of poverty' is the proportion of the population whose consumption expenditure is less than US\$1.25 a day, at 2005 exchange rates. 'Average consumption' is the average daily consumption expenditure of those below this poverty line.  
Source: Chen and Ravallion (2008).

Source: *Reaching the Marginalized* [Electronic Source], EFA Global Monitoring Report 2010, Unesco publ. Paris, 2010, p165

Furthermore, empirical evidence shows that there is no automatic relationship between a high GDP per capita and the ability of people to thrive. Thus, when countries are arranged according to the Human Development Index, the wealthier countries in terms of GDP per capita are not necessarily also the ones with better health conditions or education.<sup>195</sup>

Trends in the hybrid HDI and components by regional and HDI groups, 135 countries, 1970–2010

	Hybrid HDI		Life expectancy				Literacy			Gross enrolment			Income	
	Value	% change	Value	% change	Value	% change	Value	% change	Value	% change	Value	% change	Value	% change
	2010	1970–2010 1990–2010	2010	1970–2010 1990–2010	2010	1970–2010 1990–2010	2010	1970–2010 1990–2010	2010	1970–2010 1990–2010	2010	1970–2010 1990–2010	2010	1970–2010 1990–2010
<b>Regional groups</b>														
Developing countries	0.64	57 23	68 21 8	81 61 21	66 28 24	5,873 184 89								
Arab States	0.66	65 20	70 37 10	74 149 41	64 89 22	8,603 66 44								
East Asia and the Pacific	0.71	96 35	73 23 9	94 76 18	69 7 31	6,504 1,183 352								
Europe and Central Asia	0.75	13 4	69 3 2	97 7 2	82 17 7	11,866 120 20								
Latin America and the Caribbean	0.77	32 12	74 24 9	92 27 10	83 59 16	11,092 88 42								
South Asia	0.57	72 31	65 33 12	66 113 46	59 64 29	3,398 162 119								
Sub-Saharan Africa	0.43	53 21	52 19 7	65 183 43	54 109 42	1,466 20 28								
Developed countries	0.89	18 7	80 13 6	99 2 1	92 33 14	37,185 126 38								
OECD	0.89	18 7	80 13 6	99 2 1	93 33 14	37,105 125 38								
Non-OECD	0.86	24 9	80 14 7	96 13 6	79 29 10	40,043 263 58								

Source: *The Real Wealth of Nations: Pathways to Human Development, Human Development Report 2010- 20th Anniversary Edition, UNDP, 2010, p28*

<sup>195</sup> Deneulin & Shahani, op.cit.

The view that income and wealth are not ends in themselves but instruments for other purposes can be traced as far back as to Aristotle.<sup>196</sup> Or as the 1995 Human Development Report asked: “What is the meaning of growth if it is not translated into the lives of people?”<sup>197</sup>

Consequently, a single issue has come to dominate within the broad debate about development, namely “which is more efficient, growth or redistribution?”<sup>198</sup>

Therefore, as of fairly recently a number of new, broader approaches to development has arisen using various adjectives such as ‘sustainable development’, ‘cultural development’ or ‘human development’ to try to emphasize a more human-centric aspects of development.<sup>199</sup> It became clear that “development must [...] be aimed at the spiritual, moral and material advancement of the whole human being, both as a member of society and from the point of view of individual fulfilment”<sup>200</sup>.

### **2.3.1 RIGHT TO DEVELOPMENT**

Already in its Article 55, the UN Charter mandates the United Nations with promotion of higher standards of living; conditions of economic and social progress and development; solutions of international economic, social, health, and related problems; international cultural and educational cooperation; and universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion, while in its Article 56, it obliges all Member States to take joint and separate action in co-operation with the Organization for the achievement of this purposes.<sup>201</sup>

In this regard, Article 1(1), common to the ICCPR and ICESCR further recognize the right of self-determination, i.e. the right to freely pursue economic, social and cultural development.<sup>202</sup>

Thus, in 1961, the United Nations General Assembly declared its first ‘Development Decade’, with the objective to support both developed and

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<sup>196</sup> Todaro & Smith, p17

<sup>197</sup> Ibid, p3

<sup>198</sup> Edelman & Haugerud, op.cit, 370

<sup>199</sup> Goncalves & Paola, op.cit, p16

<sup>200</sup> Ibid, p15

<sup>201</sup> *Charter of the United Nations* [Electronic Source], 26 June 1945, <http://www.un.org/en/documents/charter/index.shtml>

<sup>202</sup> ICESCR, op.cit.

developing countries in their efforts to achieve self-sustaining growth and social advancement through economic growth.<sup>203</sup> However, it soon became obvious that pure economic growth tended to concentrate income and wealth in the hands of the few, leaving many in poverty. Therefore, in the 1970s, academic community started trying to find ways of linking economic growth and redistribution and by the end of the 1970s, a newly established ‘basic needs’ approach came to be more widely recognized.<sup>204</sup>

Furthermore, in the 1980s, another new approach emerged, i.e. the ‘Right to Development’ (further RTD) approach, focusing on a man as the centre of development. This RTD approach was first officially affirmed in 1981 by the Organization of African Unity and then, in 1986, by the UN General Assembly with its Resolution 41/128 on ‘Declaration of the Right to Development’, adopted by 149 votes in favour, 8 abstentions and only one vote against, namely that of the USA.<sup>205</sup> Declaration on Right to Development starts by reiterating in its preamble, and later in its Article 6 that “all human rights and fundamental freedoms are indivisible and interdependent and that, in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights and that, accordingly, the promotion of, respect for and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms”.<sup>206</sup> It continues by stating in its Article 1 that “the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized”<sup>207</sup>, using similar terminology of UDHR’s Article 28, which states that “everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized”.<sup>208</sup> Further, in its Article 2 it reiterates that “human person is the

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<sup>203</sup> Deneulin & Shahani, op.cit, p 57

<sup>204</sup> Ibid.

<sup>205</sup> Sitta, Alessandro, *The Right to Development in the Human Rights Framework for Development* [Electronic Source], p6  
[http://www.capabilityapproach.com/pubs/5\\_1\\_Sitta.pdf](http://www.capabilityapproach.com/pubs/5_1_Sitta.pdf)

<sup>206</sup> *Declaration on the Right to Development*, UN GA Resolution 41/128, 4. December 1986 <http://www2.ohchr.org/english/law/rtd.htm>

<sup>207</sup> Ibid.

<sup>208</sup> Marks, Stephen P. (ed), *Implementing the Right to Development; The Role of International law* [Electronic Version], Friedrich Ebert Stiftung, 2008, p118  
<http://library.fes.de/pdf-files/bueros/genf/05659.pdf>

central subject of development and should be the active participant and beneficiary of the right to development”, while in its Article 8 it obliges states to “undertake, at the national level, all necessary measures for the realization of the right to development” and to ensure “equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income” and finally to take measures necessary for eradicating all social injustices.<sup>209</sup> Lastly, in its Article 9, the Declaration asserts that all aspects of the right to development are “indivisible and interdependent and each of them should be considered in the context of the whole”.<sup>210</sup>

From then onwards, the RTD was asserted in many international meetings, including the 1992 United Nations Conference on Environment and Development, the 1993 World Conference on Human Rights which reaffirmed the right to development as “a universal and inalienable human right” and as “an integral part of fundamental human rights”<sup>211</sup>, the 1995 World Summit on Social Development and the 2000 United Nations Millennium Declaration.<sup>212</sup>

The United Nations Millennium Declaration was adopted in New York in September 2000 during the UN Millennium Summit and it sets eight development goals to be achieved by the year 2015, which are now known as the Millennium Development Goals.<sup>213</sup> These goals are divided into 21 targets with 60 indicators against which progress is tracked.<sup>214</sup> However, while they deal with poverty and education, they do not concern themselves with empowerment and participation (except in relation to gender), sustainability, equity and distributional issues with which human development approach is concerned.<sup>215</sup>

Thus, one can notice a general shift in discourse about development from a context of need, charity and aid to that of a right, responsibility and cooperation.<sup>216</sup> However, the only binding international human rights treaty which has recognized the right to development is still only the ACHPR in its Art 22(1) in which it states that “all peoples shall have the right to their economic, social and cultural development with due regard to their freedom

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<sup>209</sup> Declaration on the Right to Development, op.cit.

<sup>210</sup> Ibid.

<sup>211</sup> Building Knowledge Economies, op.cit., p124

<sup>212</sup> Sitta, op.cit, p6

<sup>213</sup> Dutfield & Suthersanen, op.cit, p272

<sup>214</sup> Deneulin & Shahani, op.cit, p66

<sup>215</sup> Ibid.

<sup>216</sup> Sitta, op.cit, p17



and identity and in the equal enjoyment of the common heritage of mankind”.<sup>217</sup>

### **2.3.1.1 BASIC-NEEDS APPROACH**

The basic needs approach was formally introduced for the first time in ILO’s ‘Report on Employment, Growth and Basic Needs’ from 1977 resulting from its data analysis on employment conditions in developing countries which showed that economic growth and employment do not necessarily guarantee freedom from poverty.<sup>218</sup> Thus, for example, in Brazil, a per capita GNP is \$4720, but still over 16 million people continue living on a dollar a day.<sup>219</sup> Therefore, having concluded that economic growth in itself is not enough, the basic needs approach saw development as a way of promoting the minimum standard of living for the poorest people in the society.<sup>220</sup> It therefore identifies as its development goal equitable distribution of wealth and resources, while also stressing the importance of health and education.<sup>221</sup>

Basic needs idea was later on taken up by the World Bank, whose 1981 World Development Report became in a way policy paper of this approach.<sup>222</sup> However, although its development objective is to provide the conditions for a full human life, the basic needs approach is primarily focused only on the goods and services needed to achieve the minimum requirements for a decent life.<sup>223</sup>

#### **2.3.1.1.1 THE WORLD BANK AND DEVELOPMENT**

Ever since its establishment in 1944, the World Bank mainly perceived development as the equivalent of an economic growth of a country. Only in the 1980s did it embrace a more broader approach to development through basic needs strategy. Thus, in its 1991 World Development Report, it stated that the goal of development is to improve the quality of life and that while this generally involves rising incomes, it also means “better education, higher standards of health and nutrition, less poverty, cleaner environment, more equality of opportunity, greater individual freedom, and a richer cultural life”.<sup>224</sup>

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<sup>217</sup> Realising Human Rights for the Poor People, op.cit, p123

<sup>218</sup> Deneulin & Shahani, op.cit, p57

<sup>219</sup> Drahos & Mayne, op.cit, p 92

<sup>220</sup> Schech & Haggis, op.cit, p12

<sup>221</sup> Ibid.

<sup>222</sup> Deneulin & Shahani, p57

<sup>223</sup> Ibid

<sup>224</sup> Todaro & Smith, op.cit, p35

Parallel to its views on development, the World Bank initially defined poverty as merely “the inability to attain a minimal standard of living”, thus opting for a ‘consumption-based’ standard comprised of the expenditure necessary to buy basic necessities and a further amount necessary to participate in everyday life of society. Thus, it set a universal poverty line equaling \$370 per person per year at 1985 prices for all the poorest developing countries. Those with incomes per capita of less than \$370 were therefore deemed ‘poor’ while those with less than \$275 per capita per year were considered ‘extremely poor’.<sup>225</sup> However, the Bank’s 2000/2001 World Development Report extended its view on poverty to encompass also low achievement in education and health.<sup>226</sup>

### **2.3.1.2 AMARTYA SEN AND ‘CAPABILITIES APPROACH’ TO DEVELOPMENT**

Amartya Sen saw development as “expansion of the ‘capabilities’ of persons to lead the kind of lives they value and have reason to value”.<sup>227</sup> Therefore, he saw poverty, not only as low income, but as a deprivation of basic capabilities<sup>228</sup>, or rather, he thought that more important than an economic growth was how this economic growth is used.<sup>229</sup> Consequently, for him development meant the removal of major sources of ‘unfreedom’<sup>230</sup>, since “deprived people tend to come to terms with their deprivation because of the sheer necessity of survival, and they may, as a result, lack the courage to demand any radical change, and may even adjust their desires and expectations to what they unambitiously see as feasible”.<sup>231</sup> For this reason, he saw social and economic factors, such as basic education, as important not only on their own, but also as empowering tools for the people.<sup>232</sup> For example, denying the person the opportunity of education is immediately also contrary to the basic conditions of participatory freedom, since participation requires knowledge.<sup>233</sup> Moreover, a person who is denied the

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<sup>225</sup> Townsend & Gordon, op.cit, p63

<sup>226</sup> Riddell, Roger, *Approaches to Poverty; A Note from the “Development” Perspective* [Electronic Source], paper presented on researcher’s meeting organized by International Council on Human Rights Policy, 24-25 November 2004, p10 [http://www.ichrp.org/files/papers/144/121\\_Riddell.pdf](http://www.ichrp.org/files/papers/144/121_Riddell.pdf)

<sup>227</sup> Sen, op.cit, p18

<sup>228</sup> Ibid, p20

<sup>229</sup> Ibid, p44

<sup>230</sup> Ibid, p1

<sup>231</sup> Ibid, p63

<sup>232</sup> Ibid.

<sup>233</sup> Ibid, p33

opportunity of elementary schooling is not only deprived as a youngster, but also handicapped throughout the life.<sup>234</sup>

Therefore, with his capability approach, Sen looks beyond income measures and access to commodities that were focus point in basic-needs approach, to concentrate more thoroughly on how human beings are able to function.<sup>235</sup> However, he also rejected the utilitarian approach of maximizing pleasure, quoting William Cowper's verse: "Freedom has a thousand charms to show, That slaves, howe'er contented, never know."<sup>236</sup> Thus, for him, and the capabilities approach in general, it is the empowerment that matters.<sup>237</sup> And, in this way, literacy, education and access to knowledge can empower people to make informed choices and hold governments accountable.<sup>238</sup>

### 2.3.1.3 HUMAN DEVELOPMENT APPROACH

Building on Sen's capabilities approach, renowned Pakistani economist Mahbub ul Haq coined in 1990 the term 'human development'<sup>239</sup> which was subsequently used as the title of the new annual development report prepared by the United Nations Development Programme, namely Human Development Report. In a way, it came into existence as the answer to the need of a broader assessment of the world's economic and social progress than it was done by the usual income and economic growth evaluation dominant in the World Bank's annual World Development Reports.<sup>240</sup>

Human Development therefore put people at the centre of development<sup>241</sup>, defining human development as a process of enlarging people's choices, emphasizing especially the freedom to be healthy, to be educated and to enjoy a decent standard of living. But beside these main goals, it saw human development and wellbeing as encompassing a much broader range of principles such as equity, sustainability and respect for human rights.<sup>242</sup>

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<sup>234</sup> Ibid, p284

<sup>235</sup> Wong, Tzen, PIIPA & Dutfield, Graham (eds), *Intellectual Property and Human Development; Current Trends and Future Scenarios* [Electronic Resource], PIIPA, Cambridge University Press, 2011, p22  
[http://www.piipa.org/index.php?option=com\\_content&view=article&id=99&Itemid=77](http://www.piipa.org/index.php?option=com_content&view=article&id=99&Itemid=77)

<sup>236</sup> Sen, op.cit, p298

<sup>237</sup> *The Real Wealth of Nations: Pathways to Human Development, Human Development Report 2010- 20th Anniversary Edition* [Electronic Source], UNDP, 2010, p66  
[http://www.undp.org.ua/downloads/HDR\\_2010\\_EN\\_Complete.pdf](http://www.undp.org.ua/downloads/HDR_2010_EN_Complete.pdf)

<sup>238</sup> Ibid, p 67

<sup>239</sup> Deneulin & Shahani, op.cit, p25

<sup>240</sup> Ibid.

<sup>241</sup> *The Real Wealth of Nations*, op.cit, p2

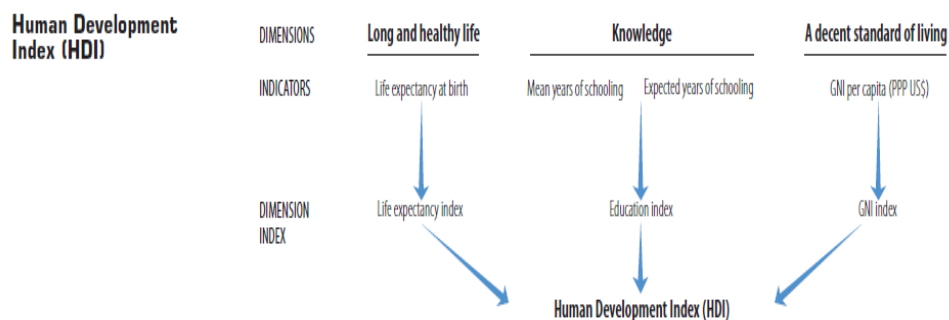
<sup>242</sup> Ibid.

Thus, in its first chapter, titled ‘Defining and Measuring Human Development’, the 2010 Human Development Report stated that the basic objective of development is to create an enabling environment for people to live long, healthy and creative lives.<sup>243</sup>

There are today four essential components in the human development model<sup>244</sup>: (1) equity, which should be understood as equity in opportunities, not necessarily in results since how people choose to use their opportunities is their own concern;<sup>245</sup> (2) sustainability, which is concerned with the next generation and their opportunity to enjoy the same wellbeing that we enjoy now;<sup>246</sup> (3) productivity, which implies investments in people and an enabling macroeconomic environment for them to achieve their maximum potential;<sup>247</sup> and (4) empowerment, which means that people are in a position to exercise choices of their own free will.<sup>248</sup>

### 2.3.1.3.1 HUMAN DEVELOPMENT INDEX

Human Development Index measures three key components: (1) longevity, which is measured by life expectancy at birth; (2) knowledge, which is measured by adult literacy and mean years of schooling, with a ratio of two-thirds to literacy and one-third to mean years of schooling; and (3), income, which is measured as the current global average real GDP per capita in PPP dollars.<sup>249</sup>



Source: *The Real Wealth of Nations: Pathways to Human Development, Human Development Report 2010- 20th Anniversary Edition, UNDP, 2010, p215*

<sup>243</sup> Ibid, p12

<sup>244</sup> Haq, Mahbub ul, *Reflections on human development: how the focus of development economics shifted from national income accounting to people-centred policies, told by one of the chief architects of the new paradigm*, Oxford Univ. Press, New York, 1995, p16

<sup>245</sup> Ibid, p17

<sup>246</sup> Ibid, p18

<sup>247</sup> Ibid, p19

<sup>248</sup> Ibid, p20

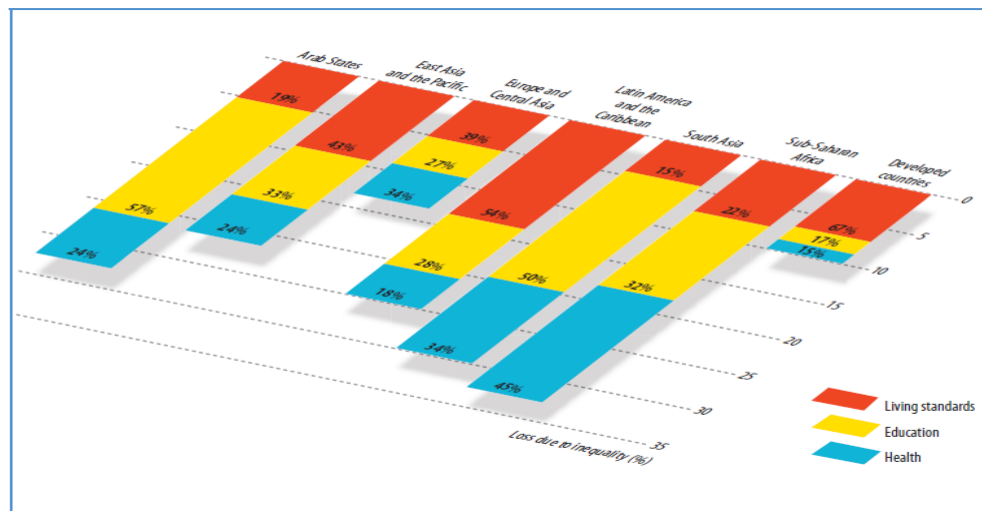
<sup>249</sup> Ibid, p49

It ranks annually all countries on a scale of 0 (lowest human development) to 1 (highest) in three groups: low human development (0.0 to 0.499), medium human development (0.50 to 0.799), and high human development (0.80 to 1.0).<sup>250</sup> What HDI shows is that a country can be much better than might be expected at low level of income and conversely, that substantial income growth can still accomplish relatively little in regard to human development.<sup>251</sup>

