The domain of intellectual property rights, along with the regulations that govern them, has a steadily, almost visibly incremental bearing these days upon the ordinary lives of people across the globe, in the rich world and the poor and in the North and the South. Its influence has escalated to the point where for some it may mean the difference between life and death; on it are now founded industries in the first rank of corporate power and thrust. As a modus for wealth creation it is being transferred onto other previously unthought-of sectors outside the familiar orbit of the market: indigenous cultural forms, music, fabric and other designs, symbols, artefacts, knowledge of natural resources, dance steps, motifs, advertising catch phrases, logos and brand names …

Once this was disregarded as no more than a rather obscure and quite boring part of general commercial law, left to a few specialists. Not so today. Intellectual property right law and regulations are a focal concern, not only for lawyers and businesspeople, but also in pivotal debates about development and political economy.

Yet despite this pervasive impact, few people, lawyers included, have much knowledge or understanding of the real implications of intellectual property rights. Very few seem to take these implications seriously and, indeed, intellectual property rights issues are far more likely to be regarded either as being of no real significance or simply as signalling regulations that exist merely to be broken. Misconceptions abound about how it often affects central, crucially important developmental issues and the debate that does ensue is often full of misinterpretations and ideological preconceptions. A measure of the poverty of general public comprehension here is
that, despite the bearing they have on issues of huge social and economic importance, intellectual property right matters still enjoy relatively little systematic media coverage outside of specialist circles. *The Economist* seems to be one of the few journals that cover the issue consistently.

Responding to this situation, the World Association for Christian Communication (WACC) initiated a series of deliberations in different regions of the world under the auspices of its Global Studies Programme Initiative (2002–07). The 2004 Durban seminar, held under the auspices of the Southern African and South–South Working Group on Media, Culture and Communication, mapped out key issues and trends in intellectual property rights as they relate to the media and communication. The group meets every two years and focuses broadly on issues of political economy, identity and culture (see e.g. Tomaselli and Dunn 2001; Thomas and Lee 2001; Tomaselli 2004; Waldahl 1997; cf. also Zhurarawa et al. 1997; Teer-Tomaselli and Roome 1997; Tomaselli 2004). The key objective of WACC’s series of workshops across the world was to analyse intellectual property rights and other communication- and political economy-related issues critically. The Durban seminar focused on three levels of communication/media being impacted by intellectual property rights: (1) traditional communication, (2) mass media and (3) digital media. In the papers collected here, intellectual property rights are explored from the perspectives of political economy, culture, convergence and the public domain.

Intellectual property law consists of four main areas: (1) copyright law, (2) patent law, (3) trademark law and (4) trade secret law. Of these, the most hotly debated have been the first two, but trademark regulations have also created a considerable stir in relation to recent South African lawsuits over parodies of trade marks for popular goods – including, for instance, T-shirts giving a political tweak to the logo of a popular beer. Various systems of legal regulation govern these four separate areas and even though they are often debated as one and the same, they are different when it comes to legal and also economic implications. According to *Encyclopaedia Britannica* the four areas of intellectual property rights may be defined in the following manner:

*Copyright* law confers upon the creators of ‘original forms of expression’ (e.g. books, movies, musical compositions and works of art) exclusive rights to reproduce, adapt and publicly perform their creations.

*Patent* law enables the inventors of new products and processes to prevent others from making, using, or selling their inventions.

*Trademark* law empowers the sellers of goods and services to apply distinctive words or symbols to their products and to prevent their competitors from using the same or confusingly similar insignia or phrasing.

*Trade-secret* law prohibits rival companies from making use of wrongfully obtained, confidential commercially valuable information (e.g. soft-drink formulas or secret marketing strategies).
In recent years the question of intellectual property rights has become central to debates on development and the relationship between the South and the North – and indeed to the whole issue of globalisation. The reason for this is the so-called Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), which has contributed greatly to the expansion of intellectual property law. Intellectual property rights used to be largely a domestic issue, with countries deciding on their own levels of legal protection and enforcement. But TRIPS requires members of the World Trade Organisation (WTO) to establish and enforce minimum levels of copyright, patent and trademark protection within their jurisdictions. In this context it is important to note that TRIPS does not create a universal patent system. Rather, it lays down a list of ground rules describing the protection that a country’s system must provide. These include computer programs, plant varieties and pharmaceuticals, all of which were unprotected in most developing countries until the agreement. Patent rights are valid, no matter whether the products are imported or locally produced, and protection and enforcement must be extended equally to all patent holders, whether foreign or domestic (The Economist 2002).

This has, furthermore, led many development non-governmental organisations (NGOs) and some Third World governments to argue that TRIPS favours only the North, because intellectual property rights largely reside with Western multinational companies, allowing them to establish monopolies, drive out local competition, divert research and development away from the needs of poor countries, and to force up the price of everything from seed to software. In the process, patents prevent poor people from getting life-saving drugs, they interfere with age-old farming practices and allow foreign ‘pirates’ to raid local resources, such as medicinal plants, without getting permission or paying compensation (The Economist 2001).

