

# **“The best ideas are common property”: copyright and contract law in a changing information environment**

**Colin Darch**

*This article<sup>1</sup> sets out to review, in the broad context of the African struggle for development, the implications of a fundamental shift in library practice that is currently taking place across the world. The shift is from a local, ownership-based library practice, governed both by the common law of property and by print-specific copyright statute, to a global and access-based library practice, governed primarily by negotiated contracts between monopolistic service providers and their clients the librarians. The tactical and strategic options open to us as information professionals in poor countries in this unpredictable environment, are discussed.*

## **The good old balancing act: librarians, end users and rights holders**

The move to a new access-based library practice is influenced by several factors, apart from the obvious one of rapid technological change. There is a quiet and belated acceptance in the library profession that the venerable “Alexandrian model” of infinite library growth is unsustainable, even in the industrialised North and even in the short term.<sup>2</sup> In addition, we have been witnessing since the early 1990s an aggressive global drive to extend copyright and other key intellectual property rights into new areas, in a kind of academic “enclosure movement”.<sup>3</sup> Many people are fiercely resisting this ongoing shrinkage of the public domain, both technologically and philosophically, in a struggle whose outcome is not yet clear to us. This article argues, however, that most of the library and information profession is not neutral in this process, but rather colludes actively to support the legal status quo.

There are excellent practical reasons why this is so. Tactically, librarians as a profession clearly recognise and deal with things as they actually are in the present moment, rather than as they would like them to be. The changeover from traditional paper and print resources to a mix dominated by digital resources in libraries is messy, unplanned, professionally threatening and confusing. Librarians are required, however, to learn the needed new skills and to continue to provide service to real clients in real time, and have to deal with the complexities of copyright and contract law whether they want to or not. In this context, securing the best deal and defending the free flow of information - to say nothing of ensuring professional survival - are urgent but often conflicting short-term imperatives. This means that to provide service in the real world, library organisations have to balance between competing interests.

This reality is widely recognised. In its policy document on digital copyright, for example, IFLA states that librarians and information professionals “are committed to support the needs of their patrons to gain access to copyright works and the information and ideas that they contain”. So far, so good. But IFLA adds that “[librarians] also respect the needs of authors and copyright owners to obtain a fair economic return on their intellectual property”, and goes on to suggest, approvingly, that librarians “promote respect for copyright and actively defend copyright works against piracy, unfair use and unauthorised exploitation, in both the print and the digital environment.” Libraries, claims the document, “have long acknowledged that they have a role in ... encouraging compliance” (IFLA 2000); Some of us, in fact, may be a little uncomfortable with the implications of this “long acknowledged” role of ours as copyright police.

Office holders of the American Library Association have also argued that “libraries are creatures of the historical and statutory balance in

copyright law”, and are therefore, presumably, not exclusively on the lookout for their users’ interests. Carol C. Henderson, the Executive Director of the ALA’s Washington Office, wrote approvingly in 1998 that while librarians “take seriously their role as advocates for individual users of copyrighted materials”, they also “pay close attention to [the] balance [in copyright law]” (Henderson 1998).

Closer to home, it turns out that neither of South Africa’s two currently existing professional associations have taken a formal or critical position on copyright or intellectual property issues. The secretary of LIASA, which was founded in July 1997 as the result of a merger between two older groups, stated in response to a query that “closer co-operation between libraries/librarians and publishers should be investigated ... LIASA [does] agree that all SA libraries/librarians should abide with the present SA Copyright Act and the regulations pertaining to this act” (Ferreira 2000). The older, smaller and more radical organisation LIWO, founded in the late 1980s, has also never taken a formal position on these issues, despite occasional outbursts of libertarian rhetoric voiced at local LIWO meetings in Pietermaritzburg or Cape Town (Merritt 2000a). LIWO certainly does not argue against the need for copyright protection (Merrett 2000b).