### 2.3.1.3.2 INEQUALITY ADJUSTED HDI

There is a strong negative relationship between inequality and human development which suggests that reducing inequality can significantly improve human development.<sup>252</sup>

Loss in the HDI and its components due to inequality, by region



Source: *The Real Wealth of Nations: Pathways to Human Development, Human Development Report 2010- 20th Anniversary Edition, UNDP, 2010, p88*

Therefore, the 1990s Human Development Report also introduced inequality-adjusted HDI (further IHDI) to measure not only country's average human development, through health, education and income indicators, but also how they are distributed.<sup>253</sup> Thus, while under perfect equality the HDI and the IHDI should be equal, when there is inequality in the distribution of health, education and income, the HDI of an average person in a society (IHDI) is lower than the aggregate HDI. On average, the IHDI is about 22% lower.<sup>254</sup>

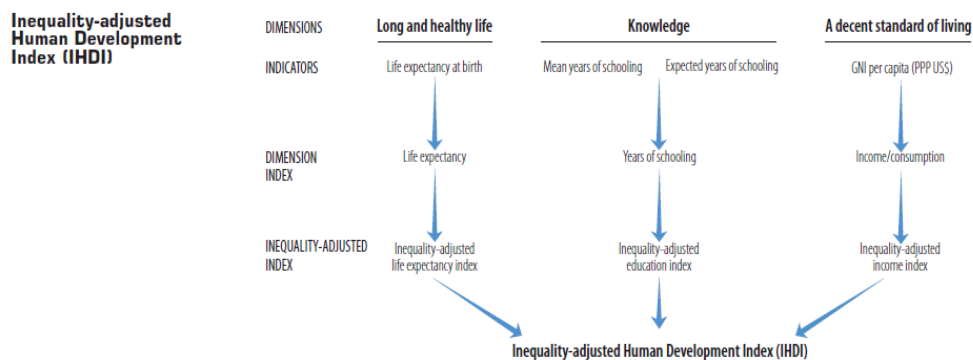
<sup>250</sup> Todaro & Smith, op.cit, p59

<sup>251</sup> Ibid, p61

<sup>252</sup> The Real Wealth of Nations, op.cit, p58

<sup>253</sup> Ibid, p87

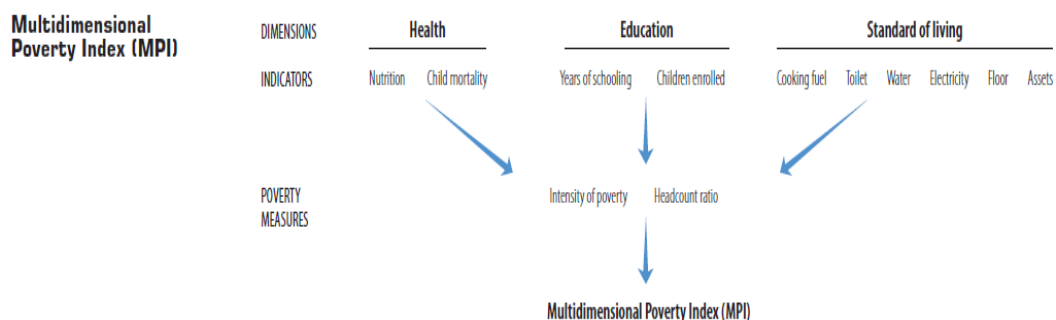
<sup>254</sup> Ibid, p7



Source: *The Real Wealth of Nations: Pathways to Human Development, Human Development Report 2010- 20th Anniversary Edition, UNDP, 2010, p215*

### 2.3.1.3.3 MULTIDIMENSIONAL POVERTY INDEX

As poverty came more into central focus, being recognised as “the denial of choices and opportunities for a tolerable life”<sup>255</sup>, the need to take it into account when measuring development became also apparent. Therefore, in the 2010, the Multidimensional Poverty Index (further MPI) was introduced in the Human Development Report, to identify deprivations across the same three dimensions as the HDI and identify the number of people who are poor, i.e. suffering a given number of deprivations) and the number of deprivations with which poor households typically contend.<sup>256</sup>



Source: *The Real Wealth of Nations: Pathways to Human Development, Human Development Report 2010- 20th Anniversary Edition, UNDP, 2010, p215*

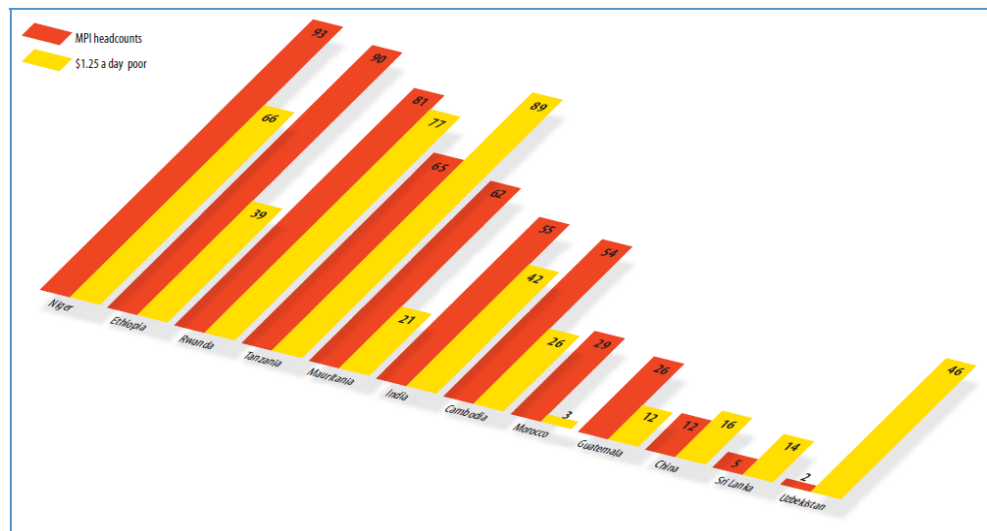
According to MPI, in 2010 almost 1.75 billion people experienced multidimensional poverty which is a higher figure than the 1.44 billion people estimated to be living on less than \$1.25 a day.<sup>257</sup>

<sup>255</sup> Townsend & Gordon, op.cit, p62

<sup>256</sup> The Real Wealth of Nations, op.cit, p7

<sup>257</sup> Ibid, p96

Percentage of people living in poverty: MPI and income poverty, selected countries



Source: *The Real Wealth of Nations: Pathways to Human Development, Human Development Report 2010- 20th Anniversary Edition, UNDP, 2010, p97*

### 2.3.1.4 HUMAN RIGHTS BASED APPROACH

Despite generally perceived as unfashionable today, for a long time human rights were divided into three generations. Following this categorization, the right to development was seen as belonging to a third generation of human rights, the so-called solidarity rights, along with the right to environment and the right to peace.<sup>258</sup> Accordingly, in 1986, the UN General Assembly adopted the abovementioned ‘Declaration on the Right to Development’ in which it was determined that the right to development is a human right, and this was later reaffirmed in 1993 ‘Vienna Declaration and Programme of Action’ and 2000 ‘Millennium Development Declaration’.<sup>259</sup>

However, human rights based approach perceives human rights and development as separate categories. In this way, human rights are seen as only providing means to secure human development, namely “legal tools and institutions – laws, the judiciary, and the process of litigation”.<sup>260</sup>

### 2.3.1.5 SOCIAL DEVELOPMENT

The 1995 Copenhagen Declaration on Social Development identifies social development as a state that allows all people, especially those living in poverty, to “exercise the rights, utilize the resources and share the responsibilities that enable them to lead satisfying lives and to contribute to

<sup>258</sup> Eide, Krause & Rosas, op.cit, p119

<sup>259</sup> Donders, Yvonne and Laaksonen, Annamari, *Finding Ways to Measure the Cultural Dimension of Human Rights and Development* (November 09, 2009), p2 <http://ssrn.com/abstract=1657837>

<sup>260</sup> Green & Sen, op.cit, p26

the well-being of their families, their communities and humankind”.<sup>261</sup> As indicators of development, the Copenhagen Declaration uses economic (volume of trade, the global wealth of nations), social (life expectancy, literacy, access to primary education and basic health care), and political (democratic institutions and civil liberties). It further outlines a program of action that puts people at the centre of development and reiterates, that while social development is primarily a national responsibility it “cannot be successfully achieved without the commitment and efforts of the international community and the integration of economic, cultural, and social policies so that they become mutually supportive”.<sup>262</sup>

### **2.3.1.6 CULTURAL DEVELOPMENT**

Since the results of the first two UN’s international development decades after the WWII revealed the limitations of a development concept based primarily on economic growth<sup>263</sup>, other aspects of development came to play more importance. Among them was also culture. In that regard, the World Commission on Culture and Development in its report ‘Our Creative Diversity’ identified two roles that the culture can play in the context of development: (1) the instrumental role; and (2) the role of a desirable end in itself by giving meaning to our existence.<sup>264</sup>

In international fora today, culture is mostly perceived in its instrumental role, joined on equal footing with other relevant factors for integrated development such as health, housing, science and education.<sup>265</sup>

In order to emphasize culture’s role in this way and to try to transcend the traditional narrow economic approach to development<sup>266</sup>, the 1982 World Conference on Cultural Policies convened by UNESCO, suggested a decade for Cultural Development. In its Recommendation No. 27 containing this idea, it stated that “culture constitutes a fundamental part of the life of each individual and of each community and that, consequently, development-whose ultimate aim should be focused on man-must have a cultural dimension”.<sup>267</sup> This recommendation was subsequently passed on to the United Nations General Assembly, which proclaimed the period 1988-1997 as the World Decade for Cultural Development. Moreover, in the ‘Plan of action’ for the decade, as priorities, among others, were identified the

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<sup>261</sup> Jørgensen, op.cit, p289

<sup>262</sup> Ibid.

<sup>263</sup> Goncalves & Paola, op.cit, p36

<sup>264</sup> Voon, op.cit.

<sup>265</sup> Goncalves & Paola, op.cit, p30

<sup>266</sup> Ibid, p7

<sup>267</sup> World Decade for Cultural Development, op.cit, p7



acknowledgment of the cultural dimension in development and participation in cultural life and development.<sup>268</sup>

Likewise, in 1999 on the UNESCO and World Bank Intergovernmental Conference ‘Culture Counts: Financing Resources and the Economics of Culture in Sustainable Development’, it was agreed that the cultural capital is crucial to advancing sustainable development and economic growth. This role of culture was further recognized in UNESCO’s ‘Universal Declaration on Cultural Diversity’ from 2001 and UNESCO’s ‘Convention on the Protection and Promotion of the Diversity of Cultural Expressions’ from 2005.<sup>269</sup>

Moreover, cultural development has also been recognized explicitly as an important component of development alongside the socio-economic development in some regional instruments such as Article 22 (1) of the African Charter on Human and Peoples’ Rights.<sup>270</sup>

## **2.4 RIGHT TO EDUCATION, THE POOR AND DEVELOPMENT**

The World Bank in one of its reports stated that education will determine who has the keys to the treasures the world can furnish and this is particularly important for the poor, who have to rely on their human capital as the main, if not the only, means of escaping poverty.<sup>271</sup>

In this regard, Amartya Sen identified three roles that education can play in the expansion of valuable capabilities: (i) instrumental social role by fostering public debate and dialogue about social and political arrangements; (ii) an instrumental process role by facilitating our capacity to participate in decision-making processes in our society; and (iii) an empowering and distributive role by facilitating the ability of marginalized and excluded groups to organize and make a case for redistribution. Moreover, he recognized that people are able to use the benefits of education to also help others and to contribute to the overall good of society as a whole, thus giving education also a broader interpersonal impact.<sup>272</sup>

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<sup>268</sup> Goncalves & Paola, op.cit, p47

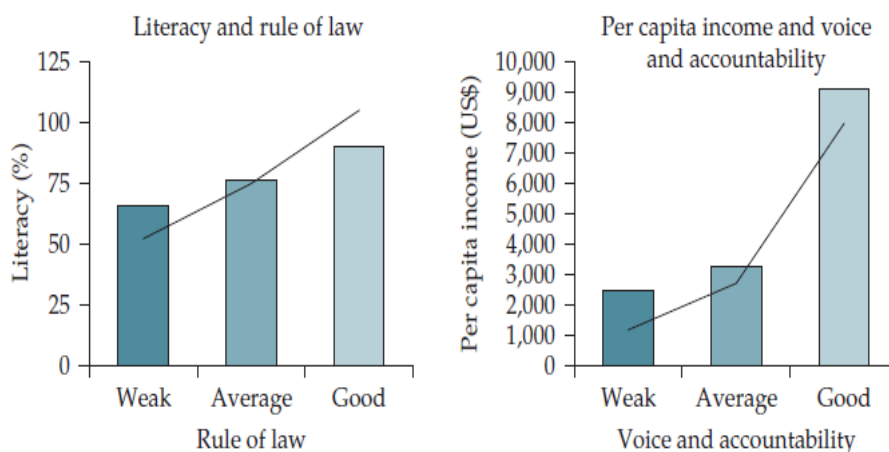
<sup>269</sup> *The Power of Culture for Development (Brochure)* [Electronic Source], UNESCO, 2010, p10 <http://unesdoc.unesco.org/images/0018/001893/189382e.pdf>

<sup>270</sup> Wong, PIIPa, Dutfield, op.cit, ch 8, p 6

<sup>271</sup> Matarasso, op.cit, p62

<sup>272</sup> Deneulin & Shahani, op.cit, p214

Accordingly, human development perspective perceives education as much more than a mere tool for developing the skills that will enhance economic growth.<sup>273</sup> This was recognized also by the CESCR, which in its General Comment No 13 asserted that while education is a human right in itself, it is also an indispensable means of realizing and promoting other human rights and basic democratic principles.<sup>274</sup> It continued by stating that “as an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities”.<sup>275</sup> Moreover, as a fundamental educational objective it identified “full development of the human personality”.<sup>276</sup>



Source: Building Knowledge Economies: Advanced Strategies for Development, World Bank, 2007, p25

In addition, recent studies connecting education and economic development established that enrolment rates had statistically significant positive effects on growth of per capita real GDP.<sup>277</sup>

<sup>273</sup> Ibid, p217

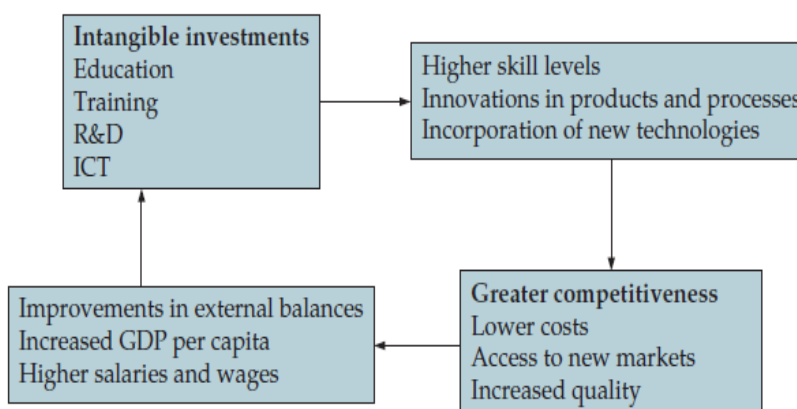
<sup>274</sup> Ssenyonjo, op.cit, p356

<sup>275</sup> General Comment No. 13, op.cit.

<sup>276</sup> Ibid.

<sup>277</sup> Building Knowledge Economies, op.cit, p26

## Knowledge-Based Competitiveness and Growth



Source: Building Knowledge Economies: Advanced Strategies for Development, World Bank, 2007, p28

Moreover, CESCR emphasized in its General Comment No 13 that “educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party” and “that education has to be affordable to all”.<sup>278</sup> The need of equal accessibility was also reaffirmed in the 1960 ‘Convention Against Discrimination in Education’, which, when defining discrimination in its Article 1 put emphasized that discrimination entails not only restricting access to education of any person or a group but also limiting anybody to education of an inferior standard.<sup>279</sup> Access to education by all was also reasserted in Article 8(1) of the ‘Declaration on the Right to Development’.<sup>280</sup> Likewise, in 1990, at the World Conference on Education for All held in Jomtien, Thailand, states once more reiterated the need to overcome extreme inequalities holding back progress in education and called for active commitment to reach ‘underserved groups’, which include, among others the poor.<sup>281</sup>

However while all countries in theory strongly endorse this principles of equal opportunity and universal rights, the evidence shows that, when it comes to opportunities for education, some people are more equal than others.<sup>282</sup> Thus, education still remains inaccessible to many because of the high costs it incurs, among other things through expensive teaching materials, despite the fact that Article 13 of ICESCR includes also the

<sup>278</sup> General Comment No 13, op.cit.

<sup>279</sup> *Reaching the Marginalized* [Electronic Source], EFA Global Monitoring Report 2010, Unesco publ. Paris, 2010, p135 <http://unesdoc.unesco.org/images/0018/001866/186606e.pdf>

<sup>280</sup> Ssenyonjo, op.cit, p361

<sup>281</sup> *Reaching the Marginalized*, op.cit, p136

<sup>282</sup> *Ibid*, p138

obligations of availability of teaching materials and economic accessibility.<sup>283</sup> Availability of teaching materials is also acknowledged as important in ‘The Agreement on the Importance of Educational, Scientific and Cultural Materials’, which stipulates that the contracting States should undertake to as far as possible “continue their common efforts to promote by every means the free circulation of educational, scientific or cultural materials, and abolish or reduce any restrictions to that free circulation”.<sup>284</sup>

Analytic work sponsored by the World Bank in the 1970s showed that textbook availability was “the single most consistent correlate of academic achievement in developing countries”.<sup>285</sup> This is also collaborated in the 2004 World Development Report, which conveyed the results of the study carried out in North East Brazil during the 1980s, measuring increases in test scores based upon dollars spent on different inputs. The study showed that better teacher’s salaries increased test scores by 1; ensuring that all teachers have 3 years of secondary schooling resulted in an increase of 1.9; providing adequate schoolrooms resulted in an increase of 7.7; while providing packet of instructional materials resulted in an increase of 19.4.<sup>286</sup> Similarly, study taken in India during the 1990s showed that higher teacher’s salaries resulted in increase of 1; facility upgrading resulted in increase of 1.2; an additional square foot of space per student resulted in an increase of 1.7; showing again the highest increase of 14 when students were provided with a packet of instructional materials.<sup>287</sup>

Although the retail prices of books in developing countries are generally lower in absolute terms, if we compare them in the context of a country’s GDP per capita (i.e. average individual income), it shows that consumers in developing countries are paying much more for the same textbooks than the consumers in developed countries.<sup>288</sup>

Accordingly, the study comparing prices of five university textbooks in Indonesia, Thailand and the US showed that books remain prohibitively expensive to the average person living in Indonesia or Thailand.

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<sup>283</sup> Torremans, Paul L.C. (ed), *Intellectual property and human rights: enhanced edition of copyright and human rights*, Kluwer Law International, Alphen aan den Rijn, 2008, p146

<sup>284</sup> Niec, op.cit, p149

<sup>285</sup> Wong, PIIPA & Dutfield, op.cit, ch6 p6

<sup>286</sup> Torremans, op.cit, p288

<sup>287</sup> Ibid.