Others, particularly those representing southern intellectual property right holders and intellectual property right activists with a developmental perspective, argue that the long-term effect of the agreement will be to benefit developing countries by stimulating local innovation and encouraging foreign investment. The argument goes that the wording of TRIPS gives poor countries considerable latitude to look out for themselves when introducing new systems of intellectual property right protection.

The areas that are most contentious in the debate over the implementation of TRIPS are, first of all, drugs and medicine. Much of the recent debate around the impact of intellectual property rights on the poor has centred on the issue of access to expensive medicines. On paper, many of the world’s least-developed countries have laws that provide patent protection for pharmaceuticals. In practice, few enforce them. An important case in point is that in March 2001, 39 of the world’s largest pharmaceutical companies took the South African government to court over the terms of its 1997 Medicines Act. The Act was intended to provide a legal framework within which medicines could be made more affordable in South Africa. The companies’ decision to pursue the legal proceedings initiated in 1997, despite South Africa’s
public health crisis, sparked international condemnation. The result was that in April
2001 the drug companies withdrew their case when the South African Government
reaffirmed its commitment to honour TRIPS and the parties agreed to work together
to implement the legislation.\cite{1} The outcome of this dispute has been portrayed as a
moral victory for South Africa and for HIV/AIDS campaigners, and inspired by the
result, developing countries issued a declaration at the WTO meeting in Doha 2001,
which asserted the primacy of public health over intellectual property rights. They
resolved that the world’s least-developed countries should be given at least until
2016 to introduce patent protection for pharmaceuticals.

One very tricky question in relation to the issue of licensing, patenting and selling
medicine is

how to make compulsory licensing (the manufacture and marketing of a patented drug
without the patent-holder’s consent) work for the poorest. TRIPS already permits
compulsory licensing under certain conditions, including national emergencies. This
is fine for countries such as Brazil, which have domestic drug industries to copy
the medicines. Brazil has, indeed, used the threat of compulsory licensing to wring
price discounts out of drug companies, a ploy which the commission, somewhat
controversially, supports.

The problem is what to do with countries which have no drug makers. For the
moment, they can import generic copies from the likes of India, but come 2006,
when those exporters are supposed to have fallen in with the TRIPS line, who will
supply the drugs? (The Economist 2002).

A second and related issue is traditional knowledge, where, for instance, ancient
herbal remedies find their way into high-priced Western pharmaceuticals without
the consent of, or compensation to, the people who have used them for generations.
The demand for the protection of traditional knowledge, which includes folklore,
is a reaction against the misappropriation and transformation of the knowledge of
indigenous people into goods and services protected by modern intellectual property
rights, thereby denying these people the benefits of the knowledge and discoveries
that they have had for centuries. If there are no provisions for protection and
documentation, extremely valuable knowledge may be lost.

Investing social/spiritual resources with a dominating economic value is often
regarded as debasing the resources of a community and the cultures that sustain
these resources. Control over these resources is coming to be the means by which
corporate dominance over ‘knowledge’ and ‘ideas’ is being renewed, reinforced and
extended. Access to knowledge, however, along with public control over the use
of knowledge are crucial to the democratisation of communication. Protection of
indigenous knowledge systems has become an urgent priority (cf. e.g. Indilinga:

Usually folklore and traditional knowledge rights are vested in the national
government, and exercised by the official copyright administrative body. The money
that is collected for folklore in many cases ends up in the financial coffers of the
state, or the funds become part of the general cultural budget. Most of the legislation enables the copyright administration to permit the use of the folklore on the payment of a fee, and on condition that the moral rights of the community that created the knowledge be recognised and respected. But many questions and dilemmas surround the protection of traditional knowledge and weaken the clout that protective measures could seek to offer.

There are numerous dilemmas involved in the protection of folklore and traditional knowledge. If folklore is transformed into a work that is the subject of copyright protection, which may, in turn, obstruct access to it for the originating community, this would be especially traumatic if the folklore constitutes a critical source of information for that community. Will it be sufficient in this situation to acknowledge the source and respect the integrity of the folklore in the way it is reproduced? How should the community be compensated? If compensation is through fees and money, to whom should this go? Would it be enough if the originating communities were allowed access to the use of the copyrighted work as an exception or limitation? Further problems present themselves in multi-ethnic nations and intra-national ethnic groups. How is one to decide the beneficiaries of the protection in such a situation? It may also be a problem in distinguishing between works that qualify for protection and those that lie in the public domain (Nwauche 2003).

The third area of contestation is education and research, where it is argued that copyright may hamper access to textbooks, journals and other educational material in poor countries as well as prevent the full use of the Internet as an intellectual source.

Part of the digital agenda is the issue of protection of computer software. It is true that extensive unauthorised copying of computer software has enabled access for developing countries. But, bearing in mind the Indian experience, it cannot be correct to assume that enablement of access through a regime of weak copyright protection and enforcement will necessarily stimulate an indigenous software industry on its own. It has been argued that to ensure access for educational needs, African countries must obtain all advantages that exist, including negotiating favourable bulk licensing terms with software producers – a case in point being the Nigerian federal government’s success in negotiating with Microsoft fairly favourable licensing terms for itself and educational institutions. The development of open source software represents a very interesting alternative (which is not to imply that open source software is not subject to copyright protection). This emphasises that one of the key policy options for any developing country is to ensure access to information protected by copyright. Most countries seek to balance the inherent monopoly of copyright protection by limiting the period of protection and by granting exemptions for educational research and library use (Nwauche 2003).