In fact, although this paper makes frequent reference to developments in the United States and in European countries, the truth is that South African copyright legislation is significantly different from both those examples, and probably worse. The basic legislation in South Africa is the 1978 Copyright Act and its various amendments. This was preceded by acts in 1965 and 1916. South Africa has also been a signatory to the Berne Convention since 1951, and is a member of the World Trade Organisation, as well as being a party to trade related intellectual property agreements.<sup>4</sup> Some lawyers feel that our legislation is badly drafted, hard to interpret, conflicts with other legislation, has few precedents in case law, and gives rise to widely different interpretations among lawyers themselves. Our “fair dealing” practice, for example, is even fuzzier than most, and has not been helped by the years of isolation.<sup>5</sup> This view is supported by the massive and contentious effort

of revision that is presently going on, that is only partly in response to the fierce pressure on South Africa to bring legislation and practice into line with international trends and obligations.

The absence of case law precedents in South Africa leaves many issues unresolved. In the United States, on the contrary, courtroom battles about copyright are relatively commonplace, and resolve - eventually - real issues. *Tasini versus the New York Times*, for example, sought to establish that publishers must seek writers’ permission and pay them before republishing work that originally appeared in printed format.<sup>6</sup> Litigation can also be provoked, as in the case of the t-shirt manufacturer in California, which was sued by the Motion Picture Association of America for selling a garment bearing lines of computer code that could be used to descramble DVD films (Streitfeld and Cha 2000: A1).

It may be argued, therefore, that strategically librarians and their professional organisations cooperate closely with rights owners to enforce copyright and contract law, perhaps not always in the best interests of their patrons. In fact, librarians seem to accept that “the international copyright debate” is necessarily a finite game, in the sense that copyright law has been with us for a long time and will, therefore, always be with us. I want to argue that as information professionals, while remaining realists, we need to examine this “consensus consciousness” critically and to think through the way we should like things to be, in terms of our primary responsibility, which is arguably to our end-users, our clients, our readers. Then, we should work towards that goal. Librarians may want to wonder aloud whether the interests of information consumers are necessarily the same as the interests of information producers or information owners, especially in the present epoch.

### **Losing our balance: the shift towards contract law**

In our time, there is a fundamental legal difference between the way librarians must deal with paper resources and with digital resources. In the first case, and at one level, we exercise

property rights over purchased physical objects, the potential reproduction of which is governed and limited by copyright law. In the second case, we typically enter, in exchange for money, into a licensing agreement, a type of contract that allows designated users access to information across a computer network for a specified period of time. No goods change hands; the library owns nothing that it did not own before. The old “first sale” doctrine becomes irrelevant as the rights<sup>7</sup> that adhere to the ownership of property (the printed book or periodical) fall away completely in most of the digital environment. Such activities as making resources available to all library users, or reproducing parts of a text for individual research under the so-called “fair use” or “fair dealing” provisions of copyright law, may be strictly regulated and even overridden by the contract itself.<sup>8</sup> Contracts, under the concept of “freedom of contract”, allow parties to negotiate terms of use for copyrighted material, and indeed to waive rights granted under copyright law, thus taking precedence over copyright law. Contracts mean *exactly* what they say.

These ideas may be examined in some more detail. When I, as an individual, purchase a printed book or take out a subscription to a printed periodical publication, I am buying a piece of property - a physical object - that I am in practice pretty much free to dispose of it as I think fit. I can keep it forever, resell it, give it away, use it as fuel for a braai, or tear it up and paper the bedroom walls with its pages. Most importantly, I as the owner have the right to exclude others, to prevent them from reading my copy of the book or doing anything else with it. This is ordinary property law.

Copyright law governs my actions in practice if, as an individual, I want to copy parts of this work, or any other, on a photocopier. Opinion differs as to the legality of the action. In reality, however, prohibition of such activity by individuals has been until now as good as unenforceable, and need not concern us here.