<sup>288</sup> *Copyright and Access to Knowledge* [Electronic Source], Consumers International Asia Pacific Office, 2006, p3  
<http://www.consumersinternational.org/media/303356/copyright%20and%20access%20to%20knowledge%20-%20full%20report%20%28pdf%29.pdf>

GDP per capita of Thailand (2003)\*: \$2,305  
 GDP per capita of Indonesia (2003)\*: \$970  
 GDP per capita of the US (2003)\*: \$37,648

Exchange rate as at 1 July 2005:  
 US\$1 = THB41.39  
 US\$1 = IDR9,791.92

Titles	Thailand			Indonesia			Actual list price in the US
	Retail price	Cost (% of GDP per capita)	Price in the US (GDP equivalent)	Retail price	Cost (% of GDP per capita)	Price in the US (GDP equivalent)	
International Accounting (5 <sup>th</sup> Edition) by Frederick D.S. Choi, Gary K Meek	19.33 <sup>^</sup>	0.84	315.72	27.01 <sup>^</sup>	2.78	1,048.32	146.67
Financial Management: Principles and Applications (10 <sup>th</sup> Edition) by Arthur Keown, John Martin, John Petty, David Scott	18.00 <sup>^</sup>	0.78	294.00	26.06 <sup>^</sup>	2.69	1,011.45	135.33
Fundamentals of Financial Management (12 <sup>th</sup> Edition) by James Van Horne, John Wachowicz	24.16 <sup>^</sup>	1.05	394.61	34.91 <sup>^</sup>	3.60	1,354.93	104.00
Goodman & Gilman's The Pharmacological Basis of Therapeutics (10 <sup>th</sup> Edition) by Joel Griffith Hardman, Lee E. Limbird, Alfred G. Gilman	65.23 <sup>^</sup>	2.83	1,065.41	81.70 <sup>^</sup> #	8.43	3,170.97	139.00
Materials Science and Engineering: An Introduction (6 <sup>th</sup> Edition) by William D. Callister, Jr.	36.84 <sup>§</sup>	1.60	601.71	36.98 <sup>@</sup>	3.81	1,435.28	128.95 <sup>°</sup>

\*Data obtained from UN Human Development Report 2005  
<sup>^</sup>Price of international edition  
<sup>#</sup>Price of the 9<sup>th</sup> edition  
<sup>§</sup> Student Edition is available in Thailand for US\$11.23  
<sup>@</sup> Price of the 5<sup>th</sup> Edition  
<sup>°</sup> Price of hardcover version

Source: Copyright and Access to Knowledge, Consumers International, Asia Pacific Office, 2006, p42

Even when a comparison is made using the GDP per capita calculated at purchasing power parity (PPP) exchange rate, the prices are still excessive.<sup>289</sup>

GDP per capita (PPP US\$) of Thailand (2003)\*: \$7,595  
 GDP per capita (PPP US\$) of Indonesia (2003)\*: \$3,361  
 GDP per capita (PPP US\$) of the US (2003)\*: \$37,562

Exchange rate as at 1 July 2005:  
 US\$1 = THB41.39  
 US\$1 = IDR9,791.92

Titles	Thailand		Indonesia		Actual list price in the US
	Retail price	Price in the US (GDP equivalent)	Retail price	Price in the US (GDP equivalent)	
International Accounting (5 <sup>th</sup> Edition) by Frederick D.S. Choi, Gary K Meek	19.33 <sup>^</sup>	95.60	27.01 <sup>^</sup>	301.86	146.67
Financial Management: Principles and Applications (10 <sup>th</sup> Edition) by Arthur Keown, John Martin, John Petty, David Scott	18.00 <sup>^</sup>	89.02	26.06 <sup>^</sup>	291.24	135.33
Fundamentals of Financial Management (12 <sup>th</sup> Edition) by James Van Horne, John Wachowicz	24.16 <sup>^</sup>	119.49	34.91 <sup>^</sup>	390.15	104.00
Goodman & Gilman's The Pharmacological Basis of Therapeutics (10 <sup>th</sup> Edition) by Joel Griffith Hardman, Lee E. Limbird, Alfred G. Gilman	65.23 <sup>^</sup>	322.60	81.70 <sup>^</sup> #	913.07	139.00
Materials Science and Engineering: An Introduction (6 <sup>th</sup> Edition) by William D. Callister, Jr.	36.84 <sup>§</sup>	182.20	36.98 <sup>@</sup>	413.28	128.95 <sup>°</sup>

\*Data obtained from UN Human Development Report 2005  
<sup>^</sup>Price of international edition  
<sup>#</sup>Price of the 9<sup>th</sup> edition  
<sup>§</sup> Student Edition is available in Thailand for US\$11.23  
<sup>@</sup> Price of the 5<sup>th</sup> Edition  
<sup>°</sup> Price of hardcover version

Source: Copyright and Access to Knowledge, Consumers International, Asia Pacific Office, 2006, p43

<sup>289</sup> Ibid, p41

Therefore, although on the whole there have been some improvements regarding the right to education and improving access to it, one should not forget that there are still as many as 115 million children today that do not attend school and there are 879 million illiterate adults.<sup>290</sup>

HDI rank	ACHIEVEMENTS IN EDUCATION		ACCESS TO EDUCATION				EFFICIENCY OF PRIMARY EDUCATION		QUALITY OF PRIMARY EDUCATION		
	Adult literacy rate	Population with at least secondary education	Primary enrolment ratio		Secondary enrolment ratio		Tertiary enrolment ratio	Dropout rate, all grades	Repetition rate, all grades	Pupil-teacher ratio	Primary school teachers trained to teach
			(% of primary school-age population)	(% of primary school-age population)	(% of secondary school-age population)	(% of secondary school-age population)					
	(% ages 15 and older)	(% ages 25 and older)	Gross	Net	Gross	Net	Gross	(% of primary school cohort)	(% of total primary enrolment in previous year)	(number of pupils per teacher)	(%)
	2005–2008 <sup>a</sup>	2010	2001–2009 <sup>b</sup>	2001–2009 <sup>b</sup>	2001–2009 <sup>b</sup>	2001–2009 <sup>b</sup>	2001–2009 <sup>b</sup>	2005–2008 <sup>c</sup>	2005–2008 <sup>d</sup>	2005–2008 <sup>e</sup>	2005–2008 <sup>f</sup>
<b>Developed</b>											
OECD	..	73.8	101.7	95.6	101.1	91.8	71.4	2.9	..	..	..
Non-OECD	..	61.7	108.4	95.6	93.6	86.7	43.0	3.0	1.2	..	..
<b>Developing</b>											
Arab States	72.1	..	96.4	80.9	68.8	60.4	22.7	9.5	5.7	..	..
East Asia and the Pacific	..	..	112.2	93.3	72.8	62.6	20.9	21.3	..	..	..
Europe and Central Asia	97.5	65.1	98.5	92.3	89.3	82.1	54.2	3.3	0.9	..	..
Latin America and the Caribbean	91.1	32.5	116.5	94.4	89.8	72.5	36.7	17.8	9.2	..	..
South Asia	62.4	21.6	108.2	86.9	53.5	42.0	12.8	24.1	5.0	..	..
Sub-Saharan Africa	62.4	..	101.8	73.6	34.4	29.5	5.5	36.5	9.4	..	..
Very high human development	..	73.6	101.9	95.6	100.9	91.7	70.8	3.0	1.7	..	..
High human development	92.3	41.0	111.9	94.4	88.9	74.9	43.2	7.3	6.5	..	..
Medium human development	80.7	..	110.2	88.5	64.7	57.0	17.6	22.6	2.9	..	..
Low human development	61.2	14.3	99.9	73.4	34.7	30.9	6.0	40.4	9.6	..	..
Least developed countries	59.9	..	101.6	75.5	34.1	30.8	5.4	39.1	11.0	..	..
World	..	..	106.9	86.1	66.4	60.2	25.7	18.0	5.1	..	..

Source: The Real Wealth of Nations: Pathways to Human Development, Human Development Report 2010-20th Anniversary Edition, UNDP, 2010, Table 13

## 2.4.1 FREIRE AND CONSCIENTIZATION

Paulo Freire, influential Brazilian theorist in critical pedagogy, considered that all people ought to pursue their ontological vocation of becoming more fully human, and that we ought to strive to create the world where all people in a given social setting would be able to pursue their humanization.<sup>291</sup>

In connection to this, he developed a term ‘conscientization’, or rather consciousness rising. This development process according to William Smith can be divided into three distinct stages: magical, naïve, and critical consciousness and at each of this stages, people interpret the world and act

<sup>290</sup> Ibid, p1

<sup>291</sup> Roberts, Peter, *Education, literacy, and humanization: exploring the work of Paulo Freire*, Bergin & Garvey, Westport, Conn., 2000, p50

in it differently. Thus, magically conscious individuals tend to either deny that they have problems or avoid them by situating them in the past or elsewhere. They explain their circumstances, through reference to ‘God’s will’, fate, or bad luck. Thus, they passively accept harsh social conditions, rather than to critically analyze them. People at naïve level see as a major task reform within an existing social system. If problems are identified, individuals (rather than social structures or systems) are often blamed. Therefore, overcoming difficulties becomes a matter of using the system rather than changing it. Finally, critical consciousness is characterized by an attempt to transform oppressive social structures. Self-actualization becomes possible, and cooperative dialogical relationships are sought.<sup>292</sup> Drawing on his experiences with rural peasant communities and the urban poor in Brazil and Chile, Freire found a close connection between education and conscientization.<sup>293</sup>

## **2.5 INTELLECTUAL PROPERTY RIGHTS, THE POOR AND THE DEVELOPMENT**

Colonialism and copyright always went hand in hand. Thus, the first major international treaty in copyright, namely 1887 Berne Convention for the Protection of Literary and Artistic Works was implemented directly in territories, colonies and protectorates of four major colonial signatories, namely France, Germany, Spain and the UK without any of the colonies being involved in the negotiations.<sup>294</sup> Similarly, less than 20 out of the 106 developing countries that are now WTO members and thus bound by the TRIPS were actually involved in the negotiations of TRIPS at the Uruguay round.<sup>295</sup> Consequently, both the Berne system and the TRIPS were created to suit the interests of copyright exporters.<sup>296</sup>

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<sup>292</sup> Ibid, p140

<sup>293</sup> Ibid, p1

<sup>294</sup> Deere, Carolyn, *The implementation game: the TRIPS agreement and the global politics of intellectual property reform in developing countries*, Oxford University Press, Oxford, 2009, p8

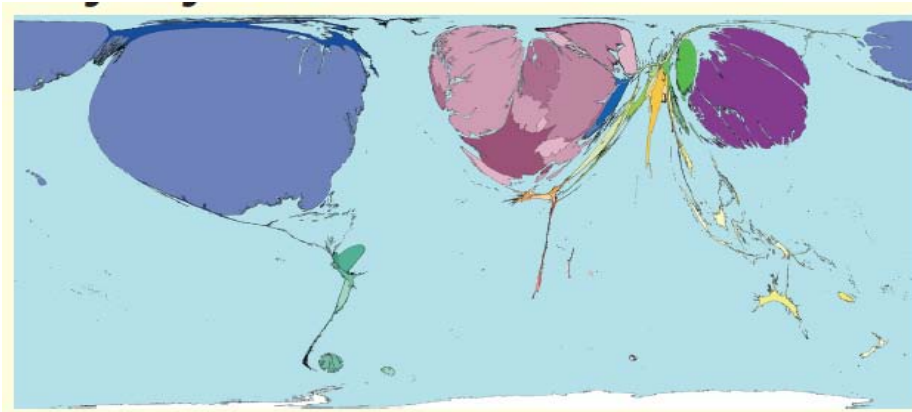
<sup>295</sup> Ibid, p56

<sup>296</sup> Drahos, Peter, *An Alternative Framework for the Global Regulation of Intellectual Property Rights*. Austrian Journal of Development Studies, No. 1, October 2005, p10 <http://ssrn.com/abstract=850751>

Moreover, many developing countries, today, undertake TRIPS-plus reforms as part of their effort to brand themselves as forward looking countries<sup>297</sup> and to attract foreign direct investment despite the fact that many of the today's rich countries also favoured 'weaker' intellectual property rights when themselves developing. Thus, in the early days the U.S. not only allowed its printing industry to reproduce British books without paying royalties, but it also refused to join the Berne Convention for a very long time, up until 1989.<sup>298</sup>

In addition, companies that own IPR, often jack up prices far above the levels that would exist had there been free competition<sup>299</sup> reducing not only possibilities of access for many consumers, but also often additionally affecting their health and welfare.<sup>300</sup>

Moreover, developing countries accounted for 78% of all cultural goods imports in 1998<sup>301</sup>, which would imply that by signing TRIPS-plus protocols, they are actually not protecting their own knowledge industries<sup>302</sup>, but rather bind themselves to collect copyright fees from their own people and pass them on to the North.<sup>303</sup> Fernando Cardoso, former Brazilian president went as far as to identify this trend as a new form of economic dependence for semi-peripheral and peripheral nations.<sup>304</sup>



Source: Map 168 taken from [www.worldmapper.org](http://www.worldmapper.org), showing the global flow of royalties and licensing fees in 2002 and how more than half (53%) goes just to the United States<sup>305</sup>.

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<sup>297</sup> Deere, op.cit, p170

<sup>298</sup> Scotchmer, Suzanne, *Innovation and incentives*, MIT Press, Cambridge, Mass., 2005, pp 321-322

<sup>299</sup> Drahos & Mayne, op.cit, p203

<sup>300</sup> Ibid, p202

<sup>301</sup> Story, Darch, Halbert, et al, op.cit, p32

<sup>302</sup> *Copyright and development: inequality in the information age*, Bellagio Publishing Network, Research and Informations Center in association with the Boston College, Center for International Higher Education, Chestnut Hill, Mass., 1996, p12

<sup>303</sup> Ibid, p13

<sup>304</sup> Bettig, op.cit, p197

<sup>305</sup> Krikorian & Kapczynski, op.cit, p176



Accordingly, between 1991 and 2001, the net US surplus of royalties and fees (which mainly relate to IP transactions) increased from \$14 billion to over \$22 billion<sup>306</sup>, while in 2005 US earned from global IP systems more than it allocated as its budget for development assistance for that year.<sup>307</sup> On the other hand, the developing countries showed in 1999 a deficit of \$7.5 billion on payments for royalties and license fees.<sup>308</sup>

Moreover, administering and enforcing the IPR system includes substantial costs of court personnel, lawyers, royalty management, and so on.<sup>309</sup> In 2002, the World Bank estimated that TRIPS implementation would generate annual costs for China of US \$ 5.1 billion, for the Republic of Korea of US \$ 15.3 billion and for India of US \$ 903 million.<sup>310</sup>

Thus, on the whole, one may be tempted to infer that for developing countries without the capacity to innovate stronger IP protection seems to have very little benefits while it imposes additional costs.<sup>311</sup> Similar conclusion was reached by the UK Commission on IPR in its report 'Integrating Intellectual Property Rights and Development Policy', where it stated that:

there is a strong indication that strong IPR regulations regarding patent rights, but copyright as well, present a considerable barrier to overcoming the various manifestations of global North-South divides, as they protect existing privileges and user rights rather than making knowledge available for free development and, in this way, helping to overcome North-South divide.<sup>312</sup>

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<sup>306</sup> Integrating Intellectual Property Rights and Development Policy, op.cit, p21

<sup>307</sup> Deere, op.cit.

<sup>308</sup> Integrating Intellectual Property Rights and Development Policy, op.cit, p21

<sup>309</sup> Andersen, Birgitte (ed), *Intellectual property rights: innovation, governance and the institutional environment*, Elgar, Cheltenham, 2006, p122

<sup>310</sup> Deere, op.cit, p10

<sup>311</sup> *Gowers Review of Intellectual Property* [Electronic Resource], HMSO, 2006, p59 <http://www.official-documents.gov.uk/document/other/0118404830/0118404830.pdf>

<sup>312</sup> Lenk, Christian, Hoppe, Nils & Andorno, Roberto (eds), *Ethics and law of intellectual property: current problems in politics, science and technology*, Ashgate, Aldershot, 2007, p219

Similarly, the 2011 UK Review of Intellectual Property and Growth concluded that in low-income countries with a weak scientific and technological infrastructure, stronger IP protection not only has little influence on their own economic growth but may even hinder it. Moreover, regarding the argument that strong IP protection attracts industries from developed countries to sell goods there, the report stated that there is no significant probability in regards to that.<sup>313</sup>

The Sub-Commission on the Promotion and Protection of Human Rights of the UN Commission on Human Rights, in its Resolution from 2000 also concluded that:

the implementation of TRIPS agreement does not adequately reflect the fundamental nature and indivisibility of all HR, including the right of everyone to enjoy the benefit of scientific progress and its applications, the right to health, the right to food, and the right to self-determination, there are apparent conflicts between the IPRs regime embodied in TRIPS Agreement, on the one hand, and international HR law, on the other.<sup>314</sup>

## 2.5.1 WIPO AND DEVELOPMENT

The IP standards set by developed countries were often transplanted directly from them to the colonial territories, ignoring their local conditions and hampering their access to the information, knowledge, and technology needed for development.<sup>315</sup> After independence, most of the newly created states, in order to be able to access the international arena decide to stay committed to this standards but “repeatedly expressed serious concern about the inappropriateness of the international intellectual property system for their own economic, social, cultural, and technological development”<sup>316</sup>. Consequently, in 2004, fourteen developing countries known as the ‘Friends of Development’, submitted a proposal to the WIPO General Assembly requesting the establishment of a new Development Agenda for WIPO noting that as a UN agency, WIPO should be guided by the UN’s

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<sup>313</sup> Hargreaves, Ian, *Digital Opportunity; A Review of Intellectual Property and Growth* [Electronic Source], 2011, p24 <http://www.ipo.gov.uk/ipreview-finalreport.pdf>

<sup>314</sup> Drahos & Mayne, op.cit, p233

<sup>315</sup> Yu, Peter K., *A Tale of Two Development Agendas* (February 26, 2009). Ohio Northern University Law Review, Vol. 34, 2009, p469 <http://ssrn.com/abstract=1349967>

<sup>316</sup> Ibid, p468

development goals including the MDG.<sup>317</sup> Finally, after 6 years of heated debate, in October 2007 the WIPO General Assembly adopted a series of recommendations known as the WIPO Development Agenda.<sup>318</sup> This agenda includes forty-five recommendations that are factored into six different thematic groups: (1) technical assistance and capacity building; (2) norm setting, flexibilities, public policy and public domain; (3) technology transfer, information and communication technologies and access to knowledge; (4) assessment, evaluation and impact studies; (5) institutional matters including mandate and governance; and (6) other issues.<sup>319</sup> However, despite these recent events, it seems that in practice, development from the WIPO perspective implies only the development of infrastructure for better implementation of IPR.

## 2.6 QUICK RECAP

In this chapter, and the one beforehand, I tried to show the importance of access to culture, both as a right in itself, but also as an important component for human development. Further, I tried to show that a certain category of people, namely the poor is often deprived of this right because of, among other things, excessive prices charged for access to cultural goods. Often, these prices are the direct result of monopolies granted through copyright. Yet, while everybody acknowledges that we do have a problem, and not a negligible one at that, any possibility of finding a solution through re-evaluation of copyright, seems always to be hampered by this repeating claim, almost mantra-like, that we NEED copyright. However, this dominant discourse, rests on some largely unexamined assumptions<sup>320</sup>, namely that it is a good system both socially and legally, that it has worked well and continues to work well throughout history and all over the world and finally, that there are no alternatives to it.<sup>321</sup> Therefore, in my next chapter I plan to re-examine these assumptions.

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<sup>317</sup> Dutfield & Suthersanen, op.cit, p128

<sup>318</sup> Deere, op.cit, p 132

<sup>319</sup> Yu, A Tale of Two Developments, op.cit,p518

<sup>320</sup> Therefore, a recent Review of Intellectual Property and Growth dedicated whole chapter for the need for objective evidence when developing IP system.  
Hargreaves, op.cit, p20

<sup>321</sup> Story, Darch, Halbert, et al, op.cit, p11

# 3 COPYRIGHT JUSTIFICATIONS

There are two approaches to making the case for copyright systems.