One of the reasons for the debate over intellectual property rights is that originally these rights existed in order to encourage creation innovation (and thus growth) by creating an incentive for creators and also for investors in products ensuing
from creative and inventive processes. As compensation for making their works and inventions accessible to the public they were granted a limited monopoly on exploitation. Now some argue that the modern international system of intellectual property right law is having the opposite effect – delaying the diffusion of new technology, and limiting the incentive to create new works and distribute new knowledge.

In respect of intellectual property rights and information/communication/media, the two instruments that are of critical concern are, first and foremost, copyright and, secondarily, patents and layout designs for integrated circuits. With rapid convergences between previously separate technologies such as information technology (IT) and biotechnologies, it would seem invidious not to consider all the instruments in the intellectual property right toolkit. However, this remains an emergent field and its multi-faceted complexities have not been dealt with in any substantive manner nor have they become part of any adequate international jurisprudence. While it would be important to keep an eye on intellectual property rights developments in these newly constituted and constituting areas such as in the life sciences – because of the potential impact that these might have on intellectual property right in other sectors, such as communications – the major focus should be on the relatively autonomous area of copyright and its impact on the democratisation of communication and the public domain. The present collection of papers is therefore a small attempt to raise some of the issues involved in these debates. It deals with intellectual property in general, but its focus of concentration is copyright, which is designed primarily to protect an artist, publisher, or other owner against specific unauthorized uses of his work (e.g. reproducing the work in any material form, publishing it, performing it in public, filming it, broadcasting it, or making an adaptation of it). A copyright supplies the holder with a limited monopoly over the created material that assures him of both control over its use and a portion of the pecuniary benefits derived from it (*Encyclopaedia Britannica*).

This means that in copyright there is a balance to be struck between, on the one hand, the rights of the creators and publishers, to protect them (and particularly the authors) against those who would steal the fruits of their efforts and investments and, on the other hand, the public benefit which flows from those creations (a benefit identified by the United States (US) Constitution in Article I, section 8, clause 8 when it empowers Congress ‘To promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries’). The feeling now in many quarters is that the interpretation of copyright law has moved in the direction of a misunderstanding that interprets it only as a tool to protect authors against those who would pilfer the author’s work [which is a misunderstanding that] threatens to upset the delicate equilibrium in copyright law. This misunderstanding obviously works to the benefit of the content owning
industries, such as the publishing industry, the music and motion picture industries and the computer software industry. This dark side, this pervasive misconception, is turning copyright into what our founding fathers tried to guard against – a tool for censorship and monopolistic oppression (Pallas Loren 2000).

But equally, many would argue that without proper copyright protection those who would suffer would be not only the creators and the creative industries, but also the public in its access to the goods resulting from such creations. Protecting copyright is thus seen as a way of fostering development by protecting the interests of authors as well as publishers, while at the same time benefiting the public.

The potential conflict between public interest, on the one hand, and the interests of the copyright-holders, on the other, has been intensified by the new digital technologies, which have increased the potential gains that either copyright owners or consumers might realise from exercising control over subsequent uses of legally acquired copyrighted works in digital form. Any attempt to resolve digital copyright conflicts may be caught between the desire of copyright owners to maintain control over their intellectual property, and the ethics and expectations of consumers who have become accustomed to making relatively free use of creative works in digital form. As a result, activities to which consumers of creative works have become accustomed, such as making copies of digital music files or television broadcasts for personal use, may in the future require the copyright owner’s approval and, in particular, the payment of fees to obtain the authorisation to download the product.

Greater computer-processing power and storage capacity, as well as the proliferation of file sharing on peer-to-peer networks, have facilitated the unauthorised use especially of music, films and television programmes. Consumers perceive this as fair use, while the big copyright holders in particular regard it as piracy. Here it seems that most notably the music and film industries have been looking backwards instead of actively seeking ways to use the new technology to the mutual benefit of rights holders and the public. There also seem to be contradictions in the way new technology is perceived by the different groups of copyright holders. The dilemma is well illustrated by a recent study on ‘Musicians and the Net’:

Musicians believe the internet is an essential tool to help create and market their work, but at the same time more than half of artists say file sharing of unauthorized copies of music should be illegal, according to a new report.

The report, called ‘Artists, Musicians and the Internet,’ found that only 28 percent of all artists surveyed consider file sharing to be a major threat to creative industries – contradicting the official stance of the lobbying arm of the record companies. About 43 percent agree that ‘file-sharing services aren’t really bad for artists, since they help to promote and distribute an artist’s work to a broad audience.’

‘When you listen to the arguments in Washington, it’s very easy to think that the internet has been a disastrous technological development for artists and musicians,’ said Mary Madden, primary author of the study, which was commissioned by the Pew Internet & American Life Project. ‘We found that (artists and musicians)
overwhelmingly feel that the internet has had a positive effect on their creative lives and careers. In general they’re embracing the internet as a tool in their creative lives’ (Dean 2004).