If a library, on the other hand, purchases a book or takes out a subscription to a periodical publication, its basic property rights are more limited, but are still fundamentally those of the owner of a piece of property. It can sell or donate the books or periodicals to another library without the permission of the publishers or

authors, it can pulp them as no longer of any use to users, and within limits it can photocopy - or allow to be photocopied - individual bits and pieces of them for the personal and private use of individual researchers.<sup>9</sup> In passing, it is important to recognise that traditional copyright laws may cover many more activities than merely copying, including in the UK for example “issuing copies of a work to the public, renting or lending the work to the public, performing, showing or playing the work in public; broadcasting the work ...; or making an adaptation ...”(Hickley 2000).

All this changes fundamentally when a library buys access to a database under a licensing contract. The library buys nothing in terms of property, and nothing else except access rights as explicitly defined in the contract, assuming certain legally enforceable obligations to the vendor into the bargain. *Caveat emptor* indeed.

In recent years, different library consortia in the industrialised countries have focussed serious attention, not on copyright law, but on how to negotiate these licensing contracts. They have attempted to establish broad contractual principles that will assist them to defend their interests and those of their end-users.<sup>10</sup> Indeed, it is by banding together in consortia that libraries in the North typically acquire the muscle to get the kind of contracts, to some extent, that they want. In Africa, even in South Africa, we have had relatively little experience of this kind of eyeball-to-eyeball negotiation, and consortia of under-resourced and geographically dispersed libraries are not typically able to insist on maximum bang for the buck, to use a vivid North American colloquialism.

It is important, then, to understand clearly that, when purchasing access to a database, “negotiating the price of the licence alone is not enough”. These are not print subscriptions. The European Copyright User Platform (ECUP) recommends that a library *should not sign any contract* that is not explicitly governed by the laws of the country where the library is located; that tries to limit further statutory rights under national copyright law; that does not allow for perpetual access to material that has already been paid for; that does not indemnify the library against intellectual property claims against the

vendor by third parties; that holds the library liable for all actions by users; that does not allow for cancellation; that does not allow disclosure of the terms of the contract; that uses vague expressions such as “reasonable” or “best effort”; that is ambiguous about dates; that does not allow sub-contracting (in consortia, libraries may divide tasks among themselves); and that does not provide for an all-inclusive bottom-line fee. ECUP also points out that libraries need to list, in their licence contracts, everything that they propose to do with the materials, because ‘matters not mentioned will not be allowed’ except at extra cost (European Copyright User Platform 1998: 23).

This is new territory for many or even most librarians in Africa.

### **A short diversion: intellectual-property or property, intellectual?**

At the heart of the debate between librarians and lawyers about copyright are fundamentally different views about the nature of copyright and of the later and broader idea of intellectual property. Much lawyerly discourse on the subject appears to start from the assumption that “intellectual property” is a subordinate category of property writ large, one of the defining characteristics of which is the right to exclude. Information professionals and others tend to regard this as an ahistorical view, and see copyright privileges in their historical context as dependent on the technology of printing as developed in Western Europe from the late fifteenth century onwards. Thus, in the first view, we have property of an intellectual character; in the second, a good that can be owned but that is distinct from other kinds of property.

In the first view of *intellectual property* as a concept that is technology-independent, all that is required as we move from handwritten manuscripts to printed texts to photocopies to binary data stored on networked computers, is an appropriate adjustment of basic principles of copyright to the new technical reality. In the second view, however, *copyright* arose specifically in the early capitalist period in Western Europe as a response to the new printing technology, and was already exposed as an

inadequate mechanism in the late 1950s, with the development of cheap mechanical dry-copying by the Xerox Corporation.

The marketing of the first dry copying machine was one of the crucial developments of the last half-century, and at a stroke made copyright a vitally important issue for librarians and others. The first plain paper copier, the Xerox 914, appeared on the market in 1959, and the technology, first developed by Chester F. Carlson in the 1930s, remained a patented process of the Xerox Corporation until some time in the 1970s (Owen 1986: 64-73). The expiry of Xerox Corporation’s patents at that time opened up the field to explosive competition, and technical development has been rapid ever since. Before the invention of the photocopy machine, copyright law was uncontroversial for the simple reason that there was no technology available to individuals that allowed them to make copies of texts other than photographing them with a camera or sitting down and writing them out by hand.