According to deontological or natural rights based justifications for copyright, copyright laws are not the source of authors' rights but only define and enforce them, since to enjoy a property right over one's creative work is a natural right and, also a human right.<sup>322</sup> This justification does not, of course easily apply to the many cases where copyright is owned by companies and not individuals.<sup>323</sup>

According to the consequentialist or utilitarian approach, copyright does not exist before the law but is granted by society to serve as an incentive and thus promote certain goals.<sup>324</sup> This utilitarian justification of copyright is prevalent in the Anglo-Saxon countries, while in most continental European countries, copyright is predominantly viewed in terms of the 'natural right' of authors in the output of their work.<sup>325</sup>

## 3.1 NATURAL LAW JUSTIFICATION

### 3.1.1 MORAL AND MATERIAL INTERESTS OF AN AUTHOR IN HUMAN RIGHTS INSTRUMENTS

Both article 27(2) of the UDHR and article 15(1)(c) of the ICESCR recognize that author has the "right to the protection of the moral and

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<sup>322</sup> *Intellectual Property Rights: Implications for Development* [Economic Resource], project on IPRs and Sustainable Development by UNCTAD-ICTSD, 2003, p30 <http://www.iprsonline.org/unctadictsd/policyDpaper.htm>

<sup>323</sup> Ibid.

<sup>324</sup> Torremans, op.cit, p177

<sup>325</sup> *The Economics of Copyright and Digitization; A Report on the Literature and the Need for Further Research* [Electronic Source], SABIP, 2010, p17 <http://www.scribd.com/doc/32937589/SABIP-The-Economics-of-Copyright-and-Digitisation-A-Report-on-the-Literature-and-the-Need-for-Further-Research>

material interests resulting from any scientific, literary or artistic production of which he is the author”.<sup>326</sup>

Similarly, this right is recognized in regional human rights instruments, such as article 13(2) of the ADRDM, article 14(1)(c), of the IACHR P1 and, albeit not explicitly, in Article 1 of Protocol 1 to the ECHR.<sup>327</sup>

However, inclusion of this provision was not without controversies. Thus, it was first rejected during both the negotiations of UDHR where it was objected that these rights were adequately covered by the existing property rights provision or that they were not really a ‘basic human right’,<sup>328</sup> and during ICESCR drafting, where they made its way into the Covenant only three years after the Commission had completed its work and five years after the cultural rights provision had been debated.<sup>329</sup> Moreover, the final vote on the relevant provision during the ICESCR negotiations went straight down the cold war divide, which could suggest that the end result of the debate was focused more on securing freedom from the state intervention than on securing authors’ moral and material rights.<sup>330</sup>

Furthermore, nowhere in the final provisions is anything mentioned about IPR. In that way, CESCR clearly distinguishes in its General Comment No 17 that the right to the protection of interests in intellectual creations “derives from the inherent dignity and worth of all persons”, and therefore is different from other legal entitlements currently recognized in the intellectual property regime.<sup>331</sup> And because corporate entities remain outside the protection of human rights instruments, their entitlements are not protected at the level of human rights.<sup>332</sup> Or as the CESCR explained:

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<sup>326</sup> UDHR, op.cit and ICESCR, op.cit.

<sup>327</sup> *General Comment No. 17; The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant on Economic, Social and Cultural Rights)* [Electronic Source], Committee on Economic, Social and Cultural Rights, 35th Session, 7-25 November 2005, para 3 [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edb797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edb797c125711500584ea8/$FILE/G0640060.pdf)

<sup>328</sup> Green, Maria, *Drafting history of Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/C.12/2000/15, 9 October 2000, p3 [http://shr.aaas.org/article15/Reference\\_Materials/E\\_C.12\\_2000\\_15\\_Eng.pdf](http://shr.aaas.org/article15/Reference_Materials/E_C.12_2000_15_Eng.pdf)

<sup>329</sup> Ibid.

<sup>330</sup> Ibid, p12

<sup>331</sup> General Comment No 17, op.cit, para 1

<sup>332</sup> Yu, Peter K., *Reconceptualizing Intellectual Property Interests in a Human Rights Framework* [Electronic Source], Research Paper No. 04-01, Legal Studies Research Paper Series, Michigan State University, 2007, p1129

human rights are fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities. Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity, encourage the dissemination of creative and innovative productions, as well as the development of cultural identities, and preserve the integrity of scientific, literary and artistic productions for the benefit of society as a whole.<sup>333</sup>

Examples of intellectual property protection that have no human rights basis are works-made-for-hire, neighbouring rights, database protection, and other rights that protect economic investments of institutional authors.<sup>334</sup>

Moreover, the right to the protection of author's interests is a "fundamental, inalienable and universal" right<sup>335</sup>, in contrast to IPR which are "generally of a temporary nature, and can be revoked, licensed or assigned to someone else".<sup>336</sup>

Both the UDHR and the ICESCR, perceive the protection of author's interests as covering two different types of interests: (i) moral interests which "safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage"<sup>337</sup> and (ii) material interests which "enable authors to enjoy an adequate standard of living".<sup>338</sup>

### 3.1.1.1 AUTHORS' MORAL INTERESTS

According to CESCR, moral interests in intellectual creations "include the right of authors to be recognized as the creators of their scientific, literary and artistic productions and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, such productions,

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[http://74.220.219.58/~drafting/sites/default/files/paper\\_article/Yu\\_Human%20Rights%20and%20IP%20Framework.pdf](http://74.220.219.58/~drafting/sites/default/files/paper_article/Yu_Human%20Rights%20and%20IP%20Framework.pdf)

<sup>333</sup> General Comment No 17, op.cit, para 1

<sup>334</sup> Yu, Peter K., *Ten Common Questions About Intellectual Property and Human Rights*. Georgia State University Law Review, Vol. 23, 2007, p 727 <http://ssrn.com/abstract=1090241>

<sup>335</sup> Yu, *Reconceptualizing IP*, op.cit, p1080

<sup>336</sup> General Comment No 17, op.cit, para 2

<sup>337</sup> Ibid.

<sup>338</sup> Ibid

which would be prejudicial to their honour and reputation”.<sup>339</sup> Moreover, CESCR makes it clear that “only the ‘author’, namely the creator, whether man or woman, individual or group of individuals, of scientific, literary or artistic productions, such as, inter alia, writers and artists, can be the beneficiary of the protection of article 15, paragraph 1 (c)”, stating further that entitlements of legal entities which are included among the holders of intellectual property rights, because of their different nature, are not protected at the level of human rights.<sup>340</sup>

### 3.1.1.2 AUTHORS’ MORAL INTERESTS AND COPYRIGHT

Legislative provisions protecting authors’ moral rights usually derive their wording from Article 6bis of the Berne Convention for the Protection of Literary and Artistic Works, which states:

independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the said work which would be prejudicial to his honour or reputation.<sup>341</sup>

However, when Article 9 of the TRIPS Agreement incorporated most of the substantive provisions of the 1971 Act of the Berne Convention, it expressly stated, mainly as a concession to the United States, that WTO Members “shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom”.<sup>342</sup>

Moreover, current copyright laws often protect works, which entail no subjective expression like directories, football coupons, compilations and other suchlike publications.<sup>343</sup> Additionally, in most common law countries, if the work is made by an employee in the course of his employment, his employer is the owner of any copyright in the work, unless an agreement

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<sup>339</sup> Ibid, para 13

<sup>340</sup> Ibid, para 7

<sup>341</sup> *Berne Convention for the Protection of Literary and Artistic Works* [Electronic Source], September 9, 1886 [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html)

<sup>342</sup> Torremans, op.cit., p 12

<sup>343</sup> Saunders, David, *Authorship and copyright*, Routledge, London, 1992, p238

exists between them which specifies otherwise.<sup>344</sup> Finally, it is often hard, if not impossible to detect individual personality of an author in collaborative and derivative works.<sup>345</sup>

Furthermore, it is questionable just how much desirable should moral rights be. In that regard, Melissa Boyle and Debra O'Connor, professors at Collage of the Holy Cross, tested their impact on artists after certain US states started introducing moral rights for visual artists from 1979 onwards. They compared artists living in states with moral rights laws and those living in states without these laws, before and after the laws were enacted. Their analysis revealed that artists' incomes fall by over \$4,250 per year because of introduction of moral rights. This was a 22% decrease relative to the average pre-period income of artists.<sup>346</sup> Furthermore, they found no impact of the law on artists' choices of residence.<sup>347</sup>

Similarly, William Landes, a renowned American economist, observed that prior to the introduction in 1990 of the US federal Visual Artists Rights Act, all artists had the ability to protect their integrity rights under contract law. He saw the fact that most chose not to do so as evidence that the costs of establishing such protection probable outweighed the benefits. In addition, he noted that many artists who are aware of their ability to waive these rights under VARA do so. Therefore, he concluded that mandating the protection of integrity rights under VARA simply adds unnecessary transaction costs and is economically inefficient.<sup>348</sup>

Moreover, some claim that artistic innovation in the past half-century has been greater in the United States than in Europe, despite Europe having moral rights laws during this period and the United States largely not.<sup>349</sup>

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<sup>344</sup> Dutfield & Suthersanen, op.cit, p85

<sup>345</sup> Masiyakurima, Patrick, *The Trouble with Moral Rights*, Modern Law Review, Vol. 68, No. 3, pp. 411-434, May 2005, p414 <http://ssrn.com/abstract=705777>

<sup>346</sup> Boyle, Melissa, O'Connor, Debra & Nazzaro, Stacy, *Moral Rights Protection for the Visual Arts* [Electronic Source], Faculty Research Series, Paper No 08-09, Collage of the Holy Cross, Department of Economics, 2008, p11 [http://academics.holycross.edu/files/econ\\_accounting/Boyle-OConnor\\_MoralRights.pdf](http://academics.holycross.edu/files/econ_accounting/Boyle-OConnor_MoralRights.pdf)

<sup>347</sup> Ibid.

<sup>348</sup> Ibid, p5

<sup>349</sup> Landes, William M. & Posner, Richard A., *The economic structure of intellectual property law*, The Belknap Press of Harvard University Press, Cambridge, Mass., 2003, p276



Anyhow, most attribution rights are protected already under tort law, rights against fraud and unfair competition law.<sup>350</sup>

Moreover, moral rights may impede transformative uses of copyright works especially where adapters such as parodists rely on extensive and unsympathetic uses of earlier texts.<sup>351</sup>

### **3.1.1.3 WHAT DOES IT MATTER WHO IS SPEAKING?<sup>352</sup> OR WHO DO MORAL RIGHTS ACTUALLY PROTECT**

#### **3.1.1.3.1 BIRTH OF THE ROMANTIC 'AUTHOR'**

The earliest genuine anticipations of copyright were the printing privileges, first granted by the State in the 15th Century Venice to individuals for limited period of time to reward them for services or to encourage them in useful activities.<sup>353</sup> Most privileges were issued to printers, but some were issued to authors, translators or editors. Soon afterwards, these privileges started extending from a right in a certain work to encompass the right in whole classes of books such as bibles, law-books, catechisms and so on. Consequently, the most powerful members of the book trade become those who managed to secure these broad privileges.<sup>354</sup> During the sixteenth century, this system of privileges spread throughout Europe, including England. However, in England the situation was a bit different since, beside this printing privileges, a publishers guild system called the Stationers' Company<sup>355</sup>, received in 1557 a royal charter granting it a monopoly on printing in exchange for heavy self-censorship of the guild. Thus, in the sixteenth and seventeenth century England only the members of the guild and those lucky few holding royal printing privileges were able to print materials.

Actually, the first affirmation of any kind of authorial interest seems to be a Parliamentary edict from 29 January 1642, which dealt with the flood of anonymous publication that was happening at that time in England. Thus, according to this edict, master and wardens of the Stationers' Company were required to take special care that nothing was printed or reprinted without the name and consent of the author. Main goal of this provision was

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<sup>350</sup> Ibid, p276 Also Boyle, O'Connor & Nazzaro, op.cit, p5.

<sup>351</sup> Masiyakurima, op.cit413

<sup>352</sup> Foucault, Michel, *The Foucault reader*, Pantheon Books, New York, 1984, p101

<sup>353</sup> Heilbrun & Gray, op.cit, p9

<sup>354</sup> Ibid, p11

<sup>355</sup> Ibid, p12

however, primarily intended to enable holding authors and printers responsible for books deemed libellous, seditious, or blasphemous and not to protect author's rights.<sup>356</sup>

Hence, despite periodic objections to censorship and despite the many difficulties in enforcing the licensing provisions, monopolies granted to printers were relatively uncontroversial up until the 1690 when apparently licensing became caught up in the factional struggles in Parliament and the attempt to renew the act confirming printing privileges failed.<sup>357</sup>

Following this, in autumn 1709 the concept of 'authorship' was introduced with the attempt to secure new bill providing protection for a new right-copyright, as distinct from licensing. And thus, the first copyright law, namely the Statute of Anne was enacted in 1709, which despite its different terminology and stated objectives, changed really very little in practice.<sup>358</sup> In the decades that followed, Stationers continued to do business much as before, purchasing authors' new statutory rights for lump-sum payments and reaping the profits.<sup>359</sup>

However, one thing did slowly start to change with the introduction of Statute of Anne, and that is how the 'author' was perceived. Before the Statute, author was mostly seen as a craftsman. Even in those rare moments when he managed to achieve something exceptional, he was not hailed as personally responsible for it, but rather as inspired by some muse, or God.<sup>360</sup>

Yet, after the introduction of the Statute, the term 'author' slowly took on a life of its own as individualistic notions of creativity, originality, and inspiration were poured into it.<sup>361</sup> Little by little, the element of craftsmanship got played down in favour of the element of inspiration, which moreover became internalized rather than externalized,<sup>362</sup> and thus

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<sup>356</sup> Ibid, p22

<sup>357</sup> Ibid, p33

<sup>358</sup> Ibid, p36

<sup>359</sup> Joyce, Craig (ed), *Copyright law*, 6. ed., LexisNexis, Newark, N. J., 2003,p18

<sup>360</sup> Woodmansee, Martha, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'*, Eighteenth Century Studies, Vol 17, No 4, 1984, pp 426-427

<sup>361</sup> Jaszi, Peter, *Toward a Theory of Copyright: The Metamorphoses of Authorship* [Electronic Source], Duke Law Journal, Vol 1991, No 2, p 471 <http://cyber.law.harvard.edu/people/tfisher/Jaszi%20Theory%203.html>

<sup>362</sup> Woodmansee, *The Genius and the Copyright*, op.cit, p427

the ‘authorship’ as a special calling, both above and apart from ordinary human activity was born.<sup>363</sup>

However, since this did not really fit well with printers interests, in mid eighteenth century new legal concept emerged, one of the ‘work’ enabling alienation of the author from the object of his work.<sup>364</sup> Consequently, publishers and other purchasers of ‘authors’ rights were able to use this delimitation between author and his work not only to exclude strangers but also the very ‘author’ who first delimited it.<sup>365</sup> This legal delimitation and alienation between author and his work is most obvious in today’s works-for-hire where the ‘author’ of the ‘work’ is the person on whose behalf the ‘work’ is made, rather than the individual who created it.<sup>366</sup>

### **3.1.1.3.2 DEATH OF AN ‘AUTHOR’**

#### **3.1.1.3.2.1 ORIGINALITY**

As a result of this historical development of author perception, when copyrights are claimed today, right holders prefer to think of themselves exclusively in terms of genius-creators and demand from the state protection against borrowers and copiers, indisposed to acknowledge any outside influences on their work.<sup>367</sup>

However, this outside influence through precursors and the context in which the work is generated does exist.<sup>368</sup> This was confirmed by the research on psychology of creativity which showed that individual creativity is to a significant degree socially structured.<sup>369</sup> Or as Newton famously said, “if I have seen further it is by standing upon the shoulders of giants”.<sup>370</sup>

Even the central figure of American Romanticism, Ralph Waldo Emerson in his essay Quotation and Originality, recognized this huge indebtedness each author owes to past work, by saying that

our debt to tradition through reading and conversation is so massive, our protest or private addition so rare and insignificant, and this

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<sup>363</sup> Joyce, op.cit, p29

<sup>364</sup> Jaszi, Toward a Theory of Copyright, op.cit, pp 473-475

<sup>365</sup> Ibid, p478

<sup>366</sup> Ibid, p485

<sup>367</sup> Drahos, Peter, *A philosophy of intellectual property*, Dartmouth, Aldershot, 1996, p62

<sup>368</sup> Bettig, op.cit, p239

<sup>369</sup> Guibault & Hugenholtz, op.cit, p151

<sup>370</sup> Wong, PIIPA, Dutfield, op.cit, p19

commonly on the ground of other reading or hearing, that, in a large sense, one would say there is no pure originality. All minds quote.<sup>371</sup>

Thus, I believe that there can be no dispute that many creations often emanate from previous creations, whether as a homage, reinterpretations or developments.<sup>372</sup> Hence, Paul Gauguin's 'Bonjour Monsieur Gauguin' was inspired by Gustave Courbet's 'The Meeting'.<sup>373</sup> Velasquez was an inspiration to the impressionists, as was acknowledged in the 2003 'Manet/Velasquez' exhibit at New York's Museum of Modern Art featuring several Velasquez works side-by-side with Manet's reinterpretations of those works.<sup>374</sup> Moreover, Beethoven had innumerable variations on a theme composed by Mozart, Brahms on a theme by Handel, Rachmaninoff on a theme by Paganini, and so forth.<sup>375</sup>

Or as an example of more blunt 'borrowing' from the past, Shakespeare usually used as his foundation already existing plot, characters and sometimes even some of the actual language.<sup>376</sup> Kafka also borrowed heavily from Kleist and Dickens and the first stanza of Yeat's poem 'The Second Coming' used two of Shelley's poems.<sup>377</sup>

All these are examples of derivative works, which under modern copyright law would require authorization from the owner of the copyrighted original.<sup>378</sup> Thus, as Justice Joseph Story, a member of the Supreme Court from 1811 to 1845, in an 1845 opinion wrote:

In truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before. The thoughts of every man are, more or less, a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection. If no book could be the subject of copy-right which was not

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<sup>371</sup> Fukumoto, Elton, *The Author Effect After the 'Death of the Author': Copyright in a Postmodern Age*, Washington Law Review 72.3, 1997, p 8

<sup>372</sup> Gossieres, Axel, Strowel, Alain & Marciano, Alain (eds), *Intellectual Property and Theories of Justice*, Palgrave Macmillan, 2008, p50

<sup>373</sup> Ibid, p51

<sup>374</sup> Guibault & Hugenholtz, op.cit, p143

<sup>375</sup> Landes & Posner, op.cit, p67

<sup>376</sup> Ibid, p58

<sup>377</sup> Ibid, p59

<sup>378</sup> Ibid, p68

new and original in the elements of which it is composed, there could be no ground for any copy-right in modern times.<sup>379</sup>

Likewise, twentieth century literary theorists such as Northrop Frye and Harold Bloom saw literature as intertextual, saying that because literature is so conventional, there can be no creation without extensive borrowing.<sup>380</sup> Hence rather than seeing poetic creation as occurring when a suitably talented person sits down with a pen and paper and produces a poem ex nihilo, Frye concluded that poetry can only be made out of other poems and novels out of other novels and that the only reason that we see author's appropriation as something negative is because of the current dominant belief in a romantic author. He continued by saying that, as any serious study of literature would show, the only real difference between the original and the imitative poet is that the former is more profoundly imitative<sup>381</sup>, or as T.S. Eliot observed, a good poet is more likely to steal than to imitate<sup>382</sup>. Bloom agreed, but saw this appropriation by newcomer author accompanied by his guilt and anxiety.<sup>383</sup>

Similarly, postmodernists concluded that there is nothing new under the sun and that all creation is only recreation, and therefore that there is no such thing as originality, merely endless imitation.<sup>384</sup> For that reason, the basic idea is to incorporate material from previous works of art, and by rearranging them or changing their context, comment upon this pre-existing material.<sup>385</sup>

Moreover, by preventing authors through copyright to build on the works of their forbearers and demanding of them to create something completely new, we may create ambience of innovation just for the sake of innovation.<sup>386</sup>

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<sup>379</sup> Fukumoto, op.cit, p8