The ease of replication and redistribution of creative works in digital form facilitates the instantaneous, global availability of copyright-infringing works. Consequently, the effectiveness of any nation’s efforts to protect the rights of its copyright owners depends increasingly on the international coordination of enforcement efforts and the harmonisation of copyright law across countries. Copyright infringement and enforcement thus become an issue both at the individual level and in the international arena.

Copyright is intimately linked with a concept that has come to be central to all debates on political economy in recent decades, namely intellectual capital, which is often used as a symbol of intellectual resources (e.g. knowledge, information and experience). These stand at the core of the information and communication systems that now create new social and economic developments. World society is evolving towards the information economy, where the main source of wealth is considered to be information itself. Intellectual capital is an elusive kind of asset, being simultaneously a source for wealth creation and a final product in this process. Its management has become an important responsibility for governments, a task for businesses and an interest for civil society. Copyright is a highly significant component in the intellectual capital of any society, as it provides the conceptual and legal framework for that capital.

But it also constitutes more than a framework. It is itself a part of the intellectual capital in the world digital society. Not only does it facilitate the operation of the market, it is also more and more often accounted for as an asset in the balances and other wealth indicators of companies and nations. Copyright can be analysed as an economic category, which manifests characteristics, functions and consequences of an economic nature, participates in economic transaction and has an increasing value in the national and global information economies. Yet mostly it has been analysed from the perspective of its legal and social implications rather than on the basis of economic considerations. This has to do partly with the fact that it originated as a social and legal construct. But, as has now become clear from the international debate, copyright no longer belongs exclusively to the legal domain. It serves as a basis for entire industries generating added value, trade and employment. According to some estimates the creative industries, most of which are based on copyright, represented 7.3 per cent or US$2.2 trillion of the value of the world economy at the end of 1999 and these industries had an annual growth rate of 5 per cent, which is greater than the average for the world economy. In 2002 the core copyright industries in the US accounted for an estimated 6 per cent of US gross domestic product (GDP) or US$626.6 billion. In total, copyright and copyright-related industries accounted for an estimated 12 per cent of the US GDP or US$1.25 trillion (Siwek 2004). By way of
comparison, in a small European country, namely Norway, with a population of 4.6 million, the core copyright industries in the same year contributed approximately 4 per cent of the gross national product (GNP) – just over NOK45 billion (estimated), or approximately US$8 billion (Kopinor 2003). This makes it clear that one is dealing with very important elements of national and international economies.

Copyrighted materials have some characteristics of being public goods. They bring benefits to the community, which are indivisibly spread and many users can use them at the same time without this diminishing their value and quality. The public good aspect is very important when analysing the contribution copyright makes to the economic, social and cultural development of nations, and affects the economic analysis in a number of ways. One such aspect is pricing. Having some characteristics too of private goods, copyright goods cannot be priced in the same way as other economic goods. The first copy of a copyright good is costly to produce, while subsequent copies may cost next to nothing. This combination of high fixed costs and negligible marginal costs for reproduction and distribution creates difficulties for conventional forms of pricing.

As an economic mechanism copyright law is designed to establish the correct balance between the time that creators invest in the creation of works and the need for society to receive and use cultural products. In this way it is supposed to allow for the optimal amount of cultural assets to be created and to allow access to the underlying intellectual property to be distributed efficiently via market transactions so that it can be consumed by those who most value it. Without the copyright mechanism there is likely to be a market failure because of the public good aspect of much of the copyright material. Markets in copyright goods fail because once copyright goods are produced, it is difficult to prevent those who do not pay for the goods from consuming them. This means that in the absence of some mechanism for enabling a copyright producer to recover the cost of investment in the copyright good, there will be an undersupply of copyright goods relative to the socially optimal level.

The main economic functions of copyright law are generally discussed in economic literature and can be summarized as follows: Firstly, copyright law defines, recognizes and protects the underlying copyright. Thus it outlines the scope of the property that will be marketed and sets out the general rules for the trade with it. Secondly, it enables the underlying intellectual property to be produced and then traded and consumed in an economically efficient manner. Thirdly it helps creators to appropriate the market value of their works. Lastly, copyright law balances productive efficiency with distributive efficiency (Gantchev 2003).

Considerations such as these illustrate the complexities involved in analysing the issue of copyright from a social, legal and economic perspective and why it is important to see it in the perspective of both national and international considerations. National boundaries are too narrow to provide adequate protection to intellectual capital, particularly as linked to the growth in importance of new global digital communications systems, with their global market for digital knowledge-based
products. Copyright safeguards the interest of rights holders in the global Internet economy and serves as a precondition for the operation of intellectual capital.

E. S. Nwauche (2003), who is the former Director-General of The Nigeria Copyright Commission, has argued forcefully why sub-Saharan African countries should adopt an enlightened copyright policy as part of their development strategies. Nwauche’s point of departure is that intellectual property is a key to technological and economic development, even for developing countries, and that the availability of copyright protection may be a necessary condition, but not a sufficient one for the development of viable domestic industries in the publishing, entertainment and software sectors in developing countries. If there is no copyright protection, these industries will disappear. However, most African countries are unable to satisfy their informational needs and have to depend on foreign copyrighted goods. The dilemma they are faced with is how to satisfy their informational needs – largely dependent on foreign creators – and at the same time nurture an indigenous copyright base.