Building on this idea, in what may appear to some to be an extreme variation of the “intellectual-property” position, Richard Stallman has argued that the copyright system, emerging in Western Europe at the same time as the printing press, was “a bargain with the public, not a natural right.” At the time that the system developed, ordinary people could not, practically, make a copy of a book, since this required access to a printing press and the relevant skills. Members of the public thus happily traded away, in the freedom to copy, “something that they *could not use*” [emphasis in the original]. However, with the successive advent of the photocopier, the tape recorder, the VCR, and burnable CDs, “the easier it [has become] to copy and share, [and so] the more useful it becomes, and the more copyright as it stands now becomes a bad deal” (Stallman 1996). Technological change, in this view, requires not so much the adaptation of the copyright mechanism as its complete abandonment.

Obviously, all this provides us with a considerable amount of raw material for a dialogue of the deaf. Information professionals, on the one hand, can appeal to the idea that information has the characteristics of a “public good”, and should not, therefore, be subject to

privatisation. A public good is by nature "non-excludable and non-rival in consumption ... it will not wear out ... and it would be extremely difficult, costly and highly inefficient to limit its use ..." (Kaul 2000). But does information share those characteristics? There is some support for the idea that it does. Within Oxfam International, for instance, with an advocacy staff of ninety people, the thinking in May 2000 was certainly in favour. A proposal for an advocacy campaign to have run between 2002 and 2004 was prepared and submitted, but was unsuccessful. Librarians will perhaps have been amused to see themselves listed, together with Richard Stallman and "indigenous rights movements" in section 12 of the document, as "heroes" (Information as a public good). That particular balloon was burst in subsequent discussion, however, when we were described by other participants as being more "like cops. Some are good, some are bad."<sup>11</sup> So much for the public perception of IFLA's long acknowledged role of encouraging copyright compliance.

On the other side of the fence are the lawyers, guided perhaps by the long-standing juridical principle "let justice be done though the heavens fall", and who will naturally argue that the consequences of property law are not their concern. Loundy, for example, admits that in fact "the current copyright law [of the United States] may present a substantial impairment to the functioning of libraries in an age of electronic documents", not least for the obvious reason that "checking out a book does not require the creation of an additional copy, while accessing an electronic document does" (Loundy 1995: 5).

Let us examine in more detail the case for moving away from a total reliance on copyright, in favour of other ways of encouraging creators and allowing vendors to turn a profit, and the case for simply "fixing up" and adapting existing law to deal with new situations.

### **Is the ship sinking? Bottles of wine and fresh coats of paint**

Where is copyright in all this? What is the future of copyright law in cyberspace? Most lawyers recognise that "electronic publishing and digital distribution of copyrighted works creates

some tough questions for the current copyright law to address" (Loundy 1995: 45). Others are blunter: "the Internet poses a great threat to owners of intellectual property" (Burcher and Hughes 1997).

But aside from disagreement about the nature of the problem and the threat it poses, there are also widely differing views even about whether it makes sense, in an electronic environment, to try to wrestle with the elusive concept of the "copy".<sup>12</sup> As John Perry Barlow points out, digital files "can be infinitely reproduced and instantaneously distributed all over the planet without cost, without our knowledge, without ... even leaving our possession ..." (Barlow 1994).

Many of the more conservative commentators agree that the concept of the "copy" has become problematic, and perhaps even absurd. Loundy points out that even "[t]he act of reading one's e-mail may result in the creation of copies of protected works if the message being read contains copyrighted expression" and since "strict liability" applies, ignorance and innocent intent are no defences (Loundy 1995: 6). In the United States, the National Research Council also looked nervously at whether the "notion of copy remains an appropriate mechanism for achieving the goals of copyright in the age of digital information". It identified two reasons why it might not - so many copies are made during routine computer processes that "the act has lost much of its predictive power". Second, these acts of copying are so basic to how computers work, that to base copyright on controlling copying gives "unexpectedly broad powers" to rights holders (National Research Council 2000).