<sup>380</sup> Ibid, p5

<sup>381</sup> Ibid

<sup>382</sup> Ibid

<sup>383</sup> Ibid

<sup>384</sup> Boyle, James, *The public domain: enclosing the commons of the mind*, Yale University Press, New Haven, Conn., 2008, p154

<sup>385</sup> Fukumoto, op.cit, p9

<sup>386</sup> Smiers, Joost & Schijndel, Marieke van, *Imagine there are is no copyright and no cultural conglomerates too... Better for artists, diversity and the economy / an essay*, Institute of Network Cultures, Amsterdam 2009., p63

### 3.1.1.3.2.2 COLLABORATIVE WRITING

Beside derivative influences, there is, and always was much simultaneous collaboration, as in joint authorship or the creation of multimedia works such as opera and film.<sup>387</sup> Thus, Andrea Lunsford from Stanford University and Lisa Ede from Oregon State University, after researching for 8 years professional circle in America concluded that the traditional model of solitary authorship is more a myth than reality. They found that most of the writing produced is done collaboratively, and moreover, that a lot of 'creative' writing filed under the banner of single authorship is as well collaborative.<sup>388</sup>

There are numerous examples throughout history of friends and colleagues contributing to the works attributed to the author. Fitzgerald for example persuaded Hemingway to drop the first fifteen pages of the original opening of *The Sun Also Rises*;<sup>389</sup> D. H. Lawrence collaborated with Frieda Lawrence, Edward Garnett, and others in *The Rainbow*, *Women in Love*, and *Sons and Lovers*<sup>390</sup>; and Mark Twain worked with Charles Dudley Warner on *The Gilded Age*<sup>391</sup>. Painters used to regularly employ collaborators specialized in certain particular objects like trees or animals to finish the painting.<sup>392</sup>

Moreover, there are also many examples of publisher/writer collaborations. For example, Richard Bentley offered to Melville to have *Pierre* rewritten "in a style to be understood by the great mass of readers"; Bentley's persuaded Anne Manning to add two chapters to *The Ladies of B'ever Hollow* to enhance sales appeal; and Dickens, in his capacity as editor, modified Bulwer Lytton's *A Strange Story* to make the serialized version appealing to readers' expectations.<sup>393</sup> Likewise, editor Maxwell Perkins virtually created 'Look Homeward, Angel' and 'Of Time and the River' out of huge masses of manuscript that Wolfe had brought him.<sup>394</sup> Another

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<sup>387</sup> Landes & Posner, op.cit, p66

<sup>388</sup> Lunsford, Andrea A., & Lisa Ede, *Collaborative Authorship and the Teaching of Writing*, in *The Construction of Authorship: Textual Appropriation in Law and Literature*. Ed. Martha Woodmansee and Peter Jaszi, Durham: Duke UP, 1994, p 418

<sup>389</sup> Stillinger, Jack, *Multiple Authorship and the Myth of Solitary Genius*. New York: Oxford UP, 1991, p156

<sup>390</sup> Ibid, p207

<sup>391</sup> Ibid, p208

<sup>392</sup> Appadurai, Arjun (ed), *The social life of things: commodities in cultural perspective*, Cambridge Univ. Press, Cambridge, 2001, p45

<sup>393</sup> Stillinger, op.cit, p140

<sup>394</sup> Ibid, p146

editor, Saxe Commins, was not even above ghost-writing when he had to, writing as O'Neill each of the forewords in the twelve-volume Wilderness Edition of The Plays of Eugene O'Neill.<sup>395</sup>

Today, this tradition of collaborations can be seen in 'living review' practice by Max Planck Institute, where articles may be complemented by ongoing commentary and dialog.<sup>396</sup>

Therefore, the question is how we disentangle the real contribution of the author from the contribution of a wider culture within which the author works, whether through influences of prior authors and society in general or through collaborations. Even if we acknowledge a natural right to property, it should still apply only to that part of the product that we can attribute to the 'author', and not to the whole product.<sup>397</sup> Therefore, "at the same time as the law can invent authors where romantic literary theory would deny them, law can deny authorship where literary theory might recognize it. Thus, copyright law denies authorship to the contributor of ideas and, in cases of collaborative works, frequently refuses to recognize contributors as authors in an attempt to simplify ownership".<sup>398</sup> Those who do not fit this model, like custodians of tribal culture or collectives practicing traditional artistic and music forms, are denied protection.<sup>399</sup>

### **3.1.1.3.2.3 LONG LIVE THE TEXT**

Another way of looking at the creativity and authorship is by completely denying author's existence.

Thus, post-structuralists argued that text itself and not a solitary author writes text.<sup>400</sup> In this way, they agreed with structuralists, who applying structural linguistics to the study of human culture de-emphasized the role of human consciousness in understanding the meaning of cultural trends. In view of that, French psychoanalyst Jacques Lacan claimed that the subject

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<sup>395</sup> Ibid, p151

<sup>396</sup> Hess, Charlotte & Ostrom, Elinor (eds), *Understanding knowledge as a commons: from theory to practice*, MIT Press, Cambridge, Mass., 2007, p316

<sup>397</sup> Gosseries, Strowel & Mariano, op.cit, p44

<sup>398</sup> Wong, PIIPA & Dutfield, op.cit, ch8 p23

<sup>399</sup> Yu, Peter K., *Intellectual Property and the Information Ecosystem*. [Electronic Source], Michigan State Law Review, Vol. 2005, pp. 1-20, Spring 2005, p14 <http://ssrn.com/abstract=578575>

<sup>400</sup> Fukumoto, op.cit, p5

does not think, but rather that language thinks and speaks the subject.<sup>401</sup> However, unlike structuralists, post-structuralists denied the possibility of incurring the meaning of a text, since “the idea that a method could give us the real meaning of a text simply repeats the similar mistake of finding out what a text means by asking its author”.<sup>402</sup> Hence, for post-structuralists concepts such as a subject, an individual, a consciousness, a method, and a meaning are only a philosophical fiction that has its uses, but has no existence prior to its social construction.<sup>403</sup> Most famous among them are Barthes, Foucault and Derrida.

Roland Barthes in ‘The Death of the Author’ sees language as the one that speaks, and not the author.<sup>404</sup> For him, “the Author is a modern figure, a product, of our society insofar as, emerging from the Middle Ages with English empiricism, French rationalism and the personal faith of the Reformation, it discovered the prestige of the individual, of, as it is more nobly put, the ‘human person’”.<sup>405</sup> He continues by saying that “we know now that text is not a line of words releasing a single ‘theological’ meaning (the ‘message’ of Author-God) but a multi-dimensional space in which a variety of writing, none of them original, blend and clash. The text is a tissue of quotations drawn from the innumerable centres of culture. Author’s only power is to mix writings, to counter the ones with the others, in such a way as never to rest on any one of them”.<sup>406</sup> Thus, while “the Author is thought to nourish the book, which is to say that he exists before it, thinks, suffers, lives for it, is in the same relation of antecedence to his work as father to his child”, “the modern scriptor is born simultaneously with the text, is in no way equipped with a being preceding or exceeding the writing, is not the subject with the book as predicate; there is no other time than that of the enunciation and every text is eternally written here and now”.<sup>407</sup> The only place where this multiplicity is focused for Barthes is the reader, as text’s destination, and not the author.<sup>408</sup>

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<sup>401</sup> Burke, Seán, *Death and return of the author: criticism and subjectivity in Barthes, Foucault and Derrida*, Edinburgh Univ. Press, Edinburgh, 1992, p100

<sup>402</sup> Fukumoto, op.cit, p6

<sup>403</sup> Ibid.

<sup>404</sup> Barthes, Roland, *Image, music, text* [Electronic Resource], Fontana, London, 1977, p2  
<http://www.hti.umich.edu/cgi/t/text/text-idx?c=genpub;cc=genpub;view=toc;idno=AAP6171.0001.001>

<sup>405</sup> Ibid, p1

<sup>406</sup> Ibid, p3

<sup>407</sup> Ibid, p2

<sup>408</sup> Ibid.



Michel Foucault in 'What Is an Author?' similarly describes how various historical developments, including the creation of an ownership system for texts during the late eighteenth century, have shaped the modern conception of the author. To Foucault, authors do not exist in nature, they are socially constructed.<sup>409</sup> He states:

We are accustomed to saying that the author is the general creator of a work in which he deposits, with infinite wealth and generosity, an inexhaustible world of significations. The truth is quite the contrary: the author is not an indefinite source of significations which fill a work; the author does not precede the works; he is a certain functional principle by which, in our culture, one limits, excludes, and chooses; in short, by which one impedes the free circulation, the free manipulation, the free composition, decomposition and recomposition of fiction.<sup>410</sup>

Derrida also argued that the act of writing does not entail having authors on one side and the words they produce on the other. He saw symbols, signs, and language as producing themselves and not as being produced by something outside them. Thus, for him, there is nothing behind language.<sup>411</sup>

Other way of looking at the text is by denying the author, by extolling the audience. In this regard, once created, works of art are independent of their creators, as should be evident by the fact that works of art do not 'die' when their creators do. Nevertheless, they are dependent for their continued existence on audiences.<sup>412</sup> Moreover, this audience must be one that can appreciate it.<sup>413</sup>

The reader of any literary (or artistic) text is always an interpreter of that text and the author, when once the work has become a work, is no more than another one of its interpreters, and not a privileged or powerful or special one either.<sup>414</sup>

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<sup>409</sup> Fukumoto, op.cit, p6

<sup>410</sup> Foucault, op.cit, p118

<sup>411</sup> Fukumoto, op.cit, p7

<sup>412</sup> Palmer, Tom G., *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects* [Electronic Source], Harvard Journal of Law and Public Policy, Vol 13, No 3, 1990, p844 <http://tomgpalmer.com/wp-content/uploads/papers/palmer-morallyjustified-harvard-v13n3.pdf>

<sup>413</sup> Ibid, p847

<sup>414</sup> Loughlan, Patricia, *Moral Rights (A View from the Town Square)* [Electronic Source], media & arts law review, 2000,p8 <http://www.law.unimelb.edu.au/cmcl/malr/511.pdf>

Likewise, one can see departure from the insistence on originality in the recent proliferation of interest for copies. Although a copy usually still remains a ‘second best’ to the original, it may also be considered a work of art by itself, as Van Gogh’s copies of Millet.<sup>415</sup> Moreover, there are now specialized auctions at which only copies are sold.<sup>416</sup> Sometimes, copies are the only traces left of the original, like many copies of Georges de La Tour which were exhibited in Paris in 1997–1998 because originals are lost.<sup>417</sup> And recently, a whole museum of copies opened in Naruto, Japan with more than one thousand copies of some of the most celebrated European works of art produced with authorizations from museums holding the originals.<sup>418</sup>

Ultimately, in reality it does not really matter how we perceive an author and whether the author exists at all, since despite the fact that in theory, it is the authors who are protected by copyright, many of them assign away their copyright in contractual agreements.<sup>419</sup> Thus, as Lionel Bently, a Lecturer at King’s Collage notes, one may say that “copyright serves paradoxically to vest authors with property only to enable them to divest that property”.<sup>420</sup> This alienation of author and his text, can be seen also in recent developments in copyright law, whereby Charter of Fundamental Rights of the EU, the only international instrument explicitly protecting IP in its Article 17(2) states only that intellectual property shall be protected without mentioning the author at all.<sup>421</sup>

#### **3.1.1.4 AUTHORS’ MATERIAL INTERESTS**

Authors’ ‘material interests’ viewed in light of the drafting history of both the UDHR and the ICESCR, seem to be narrower than what is usually protected under the right to private property. ICESCR does not even include a provision on the right to own property, while Article 17 of the UDHR guarantees right to property but it does not protect the right to own private property.<sup>422</sup> Although this is probably the result of Cold War politics<sup>423</sup>, one should keep it in mind when interpreting provisions on authors’ material rights.

Likewise, Cassin in his draft of today’s Article 27(2) of UDHR, when talking about material rights used the phrase ‘just remuneration for

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<sup>415</sup> Ginsburgh & Throsby, op.cit, p272

<sup>416</sup> Ibid, p279

<sup>417</sup> Ibid, p272

<sup>418</sup> Ibid.

<sup>419</sup> Wong, PIIPA & Dutfield, op.cit, ch 8 p 23

<sup>420</sup> Ibid

<sup>421</sup> Torremans, op.cit, p106

<sup>422</sup> Yu, Reconceptualizing Intellectual Property Interests, op.cit, p1086

<sup>423</sup> Ibid, p1085

labour’<sup>424</sup>. Peter K. Yu, from Drake University Law School, sees this provision as a probable consequence of concern to protect authors from forced intellectual labour widely used in Nazi Germany and Stalinist Russia and which the delegates repeatedly condemned during the drafting process.<sup>425</sup>

Thus, and as the drafting history seems to suggest, authors’ ‘material interests’ should not be interpreted broadly to cover all forms of economic rights protected today through copyright, but rather narrowly, to cover only just remuneration for one’s intellectual labour.<sup>426</sup>

CESCR itself similarly acknowledged in its General Comment No. 17 that the:

protection under article 15, paragraph 1(c), need not necessarily reflect the level and means of protection found in present copyright, patent and other intellectual property regimes, as long as the protection available is suited to secure for authors the moral and material interests resulting from their productions.<sup>427</sup>

It moreover continued by saying that the term of protection of material interests under article 15(1)(c), “need not extend over the entire lifespan of an author. Rather, it noted, “the purpose of enabling authors to enjoy an adequate standard of living can also be achieved through one-time payments or by vesting an author, for a limited period of time, with the exclusive right to exploit his scientific, literary or artistic production”.<sup>428</sup>

#### **3.1.1.4.1 AUTHORS’ MATERIAL INTERESTS AND COPYRIGHT**

One of the arguments often used to defend the copyright is that they generate income for artists.<sup>429</sup> However, as leading cultural economist Ruth Towse has put it, and as it has been corroborated by empirical research that I’ll mention hereinafter, “copyright generates more rhetoric than money for the majority of composers and performers in the music industry”.<sup>430</sup>

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<sup>424</sup> Shaver, *The Right to Science and Culture*, op.cit, p144

<sup>425</sup> Yu, *Reconceptualizin Intellectual Property Interests*, op.cit, p1087

<sup>426</sup> *Ibid*, p1088

<sup>427</sup> General Comment No 17, op.cit, para 7

<sup>428</sup> *Ibid*, para 16

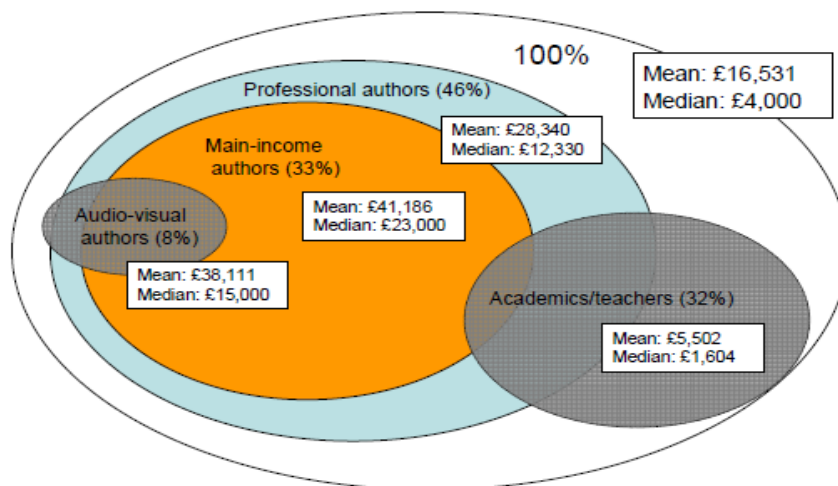
<sup>429</sup> Smiers & Schijndel, op.cit, p15

<sup>430</sup> *Ibid*.

In that regard, CIPPM survey of 25,000 British and German writers shows that as a profession, writing has remained resolutely unprosperous.<sup>431</sup> This situation seems not to differ between countries acknowledging moral rights and those who do not.

Consequently, typical earnings of professional authors are one third below the national median wage in the UK. Accordingly, median wage in 2004-05, for professional UK authors (defined for the purposes of the study as those who allocate more than 50% of their time to writing) was £12,330 or 64% of the national gross median wage. Moreover, 60% of authors had a second job.<sup>432</sup>

UK authors: earnings from writing (2004-05)  
Sample – membership of collecting society (ALCS)



Source: *Author's Earnings from Copyright and non-Copyright Sources; A Survey of 25 000 British and German Writers* CIPPM, Bournemouth University, 2007, p10

Similarly, German professional authors earn less than half of the national median wage in Germany,<sup>433</sup> meaning that their median wage was €12,000/£8,280 or just 42% of the national net median wage. As is the case with British authors, 60% hold a second job.<sup>434</sup>

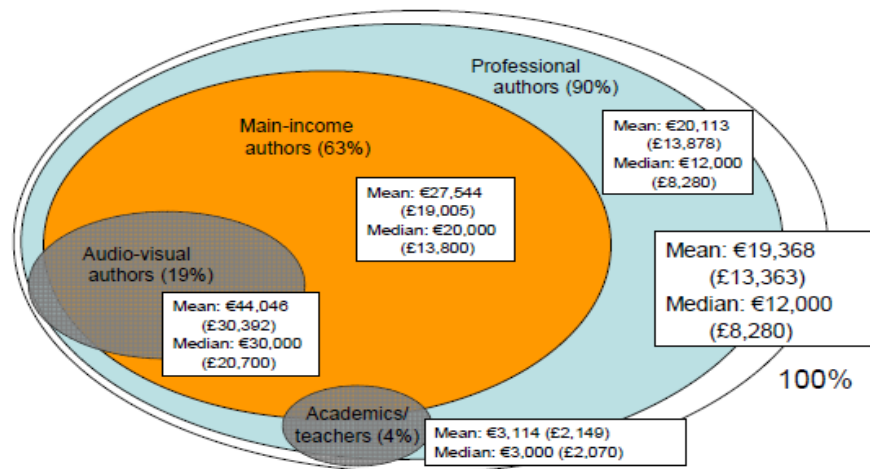
<sup>431</sup> *Author's Earnings from Copyright and non-Copyright Sources; A Survey of 25 000 British and German Writers* [Electronic Resource], CIPPM, Bournemouth University, 2007 <http://www.cippm.org.uk/downloads/ACLS%20Full%20report.pdf>

<sup>432</sup> Ibid, p5

<sup>433</sup> Ibid, p3

<sup>434</sup> Ibid, p5

German authors: earnings from writing (2005)  
 Sample – membership of professional body (VS, VDD)



Source: *Author's Earnings from Copyright and non-Copyright Sources; A Survey of 25 000 British and German Writers* CIPPM, Bournemouth University, 2007, p10

And this gap in earnings seems to be growing. According to National Endowment for the Arts, Research Division Note 33, in 1939 artist wages and salaries were about 71% of comparison group. By 1989 this had fallen to about 67%.<sup>435</sup>

Similar results regarding author's earnings in royalties were noted in 2000 survey of 30,000 members of the UK Performing Rights Society.<sup>436</sup> Only 900 earned more than the average British annual income for that year of £15,000, with 200 members receiving more than £100,000, and 700 members receiving more than £25,000. Further 1,500 received less than the average annual income, but more than £10,000, and 2,300 received more than £5,000. A total of 16,000 members received amounts under £100. Thus, as can be inferred from this results and was moreover confirmed by collecting society statistics, the top 10% of artists account for between 80% and 90% of total earnings, while the typical performing artist earns annually only couple of hundreds of pounds.<sup>437</sup>

Furthermore, when leading research institutes met at Bournemouth University in May 2008<sup>438</sup>, they concluded that artists' earnings are primarily a matter of contract, and not copyright.<sup>439</sup> And because copyright

<sup>435</sup> Heilbrun & Gray, op.cit, p313

<sup>436</sup> *A Joined Academic Statement on the Proposed Copyright Term Extension for Sound Recordings* [Electronic Source], 2008 <http://www.openrightsgroup.org/wp-content/uploads/sound-recordings-impact.pdf>

<sup>437</sup> Ibid, pp3-4

<sup>438</sup> Ibid, p2

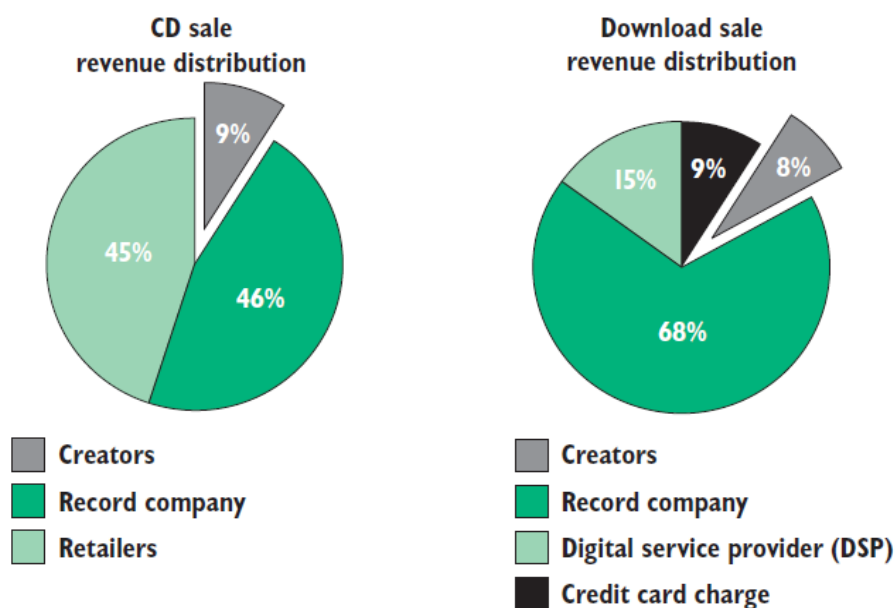
<sup>439</sup> Ibid, p3

(un)intentionally facilitated the development of large multinational corporations, integrated both horizontally and vertically so that, for example in music industries, the same conglomerate owns music publishing, record labels, record shops and radio stations, artists bargaining power in this contracts is very weak.<sup>440</sup>

Thus, in regards to writing, the most common contract is a ‘pure’ royalty contract, where the publisher pays to the author a certain percentage of the sales revenue from the work which, in case of books is mostly only 10 to 15%. Sometimes, the publisher may pay the author a lump sum advance on the royalties, which is then recouped out of future royalty payments.<sup>441</sup> Finally, there is a ‘buyout’, favoured by publishers but not the authors, since afterwards the publisher has no further obligation towards the author.<sup>442</sup>

In music industry the PWC report also indicates that, on average creators receive a very low percentage of royalties from recordings as publishers take a larger share.<sup>443</sup>

**Chart 4.I: Revenue Distribution**



Source: MCPS/PRS Alliance.