One option would be to lower copyright protection in order to access foreign works. Even if this were possible in view of the globalized norms imposed by TRIPS and other treaties, the strong possibility is that a low protection threshold coupled with a policy of discrimination against foreign works will also impact on the protection of indigenous works. Since most of these countries are at different thresholds of literary and artistic inventiveness, a weak system of protection may deny the local copyright industry one of the variables that will sustain its existence. It may be a point – given the experience of developed countries – that at the appropriate time where the local copyright industry is perceived to be ready, the protection system may be enhanced to enable growth. The danger is that a weak system breeds a culture of piracy. An enormous amount of resources would have to be spent to change this attitude when the country decides to institute a stronger level of protection (Nwauche 2003).

Nwauche points out that there are African countries where increasing levels of copyright protection have been part of a combination of factors that have led to the blossoming of viable sectors of the entertainment industry. One example is the Nigerian video/film industry, known as ‘Nollywood’, widely estimated to be the third largest in the world and dominant in the West African sub-region. Another is the Nigerian publishing industry where, in the area of pre-primary, primary and secondary books, it can be said that Nigeria is self-sufficient. Furthermore he notes how a commitment to copyright protection might result in the inflow of foreign investment leading to the creation of jobs and some dissemination of technology. Ghana has joined the league of developing countries that handle outsourced jobs for the international software industry. One of the problems for local industries is the often high level of piracy; this affects foreign products, but more than anything it undermines local cultural industries. The ideal, therefore, is to establish a practical partnership between authors and publishers’ associations, copyright and collecting societies and government agencies to fight piracy and defend the interests of local industries.
Nwauche argues for collective administration of rights as a preferred means of copyright administration. Collecting societies exist for musical works and reprography. Collecting societies are attractive because in exercising the exclusive rights of members they can give at least some of the stakeholders the assurance of compensation for the use of their work. The widespread presence of these societies for musical works testifies to this. The cultural and social functions of collective management organisations are particularly important in developing countries where extra efforts are frequently needed to strengthen creative capacity. In general, the same may be said about countries (frequently small ones) that are net importers of copyrighted material, where, when they work efficiently, national collective management organisations may achieve two important objectives: helping to preserve national cultural identity and improving public acceptance of copyright.

The overarching concern of the Durban seminar and of the articles collected in this issue of Critical Arts (not all of which emanate from the seminar) has been the way in which ‘ideas’ and ‘knowledge’, both old and new, are being rapidly ‘enclosed’, ‘privatised’ and translated into intellectual ‘property’ that is available for a fee. Given the pivotal role played by old and new media in the mediation, appropriation, manufacture and dissemination of ideas and knowledge, the current attempts to monopolise and privatise creativity and innovation are bound to have a detrimental effect on diversity, and on human creativity and the quality of the global commons. The commons comprise all ‘non-rivalrous’ resources. Language, for instance, is a part of the global commons. So are roads and parks, Darwin’s theory of evolution, the Bible and the Qur’ān. Human consumption of such resources does not inhibit or diminish the resource itself or its use by another person. One can, likewise, argue that the democratisation of communication hinges on the quality of communications in the commons.

Nowhere have the consequences of transformed paradigms of intellectual property been more vividly apparent than in the domain of indigenous knowledge and expressions of culture in traditional societies, not least in Africa.

The commodification of information and public knowledge has resulted in the creation of copyright ‘enclosures’. This led to dramatic upheavals in the ownership and use of expression and indigenous knowledge in traditional societies. The knowledge of oral cultures that is not recorded in any tangible material form is deemed to be in the public domain and therefore is ‘appropriatable’. A presentation event at the Durban seminar highlighted one of the most notorious instances in South Africa, namely the endlessly protracted saga of Solomon Linda’s song, ‘Wimoweh’, one of the all-time super-grossing earners for a variety of singers, composers and recording companies, while its original composer from Zululand in South Africa died in poverty: an illustration of the ‘open season’ on what is considered traditional culture. Because it is taken to exist in the public domain the assumption follows that such material belongs to no one. As in the case of ‘Wimoweh’, this kind of property is vulnerable to privatisation and commercial exploitation on a global scale.
Protecting traditional culture is not easy. The article by John Collins, for example, examines the problems inadvertently created by modern notions of musical copyright introduced to developing nations via trans-national record companies and global copyright societies. Collins’s study examines what happened in Ghana when, owing to the combined effects of recommendations by the World Intellectual Property Organisation (WIPO) and royalty payments to Ghana by the American musician Paul Simon, there was a questionable – if well meaning – attempt by the Ghanaian government to apply a folkloric royalty tax to Ghanaian nationals for the commercial use of their own indigenous folklore.