Source: Gowers Review of Intellectual Property, HMSO, 2006, p51

<sup>440</sup> Towse, Ruth, *Creativity, incentive and reward: an economic analysis of copyright and culture in the information age*, Edward Elgar, Cheltenham, 2001, p163

<sup>441</sup> Ibid, p116

<sup>442</sup> Ibid.

<sup>443</sup> Gowers, op.cit., p51

Therefore, with compact discs, performing artists receive approximately only 9 % of the sales revenue, while the labels receive 46%, and retailers 45%. With digital downloads, performing artists' receive even less, namely only 8%, record labels share is increased by 22% to 68%, digital service providers receive 15% and even credit card companies receive more, namely 9%.

Moreover, big corporations are not always ready to part with even this small share belonging to artists. Thus, the Beatles accused Capitol Records of failing to pay royalties on 19 million albums and singles after an audit revealed more than 20 separate areas where Capitol/EMI had 'wrongfully accounted' for costs or revenue concerning promotion, manufacture and sales, in the period from 1969–1979.<sup>444</sup>

### **3.1.2 LOCKE AND LABOR ORIGIN STORY**

John Locke analyzed property rights trying to explain and to justify the shift from the earthy commons that everybody can use to private property.<sup>445</sup> Property here is introduced as a solution to a practical problem<sup>446</sup>, namely that in order to survive, people must eat, drink, have a shelter, and so on, that is, they must be able to take natural resources, initially not owned, and make them into their exclusive property.<sup>447</sup> Locke argued that this they achieve by pouring their self-owned substance, i.e. their labour into them.<sup>448</sup> Since every individual owns his own body, he also owns each of his body organs taken separately, and any of his body products, as well as the activity of his body.<sup>449</sup> However, Locke conditioned this appropriation of commons on two things: the non-spoilage proviso, whereby a person can own only as much property as he/she can use before it spoils<sup>450</sup>, and 'enough and as good left' proviso stating that a person must leave in commons enough and as good for others<sup>451</sup>.

One problem with this idea, is that it depends on the presumption that the world is originally unowned, or rather that neither anyone in particular, nor humanity collectively has any innate claim of ownership on natural

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<sup>444</sup> Ginsburgh & Throsby, op.cit, p675

<sup>445</sup> Drahos, A Philosophy of IP, op.cit, p49

<sup>446</sup> Gosseries, Strowel & Marciano, op.cit, p30

<sup>447</sup> Ibid, p31

<sup>448</sup> Ibid, p38

<sup>449</sup> Ibid, p37

<sup>450</sup> Ibid, p45

<sup>451</sup> Ibid, p46

resources.<sup>452</sup> Moreover, and as prominent American political philosopher Robert Nozick has asked, why does a person automatically gain ownership over the unowned resource rather than lose the ownership over the labour it mixed into the resource?<sup>453</sup> Nozick additionally noted, when talking about Locke's proviso 'enough and as good left in common for others', that there are two ways one may be made worse off by another's appropriation: first, by losing the opportunity to improve his situation by a particular appropriation or any one, and second, by no longer being able to use freely (without appropriation) what he previously could.<sup>454</sup> Thus, he concluded that this proviso could never be satisfied. Another problem with Locke's theory is that sometimes, it is not so easy to identify the producer of a material product since ideas develop within a social context.<sup>455</sup>

Moreover, Locke's argument rests on a need to secure the full and effective use of real property by certain forms of exclusive control and direction. However, since intellectual property is non-rivalrous, it can be used simultaneously by many individuals without its value diminishing with use.<sup>456</sup> That even Locke saw author's rights differently can be seen from his 'Liberty of the Press', where he expresses the concern that "many good books come quite to be lost"<sup>457</sup> and advocates a weaker version of a natural right for authors, limited in time and available for purposes of education and learning.<sup>458</sup> Alas, such limitations and exceptions to intellectual property do not really go well with the presumption of natural rights in property that presumably are not dependent on any contract and should be perpetual.<sup>459</sup>

Finally, the labour origin story<sup>460</sup> justifies copyright as a recognition of the labour that went into the production. However, today's copyright system, at least in theory, is not based on the degree of labour or time spent in creating a work, but instead on the presence of originality.<sup>461</sup>

Further, copyright can even come to clash with liberty based arguments for property, as intellectual monopolies interfere with the freedom of others to

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<sup>452</sup> Ibid, p 39

<sup>453</sup> Nozick, Robert, *Anarchy, state, and Utopia*, Blackwell, Oxford, 1974, p174

<sup>454</sup> Ibid, p176

<sup>455</sup> Gosseries, Strowel & Marciano, op.cit, p53

<sup>456</sup> Ibid, p94

<sup>457</sup> Bettig, op.cit, p21

<sup>458</sup> Zemer, Lior, *The Idea of authorship in copyright*, Ashgate, Aldershot, 2007, p167

<sup>459</sup> Gosseries, Strowel & Marciano, op.cit, p30

<sup>460</sup> Patry, op.cit, p65

<sup>461</sup> Ibid.



use their own bodies or their own, justly acquired property in certain ways.<sup>462</sup>

### 3.1.3 HEGEL AND THE PERSONALITY THEORY

G.W.F. Hegel saw property as the embodiment of personality<sup>463</sup>, i.e. as a means for self-actualization, for personal expression, and for the dignity of the individual.<sup>464</sup> However, there is no suggestion by him that some personalities through this process of personification acquire special entitlements.<sup>465</sup> Likewise, this theory becomes problematic when applied to works that result in collective effort.<sup>466</sup>

Moreover, if we compare today's intellectual global system with Hegel's idea of the state, one has to wonder, whether Hegel would approve of it. Hegel saw the state as a fusion of three subsystems: the political, the civil and the ethical that operate in a kind of tense unity which is the source of the modern state's strength. Moreover, the stability of the state depends on none of the systems achieving dominance over the other.<sup>467</sup> Thus, while the state's role is to serve individuals as members of civil society, at the same time the state has an obligation to preserve the ethical life of the community since, according to Hegel, individual participation in the larger ethical life of the state is the final stage of the individual's journey to freedom.<sup>468</sup>

However, in today's state, individuals, realizing the possibilities that the property in intangible goods brings, through the race to secure this intellectual property continuously increase the pressure on the political state. And this not only nationally, but internationally as well, using the services of a strong state to bring about the realization of a global intellectual property regime which would protect their newly acquired rights. Thus, as the state becomes a protector of selected property interests, this consequently threatens the equilibrium of the state and the ethical life of the community that is slowly being replaced by group morality of property

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<sup>462</sup> Palmer, op.cit, p855

<sup>463</sup> Drahos, A philosophy of Intellectual Property, op.cit, p79

<sup>464</sup> Joyce, op.cit, p61

<sup>465</sup> Drahos, A philosophy of Intellectual Property, op.cit, p81

<sup>466</sup> Joyce, op.cit, p61

<sup>467</sup> Drahos, A philosophy of Intellectual Property, op.cit, p84

<sup>468</sup> Ibid, p85

owners.<sup>469</sup> Hence, property in abstract objects no longer acts within communities to enable freedom but acts upon them to restrict it.<sup>470</sup>

## 3.2 UTILITARIAN THEORY

### 3.2.1 INTELLECTUAL GOODS AS A PURE PUBLIC GOOD

A pure public good is a commodity with two distinctive characteristics: non-excludability and non-rivalrousness. Intellectual goods are thought to be such goods.<sup>471</sup>

#### 3.2.1.1 NON-RIVALROUSNESS

According to the economic theory of private property, society benefits from the delimitation and protection of private property rights because goods are scarce. Thus, private property guarantees that scarce goods will be put to their most efficient and productive uses.<sup>472</sup>

This ‘tragedy of commons’, i.e. misappropriation of scarce goods if not privately owned, is however questionable, especially if we take examples of prosperous and stable commons regimes governing rival resources such as land and fisheries analyzed among others by Elinor Ostrom, who recently, in part also for this work, won a Nobel Prize in economics.<sup>473</sup>

Moreover, it is difficult to justify copyright under this logic, since intellectual property rights do not arise from the scarcity of the appropriated objects but rather create scarcity artificially.<sup>474</sup> Or as well-known British economist Arnold Plant has put it:

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<sup>469</sup> Ibid

<sup>470</sup> Ibid, p91

<sup>471</sup> Salzberger, Eli M., *The Law and Economics Analysis of Intellectual Property: Paradigmatic Shift from Incentives to Traditional Property* (February 1, 2010), p6 Available at SSRN: <http://ssrn.com/abstract=1574994>

<sup>472</sup> Cole, Julio H., *Patents and Copyrights: Do the Benefits Exceed the Costs* [Electronic Source], *Journal of Libertarian Studies*, Volume 15, No 4, 201, p81 [http://mises.org/journals/jls/15\\_4/15\\_4\\_3.pdf](http://mises.org/journals/jls/15_4/15_4_3.pdf)

<sup>473</sup> Krikorian & Kapczynski, op.cit, p34

<sup>474</sup> Cole, *Patents and Copyrights*, op.cit, p81

it is a peculiarity of property rights in patents (and copyrights) that they do not arise out of the scarcity of the objects which become appropriated. They are not a consequence of scarcity. They are the deliberate creation of statute law; and whereas in general the institution of private property makes for the preservation of scarce goods, tending (as we might somewhat loosely say) to lead us ‘to make the most of them’, property rights in patents and copyright make possible the creation of scarcity of the products appropriated which could no otherwise be maintained.<sup>475</sup>

Intellectual goods are non-rivalrous, meaning that the use of such goods by one user does not detract from the ability of others to use it. Therefore, there is no social loss associated with their usage. Quite the contrary; beside the immediate value to the user, the use of intellectual goods nurtures the human capital that can then contribute to the production of more intellectual products. Thus, in economic terms, the consumption of intellectual goods creates positive externalities.<sup>476</sup>

### **3.2.1.2 NON-EXCLUDABILITY**

However, another reason put forward for copyright is that exactly because of non-rivalrousness of intellectual products, and the fact that since marginal cost of their production is close to zero (meaning that their ideal price on competitive market would also be close to zero), they are easy prey for ‘free-riding’, which in turn discourages authors and producers to invest in production and/or public disclosure of their intellectual products.<sup>477</sup> Thus, as the argument goes, copyright has to transform a global public good into a private one in order to facilitate creation of intellectual goods by enabling producers to charge prices above the ideal ones that would be achieved in competitive markets.<sup>478</sup> This ‘incentives’ argument, however, lacks any empirical support.<sup>479</sup>

Moreover, this artificial privatization comes at a cost. Some individuals who could have benefited from the resource will be priced out of access, creating ‘static’ (short-run) inefficiencies and also reducing overall social welfare.<sup>480</sup> Further, because existing knowledge is also an input into the production of new knowledge, hampering the diffusion of knowledge resources may

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<sup>475</sup> Moore, op.cit, p155

<sup>476</sup> Salzberger, op.cit, p7

<sup>477</sup> Intellectual Property Rights: Implications for Development, op.cit, p31

<sup>478</sup> Krikorian & Kapczynski, op.cit, p28

<sup>479</sup> Shaver, The Right to Science and Culture, op.cit, p159

<sup>480</sup> Ibid, p158

diminish innovation over the long term<sup>481</sup> having also ambiguous effects on dynamic (long-run) efficiency.<sup>482</sup> Moreover, copyright system brings about administrative and enforcement costs that create a ‘dead-weight loss’, i.e. they use up resources without producing a marketable product.<sup>483</sup>

### 3.2.1.3 INCENTIVES

As mentioned above, it is argued that copyright is needed to create incentives for the production of intellectual goods. This argument rests on the presumption that monetary incentives are a necessary condition for inducing creativity and innovation. However, there is no empirical proof for this. Rather, certain facts would suggest otherwise.

Economic literature, and especially Professor Bruno Frey, recognizes the existence of both extrinsic and intrinsic motivations of authors. And while extrinsic motivations satisfy a desire that is not directly contingent on the particular productive activity itself (in this way, paid-for labour is a good example of extrinsic motivation), intrinsic motivation refer to satisfaction of person’s immediate desires.<sup>484</sup> As evidence of existence of intrinsic motivation one can use numerous works that were created before there was any copyright protection at all. Even today, on the Web, one can find numerous examples of the creative self-expression steaming from thousands of blogs, home-made video clips, photos and songs, despite the fact that their authors have no chance of monetary remunerations.<sup>485</sup> Additionally, Frey contended that monetary payment is not only inappropriate for intrinsic motivation, but can also act as a disincentive to effort.<sup>486</sup>

Moreover, beside monetary benefits, there are many intrinsic benefits that people can derive from creative activity like the need to express oneself, to be acknowledged and recognized by one’s peers and the general public or simply as a way of achieving pleasure and satisfaction.<sup>487</sup> This would also follow from the fact that despite manifold deterrents to an artistic career and low earnings, an excess supply of artists persists in many countries.<sup>488</sup> As a recent study by the NEA makes clear, artists suffer from high rates of both unemployment and underemployment, effectively making art a sideline. But despite the difficulties faced by those who embark on a professional career,

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<sup>481</sup> Ibid, p159

<sup>482</sup> Krikorian & Kapczynski, op.cit, p28

<sup>483</sup> The Economics of Copyright and Digitization, op.cit, p20

<sup>484</sup> Lenk, Hoppe & Andorno, op.cit, p274

<sup>485</sup> Salzberger, op.cit, p10

<sup>486</sup> Towse, Creativity, Incentive and Reward, op.cit, p7

<sup>487</sup> Salzberger, op.cit, p10

<sup>488</sup> Ginsburgh & Throsby, op.cit, p10

the number of artists continues to grow. Thus Rand reports that during the ten-year period between 1970 and 1980, the number of self-identified artists in the United States doubled to 1.6 million.<sup>489</sup>

Moreover, there are many ways in which authors may earn indirectly through their work by building a brand-name. This is clearly seen in case of scientific journals, who mostly don't pay authors for articles.<sup>490</sup> However, authors still wish to publish as publication often entails with itself advancement in the careers through tenure and promotions.<sup>491</sup> In addition, as higher citation count often leads to more research funding and higher salary, and since Harnad and Brody<sup>492</sup> from University of Southampton estimate that the citation rate of an article cited in other journals increases dramatically when the cited article is freely accessible online, authors may find that wide accessibility is more beneficial to them than copyright protection.

Furthermore, market for ideal objects can and does function even in the absence of enforceable copyright rights as can be seen from many innovations that are not copyrightable but are nevertheless produced like fashion, jokes, recipes, scientific principles and mathematical formulae and business strategies.<sup>493</sup> However, probably the best examples are database production and free software. Thus, the production of databases is growing much faster in US than in EU despite the fact that they are protected in EU and not in the US. According to the First Evaluation of Directive 96/9/EC, while in 1996 the ratio of Europe/US database production was 1:2, in 2004 it increased to 1:3.<sup>494</sup> Likewise, in case of free software, Linux was created by a community of volunteers without any direct monetary compensation.<sup>495</sup>

Actually, when incentives are concerned, one can say that copyright may act as a double-edged sword. While it increases the rewards to innovative effort

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<sup>489</sup> Ivey, Bill J., *Arts, Inc.: how greed and neglect have destroyed our cultural rights*, University of California Press, Berkeley, 2008, p63

<sup>490</sup> Hess & Ostrom, op.cit, p175

<sup>491</sup> Ibid

<sup>492</sup> Ibid, p55

<sup>493</sup> Palmer, Tom G., *Intellectual Property: A Non-Posnerian Law and Economics Approach* [Electronic Source], Hamline Law Review, Vol 12, No 2, 1989, p287 <http://tomgpalmer.com/wp-content/uploads/papers/palmer-non-posnerian-hamline-v12n2.pdf>

<sup>494</sup> Boyle, op.cit, p219

<sup>495</sup> Salzberger, op.cit, p12

by enabling monopoly prices, it also increases the cost of future creation.<sup>496</sup> And not only the cost. Psychologists studying the ways in which environmental factors can stunt creativity, concluded that “tying extrinsic motivation and controls too tightly to the conceptual stages of the creative process can both undermine motivation and diminish the creativity of the resulting work product”.<sup>497</sup> Thus, a study by American University’s Center for Social Media determined that, for independent filmmakers, heavy copyright protection had the effect of reducing creativity.<sup>498</sup> Or in the words of Harvard Law School Professor Lawrence Lessig, too much copyright protection can result in ‘suffocation of creativity’.<sup>499</sup>

One has to also wonder whether the quantity or quality of work that we believe copyright stimulates is superior in either quantity or quality to the precluded work that potential creators would produce absent to such protection.<sup>500</sup>

Moreover, entrenched player’s dilemma implies that once one obtains monopoly rights, there is far less incentive to be inventive than in a competitive environment, without such rights.<sup>501</sup> Thus, for example, once Giuseppe Verdi started ripping the benefits from the Austrian–Sardinian copyright regime, by collecting opera performance fees and from published ‘reductions’ of individual opera arias, he admittedly grew quite wealthy, but this correlated negatively to his opera-writing pace which fell from fourteen operas in the 1840s to seven in the 1850s, two in the 1860s, and only one in each of the three succeeding decades.<sup>502</sup>

Moreover, if one would judge how much value creators themselves put on copyright according to renewal of copyright figures which show that in 1960, only about 15% of subsisting copyrights were being renewed<sup>503</sup>, one would have to wonder how big an incentive copyright actually is.

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<sup>496</sup> Boldrin, Michele & Levine, David K., *Against intellectual monopoly*, Cambridge University Press, New York, 2008, p10

<sup>497</sup> Guibault & Hugenholtz, op.cit, p156

<sup>498</sup> Ivey, op.cit, p71

<sup>499</sup> Pang, Laikwan, *Cultural control and globalization in Asia: copyright, piracy, and cinema*, Routledge, London, 2006, p13

<sup>500</sup> Gosseries & Marciano, op.cit, p98

<sup>501</sup> Patry, op.cit, p178

<sup>502</sup> Ginsburgh & Throsby, op.cit, p138

<sup>503</sup> *Study No. 31: Renewal of Copyright*, Committee on the Judiciary United States Senate, US Government Printing Office, Washington 1961, p187

What is more, royalties benefit the author usually only after the creation of the work. During the work phase, he is dependent on other earnings for a living. Therefore, one can say that copyright acts much more often as an incentive for the exploiter to invest than for the creator to create.<sup>504</sup>

Joseph Stiglitz, stated that there are more incentives for innovation in competitive marketplace than in monopoly since monopolists tend to produce less, being able to charge higher prices. Moreover, monopolists may realize that new innovation may lead to decrease in the value of their existing capital. Finally, monopolists can also try to “increase their profit by discouraging innovation by rivals and rising rivals’ costs”.<sup>505</sup>

Thus, copyright as an incentive seems to be a contradiction in itself. While it claims as its aim to promote public disclosure and dissemination of works of ‘authorship’, it gives the creators the power to restrict or deny exactly such dissemination and disclosure.<sup>506</sup>

#### **3.2.1.4 WOULD EVERYBODY FREE-RIDE?**

A representative survey of a sample of the Dutch population conducted in April 2008<sup>507</sup> showed that buying and file sharing do not exclude each other. Not only are music sharers equally likely to buy music as other people (68% of file sharers also purchase music), but they purchase it in the same amount as non-file sharers. And what is more, file sharers spend more money on merchandise and go to concerts significantly more frequently. As for films, file sharers turn out to buy significantly more DVDs than non-file sharers, while on average, they go to the cinema equally often as non-file sharers. Finally, 67% of game file sharers are buyers as well. And if they buy, they buy significantly more games than non-file sharers. Finally, most file sharers say they would not change their buying habits if downloading were no longer possible.<sup>508</sup>

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<sup>504</sup> Torremans, op.cit, p110

<sup>505</sup> Patry, op.cit, p64

<sup>506</sup> Jaszi, Toward a Theory of Copyright, op.cit, p463

<sup>507</sup> Van Eijk, Nico, Poort, Joost and Rutten, Paul, *Legal, Economic and Cultural Aspects of File Sharing*, Communications & Strategies, Vol. 77, p. 42, 2010  
<http://ssrn.com/abstract=1809696>

<sup>508</sup> *Ups and Downs; Economic and Cultural Effects of File Sharing on Music, Film and Games* [Electronic Source], TNO-rapport, 2009, p4  
[http://www.governo.it/Presidenza/antipirateria/audizioni/audizione\\_ALTROCONSUMO\\_allegato2.pdf](http://www.governo.it/Presidenza/antipirateria/audizioni/audizione_ALTROCONSUMO_allegato2.pdf)

Differences in purchasing behaviour between file sharers and non-file sharers

	<i>Music</i>	<i>Films</i>	<i>Games</i>
Buyers in the past 12 months: Yes/No	No difference	No difference	File sharers buy more often (61% vs 57%)
If a buyer in previous 12 months: number	No difference	File sharers buy more (12.0 vs 8.0 films)	File sharers buy more (4.2 vs 2.7 games)
Related products	File sharers visit concerts more often and buy more merchandise	No difference in cinema visits	No difference in buying merchandise

Source: Van Eijk, Nico, Poort, Joost and Rutten, Paul, *Legal, Economic and Cultural Aspects of File Sharing, Communications & Strategies*, Vol. 77 p44

Reasons for this results that show that every product illegally downloaded does not automatically entail, as some would like us to believe, also one less product being sold, may be deduced from the explanations file sharers gave as to why they would still buy the original. Thus, music downloaders as their main reasons for still buying the original state loving the music (over 80%) or wishing to support the artist (over 50%). One third mentions also as a reason owning the CD sleeve and booklet or the higher quality of the CD.<sup>509</sup> Film sharers cite such reasons as liking the film a lot or wanting the extra features the DVD offers. Likewise, game sharers report buying a previously downloaded game considering it a really good game and/or wanting to own the original box and game.<sup>510</sup>

A study of the Impact of Music Downloads and P2P File-Sharing on the Purchase of Music in Canada came to the similar conclusion, i.e. that P2P file sharing tends to increase rather than decrease music purchasing.<sup>511</sup> Among Canadians who engage in P2P file-sharing, for every 12 P2P downloaded songs, music purchases increased by 0.44 CDs. That is, downloading the equivalent of approximately one CD increased purchasing by about half of a CD. Roughly half of all P2P tracks were downloaded because individuals wanted to hear songs before buying them or because they wanted to avoid purchasing the whole bundle of songs on the associated CDs and roughly one quarter were downloaded because they were not available for purchase.<sup>512</sup>

<sup>509</sup> Ups and Downs, op.cit, p79

<sup>510</sup> Ibid, pp79-80

<sup>511</sup> Anderson, Brigitte & Frenz, Marion, *The Impact of Music Downloads and P2P File-Sharing on the Purchase of Music: A Study for Industry Canada* [Electronic Resource], University of London, 2007, p3 [http://www.ic.gc.ca/eic/site/ippd-dppi.nsf/vwapj/industrycanadapapermay4\\_2007\\_en.pdf/\\$file/industrycanadapapermay4\\_2007\\_en.pdf](http://www.ic.gc.ca/eic/site/ippd-dppi.nsf/vwapj/industrycanadapapermay4_2007_en.pdf/$file/industrycanadapapermay4_2007_en.pdf)

<sup>512</sup> Ibid, p3



Likewise, Peitz and Waelbroeck argue that the publishers can actually enhance their profit by allowing sampling through free downloading of digital products, as consumers are more willing to pay when they know that a product corresponds to their preferences. Equal conclusion can be found in an empirical investigation by Givon et al., which shows that an increase in illegal usage of software actually can boost the demand for buying legal copies through creating ‘addiction’.<sup>513</sup>

Actually, one recent survey of owners/managing directors of several hundred (mainly smaller, so called independent) record companies in Germany showed that on average, the independent record companies perceive the clearance of rights to entail greater obstacles to innovation than the possibility of unauthorized copying due to a lack of copyright enforcement.<sup>514</sup>

### **3.2.1.5 SO JUST HOW MUCH DOES COPYRIGHT REALLY ACT AS AN INCENTIVE?**

Study of 23 OECD countries, among which 19 extended copyright term at various times between 1991-2005 found no statistically robust evidence that copyright term extension was associated with higher movie production.<sup>515</sup> Similarly, a panel of 17 European countries studied during the period 1991-2005 showed no statistically robust evidence that compliance with the Rental Directive was associated with higher movie production.<sup>516</sup>

Moreover, Plant suggests that smaller number of published titles need not be a bad thing, since what we really want is not more titles, but more good books at lower prices. He continued by arguing that while the copyright system encourages publication of more titles, not enough copies of the books people really want to read are being published.<sup>517</sup>

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<sup>513</sup> Gayer, Amit & Shy, Oz, *Publishers, Artists and Copyright Enforcement*, Information Economics and Policy 18 (2006) p 375

<sup>514</sup> Handke, Christian, *Does One Size Copyright Fit All? Copyright and Innovation in Small Record Companies* [Electronic Source], paper presented at the Society for Economic Research on Copyright Issues Annual Congress 2008, Geneva, p12 <http://www.serci.org/2008/Handke.pdf>

<sup>515</sup> Png, I.P.L. & Wang, Qiu-hong, *Copyright Law and the Supply of Creative Work: Evidence from the Movies* [Electronic Source], April 2009, p3 <http://www.comp.nus.edu.sg/~ipng/research/copyrt.pdf>

<sup>516</sup> Ibid.

<sup>517</sup> Cole, Patents and Copyrights, op.cit, p100

It should be noted also that not all creators are opposed to their work being used to create economic value for someone else. Thus out of fifty million licenses that have been issued under Creative Commons, two-thirds allow for derivative works, and a quarter of them allow their work to be used for any purpose.<sup>518</sup>

### 3.3 COPYRIGHT DANGERS

Lessig considers that the real harm with constant extension of copyright protection lies especially for works that are not famous.<sup>519</sup> In that effect, a study by Jason Schultz shows that out of 10 000 books published in the US in 1930 and therefore still under copyright until 2025, only 174 books, or 1.7 % are still in print.<sup>520</sup> Moreover, many commercially irrelevant works, like celluloid films of the 1920s, are in danger because they are on unstable media but cannot be digitalized since they are still copyrighted. Thus, fewer than 20% of them survived until today.<sup>521</sup> Similarly, copyrighted material held by businesses can be lost through ‘abandonware’ when businesses go bankrupt.<sup>522</sup>

Moreover, there are quite a lot of ‘orphan’ works where the owner of a copyright work cannot be identified by someone else who wishes to use the work. The British Library estimates 40% of all print works to be orphan works.<sup>523</sup>

Moreover, a recent study analysing 100 contracts offered to the British Library found numerous examples of contracts and licences that prohibit the useage of the exceptions and limitations allowed in copyright law.<sup>524</sup>

Finally, many of our cultural products today are now ‘triple protected’ by copyright, contracts or licenses, and code making them pretty inaccessible.<sup>525</sup>

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<sup>518</sup> Gowers, op.cit, p62

<sup>519</sup> Lessig, op.cit, p221

<sup>520</sup> Patry, op.cit, p68

<sup>521</sup> Gowers, op.cit, p65

<sup>522</sup> Ibid,p 69

<sup>523</sup> Ibid.

<sup>524</sup> Hargreaves, op.cit, p51

<sup>525</sup> Vaidhyathan, Siva, *Copyrights and copywrongs: the rise of intellectual property and how it threatens creativity*, New York Univ. Press, New York, 2001, p178

#### Costs and benefits of a copyright system

	Benefits	Costs
Short run	Monopoly rents for rights holders and control of types of use	1. Administration costs 2. Transaction costs in trading rights 3. Access costs to users
Long run	Greater incentives for rights holders to supply copyright works	User innovation is obstructed by the costs associated with compliance

Source: *The Economics of Copyright and Digitization; A Report on the Literature and the Need for Further Research* [Electronic Source], SABIP, 2010, p12

### 3.4 STRUCTURALIST-EVOLUTIONARY ECONOMIC THEORY AND COPYRIGHT

Structuralist-evolutionary economic theory was advocated by Joseph Schumpeter, well known Austrian-American economist, who claimed that a growing economy must be propelled by firms that enjoy market power and those that strive to attain it.<sup>526</sup> Thus, successful enterprises enjoy super-normal profits until a superior innovator replaces them in a process of creative destruction. Therefore, in order to sustain incentives to innovate, it is essential that the market stays contestable. Or in other words,

if dominant firms are guaranteed a permanent monopoly or if they can obstruct market entry by innovators, neither incumbents nor newcomers may have sufficient incentive to invest in the uncertain process of innovation.<sup>527</sup>

This is also collaborated by recent OECD research, which showed that in countries where there is more contestability and dynamism in markets, productivity growth is also significantly higher<sup>528</sup>.

In 1980s record labels claimed that every album taped on cassettes was an album unsold, proving this with the numbers that showed a decrease in record sales by 11.4 in 1981. However, soon afterwards, with the launch of MTV, the industry experienced a record turn-a-round.<sup>529</sup> This led Cap Gemini Ernst & Young study to conclude that the ‘crises’ in the record industry was not caused by the cassette tapers but was to a large extent a

<sup>526</sup> The Economics of Copyright and Digitization, op.cit, p 51

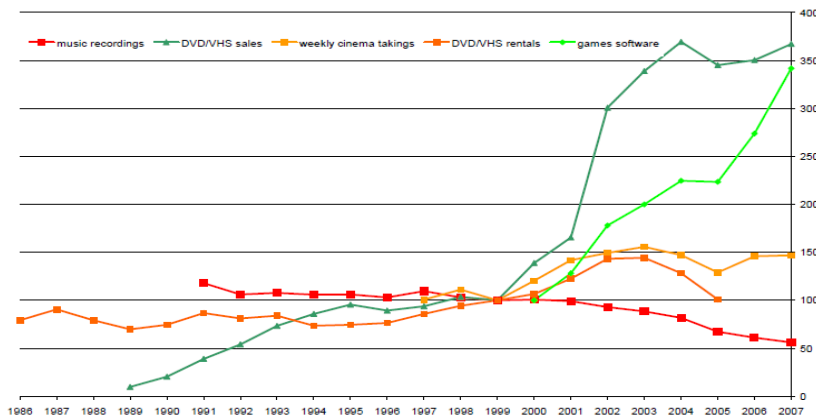
<sup>527</sup> Ibid.

<sup>528</sup> Hargreaves, op.cit, p17

<sup>529</sup> Lessig, op.cit, p69

result of stagnation in musical innovation at the major labels.<sup>530</sup> Similarly, when music industry today blames internet piracy for their losses, one cannot but wonder if there are also other reasons for this trend. In this regard, Oberholzer and Strumpf found that file sharing does not have a significant impact on CD sales. Their data set contains 1.75 million file downloads, which represent about 0.01 percent of the world downloads for the seventeen-week period spanning from September 8, 2002, to December 31, 2002. When comparing their estimates with the sharp drop in record sales, Oberholzer and Strumpf from Harvard Business School concluded that “at most, file sharing can explain a tiny fraction of this decline”.<sup>531</sup> Moreover, the 2004 US Consumer Expenditure Survey showed that spending on CDs by people without a computer (and thus unlikely to share digital content online) had also dropped by 43% in the period from 1999-2004.<sup>532</sup>

Figure 2-3 Turnover in market segments of the film and video, music and games industries (1986-2007, indexed, 1999 = 100)



Please note that 2003 interruptions in music recording and DVD measurements have been repaired on the basis of growth figures. Cinema visit index figures are based on weekly takings to correct for extra weeks in 2000 and 2006. Figures for games software: 2000 = 100, as there were no figures available for 1999 and before.

Includes year 1999 when Napster became active.

Source: *Ups and Downs; Economic and Cultural Effects of File Sharing on Music, Film and Games* [Electronic Source], TNO-rapport, 2009, p28

There are couple of explanations for this downward trend: (i) it corresponds with the downward pressure on all leisure expenditures due to rising costs of living and unemployment;<sup>533</sup> and (ii) new technologies could have created a

<sup>530</sup> Ibid.

<sup>531</sup> Ginsburg & Throsby, op.cit, p713

<sup>532</sup> Cammaerts, Bart & Meng, Bingchun, *Creative Destruction and Copyright Protection; Regulatory Responses to File-Sharing* [Electronic Resource], LSE Media Policy Project, 2011, p5 <http://www.scribd.com/doc/51217629/LSE-MPPbrief1-creative-destruction-and-copyright-protection>

<sup>533</sup> Ibid.

change in how people spend their time, possibly reducing the demand for certain media, and increasing it for another.<sup>534</sup>

Therefore, for example revenues from live performances/DJ-ing have increased considerably in recent years. In 2009 revenues from live music even outperformed recorded music sales in the UK for the first time ever.<sup>535</sup> There is also the competition from other forms of media. Thus, while CD turnover is declining, market for paid-for downloads is growing; while DVD sales and cinema visits are growing, DVD rentals are declining; and while the games market is experiencing significant growth at the console end of the market, PC games have remained stagnant.<sup>536</sup> Or in other words, while DVD and video sales increased by \$5 billion and the expenditure on games rose by \$3 billion between 1999 and 2003, CD sales experienced decline of \$2.6 billion.<sup>537</sup> Therefore, despite this negative trends in sale of CDs, it might be inferred that the overall earnings of entertainment industry comprised of film, music and games remain relatively stable.<sup>538</sup>

One might even say that file sharing in a way introduces competition back into the market forcing business to innovate and evolve. Among new market solutions slowly arising one can deduce first mover advantages, joint sale of complements, versioning, and network effects. Statutory interventions like levies on copying technology, direct subsidies, or stipends and awards are also becoming more researched.<sup>539</sup>

### 3.5 COPYRIGHT ALTERNATIVES

Beginning in July 2010, Future of Music Coalition has started analyzing the musician-based financial data according to the online survey for three different musicians: a jazz composer-performer-bandleader, an indie rock performer-composer-sideman and a chamber music ensemble.<sup>540</sup> The research is still ongoing, but current results show that average gross income per year of these musicians comprises from:

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<sup>534</sup> Ginsburg & Throsby, op.cit, p711

<sup>535</sup> Cammaerts & Meng, op.cit, p6

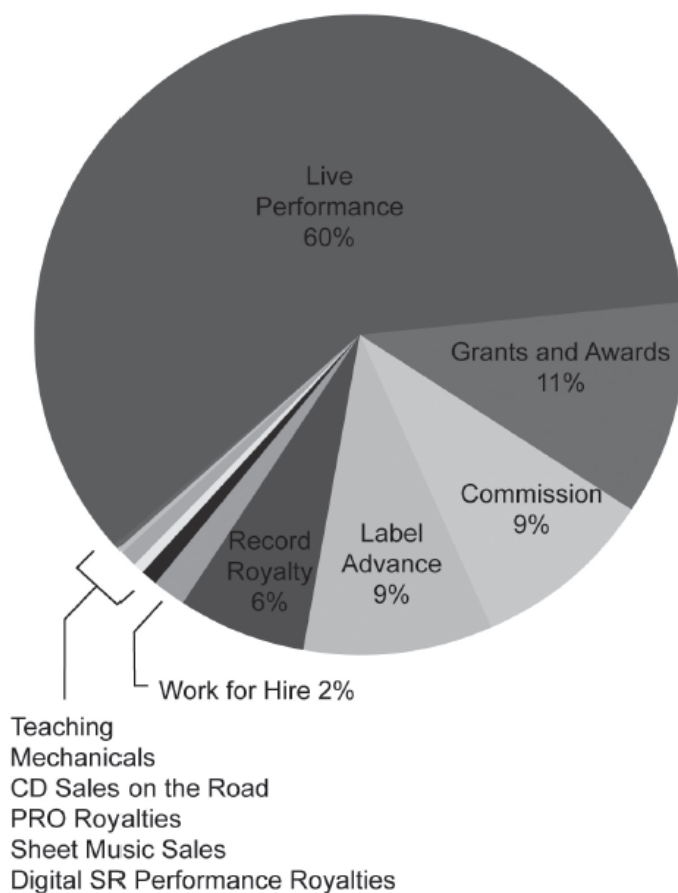
<sup>536</sup> Ups and Downs, op.cit, p13

<sup>537</sup> Ibid, p93

<sup>538</sup> Ibid, p13

<sup>539</sup> The Economics of Copyright and Digitization, op.cit, p8

<sup>540</sup> *Rethinking Music: A Briefing Book* [Electronic Source], Berkman Center for Internet & Society, 2011, p97 [http://cyber.law.harvard.edu/publications/2011/Rethinking\\_Music](http://cyber.law.harvard.edu/publications/2011/Rethinking_Music)



Source: *Rethinking Music: A Briefing Book*, Berkman Center for Internet & Society, 2011, p98

What one might infer from this, is that it seems that for average performers copyright alternatives like live concerts and grants actually bring more money than royalties.