In a slide presentation at the seminar entitled ‘Who owns the past?: The appropriation of San rock art in the new millennium’ anthropologist Frans Prins discussed the way rock art has become a major component of the expanding tourism sector. Heritage legislation regards rock art as part of the national treasure, it belongs to the nation and no group or individual can lay special claim to it. However, recent years have seen various indigenous groups and organisations claiming ancient rock art as part of their ‘intellectual property’. The San Council of South Africa, a group that draws its membership from groups with no clear historical link to the rock art, has perhaps been the most vociferous on this issue. Questions of legitimacy of ownership as a private or public resource thus impact both digital and antiquarian media. The global commons is thus subject to commercial appropriation by both multinationals and local organisations. Both kinds of appropriation are driven by commercial motives.

Core expressions of community are a fundamental aspect of living traditions. The knowledge economy fails to recognise that this is the realm of expression in which culture-based mediations of knowledge in traditional societies reside. Historical evidence, for example, suggests that non-San people (especially Southern Sotho people at initiation schools) also produced rock art, stylistically similar to the art of the San. To complicate matters further, Prins argued, various Zulu- and Xhosa-speaking communities and individuals regard San rock art both as a spiritual resource and as elements of the landscape intimately linked to their ancestors. In contrast, folklore in the West – as typically archived and exhibited in institutions such as the Smithsonian – cannot be compared with folklore in the South and in indigenous worlds where it continues to function as the glue that binds a community. The integrity of these traditions of remembering is currently at stake.

Christopher Colvin’s article on ‘Trafficking trauma: Intellectual property rights and the political economy of traumatic storytelling’, presents ethnographic fieldwork conducted with Khulumani (Western Cape), a support group of victims of apartheid-era human rights abuses. Encountering them after the conclusion of the Truth and Reconciliation Commission hearings, he found the victims still producing the stuff of dramatic public and personal memories – lurid tales of torture at the hands of the police, years spent wasting away in remote prisons, families left without any knowledge of where to find their murdered child’s remains. They were telling these
stories in group meetings, in private counselling sessions, during political protests and in the many interviews with foreign researchers and journalists who had come to document their stories. Though there were a range of actors involved in soliciting, promoting, circulating and consuming these stories of trauma, it is the global brokers of traumatic memory – the students and professors, the journalists, the documentary filmmakers, the visiting priests, politicians and psychologists – with whom Colvin is concerned. As he continued to work with these victim storytellers, a name for this process of painful, repeated narrativisation about the past presented itself – traumatic storytelling – and an image of the routes of these narratives, the transactions involved, the sites and meanings of consumption took shape in the form of the metaphor of political economy. He argues that a constant stream of experts – flying to the next global hotspot, asking permission to record, interpret and circulate ‘victims’ stories’ – sustains this economy of narrative. In the process, victims’ stories become commodified objects that move out into the wider world.

Colvin paints a portrait of traumatic storytelling as commodity and traces some of the paths of circulation and consumption that traumatic narratives follow as researchers, journalists, politicians, priests and others solicit and distribute stories. This article sketches an outline of this political economy of traumatic storytelling, raises questions about intellectual property rights in the circulation and consumption of traumatic narratives and explores the recent, ambivalent moves by Khulumani to take back some control over these valued, circulating narrative objects.

One of the focal questions that the Durban seminar participants had to contemplate was how intangible culture can be protected from unfair exploitation. More particularly, how can such culture become a generator of income in its own right as far as the host community is concerned?

The common notion of intellectual property is that creative ownership is a purely post-capitalist concept. David Kerr writes that in reality, pre-capitalist Malawian oral traditions of song, dance and narrative did contain notions of ownership, in relation to the individual, the community, or even the genre or form. These concepts were, however, very flexible, acknowledging imitation as an integral catalyst in the process of innovation. This motive became particularly important when artists brought up in a pre-capitalist set of cultural values became exposed (e.g. through migrant labour) to post-capitalist cultural forms such as commercial popular music or film. In this context, Kerr argues that mimicry was often seen not as a violation of an original ‘author’s’ right, but as a legitimate tool of innovative modernisation. The transition from a collective, communal concept of ownership to one of individual authorial rights is problematic. The re-oralisation of literature or of mediated art forms is a very common (and not always negative) practice in a culture where access to books and electronic media is restricted. Kerr concludes that legal protection for individual authors needs to be promulgated within a regulatory context, which engages with indigenous notions of creative ownership and provides space for collective, pre-capitalist methods of artistic practice.
IPRs are being vigorously invoked to protect the power, especially of audiovisual companies, in the film and music industries, where huge amounts are being invested in the fight against video and compact disc (CD) piracy. At the very same time, these companies are involved in prospecting for the world’s communication and information resources, often with scant regard for ethical considerations, as is clearly illustrated by Malan. It is only on the rare occasion that multinational companies have provided adequate compensation to communities or individuals from whom they have poached cultural resources. What is the experience of exploited communities in this regard? Participants at one of the seminar sessions learnt of an interesting precedent here in the way that the indigenous Saami people in Norway work with Kopinor, the Norwegian reproduction rights organisation. Every year approximately NOK 2 million is paid by Kopinor to Saami rights holders as a compensation for the commercial and educational copying of their works. Protecting rights is not just the preserve of the multinationals but applies to all organisations and individuals, irrespective of their economic status.