### 3.5.1 LIVE PERFORMANCES

As already mentioned, concerts today provide a larger source of income for performers than record sales or publishing royalties. For example, according to LaFranco, in 2002 only four of the top 35 income-earners made more money from recordings than from live concerts.<sup>541</sup>

<sup>541</sup> Ginsburg & Throsby, op.cit, p671

Table 1  
Estimated pre-tax gross income by source for 35 top artists who toured in 2002 (millions of US dollars)

Rank	Artist	Live concerts	Recordings	Publishing	Total income
1	Paul McCartney	64.9	2.2	2.2	72.1
2	The Rolling Stones	39.6	0.9	2.2	44.0
3	Dave Matthews Band	27.9	0.0	2.5	31.3
4	Celine Dion	22.4	3.1	0.9	31.1
5	Eminem	5.5	10.4	3.8	28.9
6	Cher	26.2	0.5	0.0	26.7
7	Bruce Springsteen	17.9	2.2	4.5	24.8
8	Jay-Z	0.7	12.7	0.7	22.7
9	Ozzy Osbourne/The Osbournes	3.8	0.2	0.5	22.5
10	Elton John	20.2	0.9	1.3	22.4
11	The Eagles	15.1	0.7	1.4	17.6
12	Jimmy Buffett	13.7	0.2	0.5	17.6
13	Billy Joel	16.0	0.0	1.0	17.0
14	Neil Diamond	16.5	0.0	0.3	16.8
15	Aerosmith	11.6	1.0	0.8	16.5
16	Crosby, Stills, Nash & Young	15.7	0.0	0.3	16.0
17	Creed	10.9	1.1	1.6	13.4
18	Rush	13.4	0.0	0.0	13.4
19	Linkin Park	1.7	4.7	6.3	13.1
20	The Who	12.6	0.0	0.0	12.6
21	Red Hot Chili Peppers	6.1	3.4	2.7	12.1
22	Brian "Baby" Williams	0.2	2.7	0.9	11.8
23	Nsync	7.7	0.5	0.9	9.4
24	Barry Manilow	8.0	1.2	0.0	9.2
25	Britney Spears	5.5	1.8	1.0	9.1
26	Alan Jackson	4.6	3.0	1.4	9.0
27	Rod Stewart	6.6	1.4	0.8	8.8
28	Andrea Bocelli	8.1	0.2	0.4	8.7
29	Brooks and Dunn	6.7	0.4	1.4	8.1
30	Enrique Iglesias	4.4	1.5	1.7	7.6
31	Tom Petty	6.6	0.2	0.7	7.5
32	Tool	7.3	0.0	0.0	7.4
33	Kid Rock	3.4	0.8	1.3	7.0
34	Kenny Chesney	5.8	1.1	0.1	7.0
35	Santana	6.0	0.0	0.7	6.9
	Average	12.7	1.7	1.3	17.4

Notes: Figures are estimates of pre-tax gross income in 2002. The total income may exceed the sum of the first three columns because of TV, movie, merchandise and other potential sources of income.  
Source: LaFranco (2003).

Source: Ginsburgh, Victor & Throsby, David (eds), *Handbook of the economics of art and culture. Vol. 1*, Elsevier North-Holland, Amsterdam, 2006, p671

Moreover, Gayer and Shy suggest that artist's revenues from concerts are greater under file sharing since they get better publicity through the distribution of songs on P2P networks.<sup>542</sup> They continue by saying that the demand for live performances is substantially reduced when piracy is prevented since the total network size shrinks to one-third of the network size when piracy exists. This reduction makes the artist significantly less popular and thereby it reduces also the demand for the artist's live performances.<sup>543</sup>

### 3.5.2 FIRST-MOVER EFFECT

Harvard Professor and US Supreme Court Justice Steven Breyer challenged the need for copyright protection by arguing that creators have advantage of

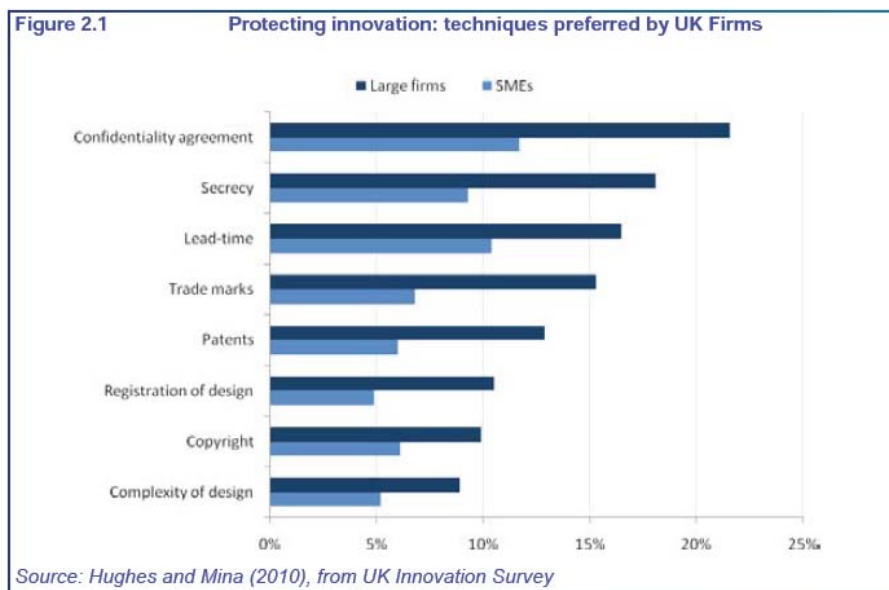
<sup>542</sup> Ibid, p714

<sup>543</sup> Gayer & Shy, op.cit, p382

lead-time.<sup>544</sup> Same belief was held by Plant.<sup>545</sup> One practical example of this can be seen in the case of publisher Norton, who was awarded the privilege of publishing on paper, at the same day as it was made public online ‘The Final Report of the National Commission on Terrorist Attacks upon the United States’. Although the Report became freely available for download the same day as it was published by Norton, and thus, others could also publish it, Norton still earned a profit of at least US\$ 600,000.<sup>546</sup>

Moreover, there are several reasons why it is unlikely that another cultural entrepreneur will pop up and exploit the work immediately after release if it is not copyrighted. In general, most artistic work is just not famous enough for free riders to try to exploit it. And those that become famous enough will have already generated enough money for the author as a first-mover by the time anybody decides to free ride on them.<sup>547</sup>

Furthermore, according to 2010 UK Innovation Survey, both big and smaller UK companies prefer lead-time to copyright when protecting innovation<sup>548</sup>.



Source: Hargreaves, Ian, Digital Opportunity; A Review of Intellectual Property and Growth, 2011, p21

<sup>544</sup> Salzberger, op.cit, p9

<sup>545</sup> Towse, Creativity, Incentive and Reward, op.cit, p11

<sup>546</sup> Boldrin & Levine, op.cit, p24

<sup>547</sup> Smiers & Schijndel, op.cit, p44

<sup>548</sup> Hargreaves, op.cit., p17



### 3.5.3 SAMPLING AND VERSIONING

Balzac said that “for artists, the great problem to be solved is how to get oneself noticed”.

As I already mentioned before, a lot of file sharing is actually sampling that often ends up with a product being bought. Sampling is a useful tool for an artist to advertise himself via widespread circulation of his creation. The more people access the work, the more likely it is that the work will become popular, generating more returns once they are released to the general public.<sup>549</sup> Thus, author Cory Doctorow allows his fans to download his novels free of charge. Despite of this, he is still selling many books through the mainstream media.<sup>550</sup>

Moreover, there are often free versions of software or books with reduced functionality available over the Internet with the more complete versions available for sale. The freely available low-quality versions are supposed to act as advertisement for the more high-quality and expensive versions.<sup>551</sup>

### 3.5.4 BRANDING

Condorcet advocated protection for authors similar to today’s trade-mark system. He believed that authors could still earn a modest premium despite ‘unauthorized’ copies circulating freely along with the original, because at least some members of the public would still prefer to own the original as more authentic.<sup>552</sup> Thus, a Raphael, worth £8000 when it was thought to be a copy, commanded an offer of £35,000,000 after it was discovered that it was an original.<sup>553</sup> Similar examples can be seen in hot couture fashion which despite cheap copies is still prospering.

Accordingly, Walter Benjamin stated that copies and reproductions do not destroy the aura of the original, but contribute to its value as they are the best testimony to the value of originals and a work that does not inspire

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<sup>549</sup> Liebowitz, Stan J. & Watt, Richard, *How to Best Ensure Remuneration for Creators in the Market for Music? Copyright and its Alternatives*. Journal of Economic Surveys, Vol. 20, No. 4, pp. 513-545, September 2006, p529

<sup>550</sup> Smiers & Schijndel, op.cit, p51

<sup>551</sup> Liebowitz & Watt, op.cit, p529

<sup>552</sup> Boyle, op.cit, p31

<sup>553</sup> Ginsburgh & Throsby, op.cit, p154

copies is a dead work.<sup>554</sup> Moreover, the whole concept of an original could not exist without that of a copy.<sup>555</sup>

Furthermore, artist can use their names to endorse different products.

### **3.5.5 BUNDLING**

Artists may bundle their copyable products with complementary non-copyable or at least harder to copy products, like the artist's autograph, fan club membership, posters, T-shirts, options for concert tickets, etc.<sup>556</sup>

Another way to earn money is by bundling advertisements and merchandise. In the last two years, companies like Pandora, Spotify, Rdio, MOG, and countless others have raised over \$200 million from investors primarily by offering music listening for free in exchange for advertising revenue.<sup>557</sup> Or, for example, James Bond movie was used to promote BMW vehicles. Moreover, in this way, the bigger the number of copies of a given work bundled with advertisement gets to circulate, the greater its value and appeal to investors who advertise.<sup>558</sup>

### **3.5.6 BEAT 'FREE' BY BEING EASIER THAN FREE<sup>559</sup>**

According to a global survey of consumers conducted by Consumers International in 13 languages and covering 15,000 consumers across 24 countries, consumers around the world would choose original over pirated copies, if they were available at an affordable price.<sup>560</sup>

Likewise, Harris Interactive 2010 report showed that 29% users of P2P services stopped using them when "better pay service was available".<sup>561</sup>

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<sup>554</sup> Ibid, p271

<sup>555</sup> Boon, Marcus, *In praise of copying*, Harvard University Press, Cambridge, Mass., 2010, p49

<sup>556</sup> Liebowitz & Watt, op.cit, p 527

<sup>557</sup> Rethinking Muisic, op.cit, p 62

<sup>558</sup> Liebowitz & Watt, op.cit, p 528

<sup>559</sup> Lessig, op.cit, p302

<sup>560</sup> *Access to Knowledge for Consumers; Reports of Campaigns and Research 2008-2010* [Electronic Source], Consumers International 2010, p2  
[http://www.consumersinternational.org/media/453199/a2k-reports2010\\_b.pdf](http://www.consumersinternational.org/media/453199/a2k-reports2010_b.pdf)

<sup>561</sup> Hargreaves, op.cit, p80

Therefore, 2011 Review of Intellectual Property and Growth concluded that “there is research suggesting a willingness to pay significantly more than zero for a CD, albeit not the current full market price, even when illegal copies of the same thing were available for no charge”.<sup>562</sup>

### **3.5.7 TIPPING**

When in 2007, the musical group Radiohead posted its new album *In Rainbows* on the Internet allowing its fans to decide whether they wanted to pay for it and, if so, how much somewhere between 40% and 60% of the users chose to pay the band, on average €5, ensuring at least €2 million of revenue for the band.<sup>563</sup>

Similarly, when Trent Reznor released in this way his *Ghosts I-IV*, he earned \$1.6 million in revenue in 2008.<sup>564</sup>

The defining traits of this strategy are (i) to make music available for download in high-quality format and (ii) to offer payment options starting from ‘free’ onwards.<sup>565</sup> Bandcamp claims that on ‘pay what you want’ albums, fans pay on average 50% more than what the artist requests. Similarly, recent paper on Magnatune, revealed that over a five-year period, 48% of users paid \$8 per album where \$5 was the minimum, and only 16% paid the minimum. Another 15% paid \$10, 7.3% \$12, and 2.6% paid \$18 per album. These payments were moreover highly anchored around coordination focal point, i.e. ‘\$8’ was called the ‘typical’ donation. Thus, 48.05% of fans paid \$8, only 2.93% paid \$7.50 and 0.34% paid 8.50.<sup>566</sup>

### **3.5.8 CROWDSOURCING**

SellaBand uses ‘crowdsourcing’ for raising investment funds for initial costs of the band by people who believe in it. They can buy shares in such a band for \$10 and upwards. If the group manages to scrape together \$50,000 in this way, SellaBand will support production, carry out promotion etc. Jill Sobule managed for example managed in this way to raise \$75,000 she needed in under two months. Similar business model is practiced by

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<sup>562</sup> Ibid.

<sup>563</sup> Smiers & Schijndel, op.cit, p56

<sup>564</sup> Rethinking Muisic, op.cit, p29

<sup>565</sup> Ibid, p29

<sup>566</sup> Ibid.

Kickstarter, which however covers a wider range of art forms.<sup>567</sup> And there are many more. VODO was launched in late 2009 to help creators to promote and distribute their independent films, music and books using Peer-to-Peer technology. Today it also offers the audience the opportunity to become sponsors of such works for a variety of incentives like credits in future production or downloadable soundtrack. In this way, they collected \$ 30,000 in first eight weeks for VODO show Pioneer One and \$25,000 in the first 30 days for The Yes Men Fix the World.<sup>568</sup>

## **3.5.9 STATE INTERVENTION**

### **3.5.9.1 GRANTS AND SUBSIDIES**

Governments and commercial sponsors provide many prestigious and less prestigious prizes for the best novelist, the best poet, the best translator, and so on.<sup>569</sup> Moreover, these prizes stimulate quality rather than quantity.<sup>570</sup> Similarly, Sweden practices subsidies for publishers of high-quality books.<sup>571</sup>

### **3.5.9.2 LEVY**

A simplification of the copyright system could also be found in imposing a one-time levy on music, films, books and visual material. Today it is applied in many countries as a surcharge on blank cassettes, CDs and DVDs.<sup>572</sup>

Another way would be to impose monthly levy to compensate Internet file sharing. Thus, the Swedish music collecting society STIM in a survey published in February 2009 found that 86.2% of responding Internet users would be willing to pay a monthly copyright levy entitling them to file sharing. An objection often raised against such a levy mandatory for all Internet users is that not all people file-share. This could, however, be alleviated by differentiating the rate of levy by access speed. Moreover, none of the taxes imposed by the state benefits everybody. Thus, for example, taxes of citizens without children are used for funding kindergartens.<sup>573</sup> As for the amount of such levy, it seems that ever since Fisher calculated that the fair amount would be roughly \$5 per month,

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<sup>567</sup> Ibid, p29

<sup>568</sup> FAQ, VODO, <http://vodo.net/> (retrieved 2 May 2011)

<sup>569</sup> Ginsburgh & Throsby, op.cit, p 751

<sup>570</sup> Ibid, p752

<sup>571</sup> Ibid, p753

<sup>572</sup> Smiers & Schijndel, op.cit, p33

<sup>573</sup> Rethinking Music, op.cit, p47

number five (regardless whether of dollars, pounds or Euros) has become the magic number in the debate.<sup>574</sup>

In this regard, recently there has been a suggestion of a Brazilian copyright law reform, which would permit private online sharing of published copyright protected works for non-commercial purposes subject to just such collectively managed levy. The permission would be only for private, natural persons, excluding companies and other legal institutions and would apply only to published works, ensuring the right of first publication to the author. Moreover, it would apply only to non-commercial uses. This levy would then be allocated by CMOs to authors based on the measured popularity of their works.<sup>575</sup>

### **3.6 TO RECUPERATE, OR WHY WE HAVE AUTHORS' PROTECTION**

CESCR stated in its General Comment No 17 that “the right to benefit from the protection of the moral and material interests resulting from one’s scientific, literary and artistic productions seeks to encourage the active contribution of creators to the arts and sciences and to the progress of society as a whole”.<sup>576</sup>

It continued by saying that “the full realization of article 15, paragraph 1 (c), requires measures necessary for the conservation, development and diffusion of science and culture” which follows from article 15, paragraph 2, of the Covenant.<sup>577</sup>

What is more, the CESCR cautioned that the rights of authors cannot be isolated from the other rights recognized in the ICESCR and that States parties are “obliged to strike an adequate balance between their obligations under article 15, paragraph 1 (c), on one hand, and under the other provisions of the Covenant, on the other hand, with a view to promoting and protecting the full range of rights guaranteed in the Covenant”. Moreover, the CESCR continued, “in striking this balance, the private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their productions should be given due consideration”.<sup>578</sup>

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<sup>574</sup> Ibid

<sup>575</sup> Ibid, pp44-45

<sup>576</sup> General Comment No 17, op.cit, para 4

<sup>577</sup> Ibid, para 29

<sup>578</sup> Ibid, para 35

Furthermore, it concluded that “the scope of protection of the moral and material interests of the author provided for by article 15, paragraph 1 (c), does not necessarily coincide with what is referred to as intellectual property rights under national legislation or international agreements”<sup>579</sup> and that “it is therefore important not to equate intellectual property rights with the human right recognized in article 15, paragraph 1 (c)”.<sup>580</sup> The CESCR finished its General Comment No 17 by saying that “ultimately, intellectual property is a social product and has a social function”.<sup>581</sup>

So does copyright fulfil this social function? I think not. As the late professor of intellectual property law, Mogens Koktvedgaard, has said:

The whole system of copyright is effectively based on a fundamental lie, in which fine words are used to conjure up the illusion that copyright protects literary and artistic works and serves the higher interests of the fine arts etc. But the truth is that today the law is primarily there to protect the commercial interests of the providers of various products and services, and has no regard either for the quality of these products and services or their social justification.<sup>582</sup>

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<sup>579</sup> Ibid, para 2

<sup>580</sup> Ibid, para 3

<sup>581</sup> Ibid, para 35

<sup>582</sup> Rosenmeier, Morten & Teilmann, Stina (eds), *Art and law: the copyright debate*, 1. ed., DJØF, Copenhagen, 2005, p28

## 4 CONCLUSION

Today, debates about copyright are mostly portrayed as those between a starving artist-genius on one side who only wants to earn a living, and a scheming, free-riding pirates who want to steal his rightful property on the opposite side. Set in this way, I do agree that it is very hard to continue arguing against copyright. However, is this truly how the reality looks like?

William Patry, Senior copyright council at Google, said that calling somebody a pirate doesn't by itself make others regard him as such, but slowly, by repetition, the claim starts to stick as "a feeling of greater likelihood that the claim is true begins to accompany the growing familiarity".<sup>583</sup> Or as Michael de Certeau said, "in modern society, what perpetuates a belief is not one's faith but one's inertia, in the sense that people no longer know the content of their belief but continue to hold it".<sup>584</sup>

Accordingly, this 'truth-effect' can apply to the copyright as a whole. We have been told repeatedly that copyright is good, that demanding affordable access to culture is unfair to artists, and moreover, that copyright is actually here for us and for our future (which, however we won't live to see), since it incents artists to create. And very often, these claims are taken as irrefutable truths by all sides when any debate about copyright is initiated. However, this copyright framework leaves then very little to be changed.

Thus, in my master thesis, I have tried to deconstruct this copyright discourse and to see how much of it is actually true. My conclusion is 'very little'. Moreover, as I have tried to show, copyright actually entails much harm not only for consumers, but also for many creators that it claims to protect.

So where do we go from here? Christophe Geiger, professor at University of Strasbourg said that "the question of legitimacy of a right depends on whether the right fulfils its assigned function" and that "today we no longer know why we have intellectual property and why its scope should be increasingly extended".<sup>585</sup>

However, although many would readily agree with his statement, it seems that somehow we got ensnared in this copyright discourse, thus limiting significantly our options. We should not forget that we, as a society are

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<sup>583</sup> Patry, op.cit, p48

<sup>584</sup> Pang, op.cit, p44

<sup>585</sup> Torremans, op.cit, p106

those who make laws, and can therefore also unmake them. Or to put it differently, we should not get lost when analyzing laws in the trap of reification, i.e. of “the apprehension of the products of human activity as if they were something other than human products - such as facts of nature, results of cosmic laws, or manifestations of divine will”<sup>586</sup>. Therefore, and as Henry David Thoreau suggested, we should stop cultivating this irrational respect for man-made laws, and focus back on the rights that they are supposed to serve, or rather,

“we should be men first, and subjects afterward”.<sup>587</sup>

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<sup>586</sup> Berger, Peter L. & Luckmann, Thomas, *The social construction of reality: a treatise in the sociology of knowledge*, Repr., Penguin, London, 1991, p106

<sup>587</sup> Torremans, op.cit, p131



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