Current intellectual property right legislations are being deployed to commoditise ideas, to turn information into a perishable ‘good’. The US Congress has approved eleven copyright extensions in 40 years. The 1998 law alone extended copyright by 20 years: works copyrighted by individuals since 1978 were granted a term of 70 years beyond the life of the author; works made by, or for, corporations were protected for 95 years. Today, every creative act recorded in any given medium is liable to be covered under copyright. Technically, copyright now covers an e-mail letter, a poem written by a child, a grade one colouring-in book and a text-message. These successive extensions of copyright terms have benefited corporations more than individual authors. In fact, copyright has almost become an exclusive instrument for corporations to maintain their monopoly over ideas and knowledge. The question for the present issue of this journal is: How can individuals, communities and groups protect their own intellectual and cultural creations, earning due royalties, while simultaneously ensuring that they remain part of the global information commons?

In the digital era and in the context of convergence, the inter-sectoral applications of IT and the knowledge economy, intellectual property rights are being extended to cover hardware and software, the technologies of transmission, and the means of reception and use. Microsoft’s attempts to bundle its products have been complemented by attempts to place property values on the ‘codes’ and ‘content’ of its Windows platform. Yet, ironically, this platform evolved during a period when copyright regulations were not as proprietorial as is the case today. The many derivative features of the Windows platform, including the graphic and menu-based interface system, were borrowed, reminding one of the ‘collective origins’ of much of the knowledge that is being enclosed today. In this sense all new knowledge owes its existence to existing knowledge. With every successive Windows product, the licensing agreement permitting the terms of its use becomes ever tighter.
precisely the intent to make ‘source code’ and ‘content’ available free of charge, thus ensuring innovation, creativity and the freedom to devise software for need-based applications.

‘Copyright in the Information Age’ by Tana Pistorius focuses on the tension between copyright law, technological development, and the rights of creators and users of works. Pistorius explains why ‘digital’ is different from a legal perspective, as evidenced by the impact of digital technology on the traditional notions of copyright law. Copyright law has been the main focus of legal battles that rage among businesses seeking to secure dominant positions in the emerging markets of electronic commerce. The key copyright issues adopted in response to the information age in international conventions and national copyright laws include, argues Pistorius, the right to communication, digital rights management, anti-circumvention provisions and the *sui generis* protection of electronic databases.

Helge Rønning sets a comparative scene by focusing in particular on media culture and intellectual property right. Rønning examines the rights of individuals or communities over their own cultural and intellectual creations in terms of the implications of copyright laws on multinational corporations, as well as the ownership rights of academics to their own intellectual rights. Another Northern example is offered by Joyce Smith. She highlights copyright issues involved in the day-to-day operation of Canadian news media. Her discussion includes the struggles by freelance journalists to have economic control over their materials. The compilation of news sites using online databases, once accessible only by a few, has pushed the importance of ownership and copyright to the top of the agenda for journalists and those who disseminate content.

With regard to Africa itself, Sarah Chiumbu examines the Africa Information Society Initiative (AISI) which recognises the importance of information and communication technologies (ICTs) in advancing sustainable development. The growth of ICT use and penetration in Africa are hampered by several problems: lack of education, erratic electricity supply and lack of computer hardware. She discusses the implications of global pressure for countries to converge upon the same set of intellectual property standards in areas such as copyrights, patents, trademarks, industrial designs, geographical indication and so on, regardless of their different levels of development. Chiumbu argues that dynamic tensions are caused by copyright owners’ abilities to use digital rights management and similar technologies to protect their works against unauthorised use, but which also form a barrier against users’ legitimate right to access and use such works. Furthermore, additional legal barriers, such as click-wrap licences embedded in digital products, also restrict access to, and use of, works. Why is it that free – often better – software is spurned by even public (often resource-poor) institutions such as universities, which prefer to impoverish themselves by paying huge software licences?

The Internet’s potential as a common resource is being eroded by attempts to control its free use. When the Internet first became established as a global means
of communication, it was characterised by a commons of software, a commons of knowledge and a commons of innovation. In other words, numerous and unrelated innovators contributed to the making of the Internet. This tradition of the participatory development of the Internet and its free use is fast becoming a historical footnote in light of the many attempts to privatise the Net. The Internet’s greatest potential lies in its possibilities and capacities for a decentralised control of knowledge and ideas, through the sharing of a vast range of resources, from scholarship, to music, to images. While the Internet remains a vast storehouse of accessible knowledge, its architecture and content is being taken over by commercial interests which are not interested in maintaining its status as a public resource.

The question is, to what extent can public information be valorised to generate investment income for enhancing the public sphere generally, rather than corporations alone?

Public relations activities, for example, regularly include press releases to news media institutions. Written in journalistic style, but incorporating self-serving quotations and turns of phrase, press releases work to the purpose of promoting a particular product, organisation or activity. It is commonplace, argues Warren Parker, for press releases to be used in part, or as a whole, without reference to the primary author and in some instances, with the staff reporter by-lined as author. Duplication of any part or totality of a press release is the objective of the original author – and any masking of this original source serves to legitimate that objective. Parker’s review of HIV/AIDS reporting shows that many reports include only single sources for quotes and information and many of these are the product of press releases that ultimately serve the informational needs and interests of the organisations from which they emanate. The practice of not accrediting the original author constitutes plagiarism in the normal definition, but in practice it serves the needs both of news media institutions that obtain low-cost ‘copy’ and of the authors of press releases, whose objective is to gain column centimetres at no cost, whilst at the same time masking their public relations interests.

Ian Glenn’s study of plagiarism, ‘Begging, borrowing, stealing’, examines specific cases and asks questions about the prevalence of the practice in contemporary South African journalism. Glenn examines the larger economic and technological context that encourages or even forces forms of copying and plagiarism: of others, of self, of international editions, of competitors’ styles, or of material found on the Internet. In short, Glenn argues that plagiarism has flourished as payment for content has diminished relative to other journalism costs and as editorial standards have declined and papers and magazines increasingly rely on outsourced material and freelancers.

There are currently a number of efforts in both the North and the South directed towards the establishment of common property in the public domain. Most of these are aimed at enabling the survival of marginalised communities whose livelihoods have been threatened by the privatisation of agriculture and the health sector. While such efforts remain vital, it is necessary too for a people’s cultural environment to
be a focus for struggle. In a context characterised by dynamic change, old media and new technologies can play a significant role in reinforcing community and in the extension of democracy and the empowerment of ordinary people. Current trends in intellectual property right legislation reinforce the status quo of communication. It is necessary to create and sustain new spaces for cultural creativity and innovation in the global commons.

How can the authors of information, whether copyrighted or not, benefit financially from their own labour? How can this work underpin public service principles of information flow? How can the global commons be protected?

Academic intellectual production is largely funded by the taxpayer. Yet, the ownership of this labour is ceded by academic authors to multinational publishing companies, who then sell it back to the very authors, institutions, students and taxpayers who funded the research in the first place. In this scenario, the public subsidises the multinational publishers, who then assume ownership of the work. This process is not that different from the Council for Scientific and Industrial Research (CSIR) appropriating commercial rights to the chemicals found in the Hoodia plant, used by hunter-gatherers over countless generations. As Christopher Merrett argues, international commercial publishers derive enormous profit from donated knowledge created by academic institutions and the voluntary assistance of their staff (see also Rønning). This relationship is draining higher education of resources, and Merrett argues that Third World scholarship is particularly vulnerable: It produces high-quality research at a fraction of the cost of the First World and gives it away to international commercial publishers. These publishers then sometimes price it beyond the means of originators who may wish to purchase it. The copyright holders’ earnings are based on little more than administration, editing and marketing. One of the symptoms of increasing publishing monopoly is aggregation, the bundling together in an electronic package of text, abstracts and indexes in all-or-nothing deals at negotiable rent. For the average library, concludes Merrett, this leads to a loss of collection coherence and ownership, archival uncertainty and additional costs relating to the rapidly changing nature of technology.

So, if the generation of knowledge – whether in academic endeavour or in creative production – is to contribute to the global commons, the task remains for academics, for communities, for First Peoples, to recover ownership rights to their intellectual property and likewise secure for the public their rights to information at a fair price. To work for these goals, here, in conclusion, are some questions we propose as an operative checklist for national copyright agencies:

- What role could copyright agencies play in facilitating copyright protection with regard to that indigenous knowledge which remains part of the local and/or global commons?
- How can these agencies assist local creators in ensuring copyright and fair use of their own work?
How can the needs of the developing world be secured by copyright agencies where the cost of imported information is otherwise prohibitive?

How can information as a retailed good be made affordable to developing countries? How can intangible culture be protected from unfair exploitation? How can such culture become a generator of income in its own right as far as the host community is concerned?

How can the authors of information, whether copyrighted or not, benefit financially from their own labour? And, how can this work underpin public service principles of information flow?

How can academics recover ownership rights to their intellectual property and the public their rights to the information, at a fair price? How can this work contribute to the global commons?

To what extent can public information be valorised to generate investment income for enhancing the public sphere in general, rather than corporations only?

How can individuals protect their own intellectual and cultural creations, earning due royalties, while simultaneously ensuring that they remain part of the global information commons?

We do not profess to have all the answers. But the papers collected here offer a start in considering these questions in the contexts found in some parts of Africa’s global South.

Notes


3. This is a process that has been covered in and debated at length on the basis of among other things, Manuel Castells’ famous three volumes on The information age: Economy, society and culture, particularly volume I, The rise of the network society. It is, however, remarkable that the issue of the role of intellectual property rights is only mentioned in passing by Castells and it illustrates how little the concept has really been discussed.

4. Core copyright industries are those whose revenues depend directly on the production or dissemination of copyrighted works. They have traditionally been in the news and entertainment sector – journalism; literature; sound recordings and movies; radio, television, cable broadcasting. More recently, computer software has become an important core copyright industry.
5. Copyright-related industries produce goods used in conjunction with copyrighted materials. Examples include the computer hardware and consumer electronics industries and, increasingly, telecommunications and the Internet.

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