Can copyright law be fixed up to deal with these challenges? There are two diametrically opposed views, which might be summarised as "slap on a coat of paint and it'll look just like new" versus "selling wine without bottles".<sup>13</sup> As members of the information profession in Africa we need to sit up and take notice as this argument rages - it is part of the argument that has been raging in the streets of Seattle and Prague, as well as in courtrooms in the United States and elsewhere, and it has an immense impact on us and on our societies.

Copyright law has had new coats of paint slapped on before. In 1909 for instance, as Glenn Otis Brown points out, the advent of piano roll technology provoked major concern among music publishers, with court cases and hearings in the United States Congress being held on the “rights” of composers. One of the key outcomes of that particular crisis was the compulsory licensing system - a composer could not stop a musician recording a piece so long as the required licence fee was paid (Brown 2000). One of the lessons of the episode, Brown argues, is that ‘an overzealous copyright policy is no better than an under enforced one’. It can be argued that publishers, then and now, are interested parties, trying to gain control of the business model.

Part of the argument is about the *purpose* of creating property in ideas through copyright legislation. Despite the beliefs of publishers and commercial holders of rights, it can be convincingly argued that the objective is not “the maximization of financial rewards to copyright owners” but rather the encouragement of “the creation and dissemination of literary and artistic works in order to enhance the public’s access to knowledge” (Samuelson 1993). The most famous expression of this doctrine is in the United States Constitution itself, article I, section 8, clause 8, which speaks of promoting the “Progress of Science and useful Arts ...” by means of copyright laws.

If this is the true purpose, then it might be argued that the real copyright radicals are those who are seeking, with considerable success at the moment, to “shift from the idea of a limited exclusive right ... to the concept of long-term ownership” of intellectual property (Berry 2000). This is the means by which vendors or service providers will be able to enforce their near-monopolistic ownership of the resources that they make available, for access only, through contracts with libraries. However, the conventional wisdom holds that the copyright radicals are those who argue that the system simply cannot work. Let us look more closely at their arguments.

### **Selling wine without the bottle: the libertarian attack on copyright**

In a famous essay originally written in 1994, John Perry Barlow wrote of copyright law that we are all “sailing into the future on a sinking ship”. The ship Barlow refers to is the “accumulated canon of copyright and patent law, ... developed to convey forms and methods of expression entirely different from the vaporous cargo it is now being asked to carry.” Barlow, whose gift for vivid imagery may have its roots in his earlier career as a lyricist for the California rock band, the Grateful Dead, has also written that, since the “rights” of creators were attached to physical manifestations of their ideas (books, periodicals, inventions), they were not “paid for ideas but for the ability to deliver them into reality. For all practical purposes, the value was in the conveyance and not the thought conveyed. In other words, the bottle was protected, not the wine” (Barlow 2000).

Barlow was not the only one to anticipate difficulties. As long ago as 1994, an AAU Task Force on intellectual property rights posed the question quite bluntly: “will copyright endure?” (AAU Task Force 1994). The group’s starting point had been “to assume that legal constructs and economic practices familiar in the world of mainly printed information will persist and can be modified to account for information that comes in technologically different forms.” Yet they recognised that there was already “a strong current of contemporary thought that holds that society is about to reach the point ... where current ways of doing business, dependent initially on old technologies ..., are about to collapse completely.” The danger of assuming that business will continue as usual, and by implication that the Richard Stallmans and John Perry Barlows of this world are libertarian loonies, argued the Task Force cogently, was that academics “may wake one day to find themselves keepers of quiet gardens no longer much frequented by a bustling world that has taken its information business elsewhere.” This danger, they added “probably faces traditional publishers most urgently”.

Some lawyers already agree with this view that copyright law may quite quickly become

irrelevant or be “eclipsed” in an electronic environment governed by licensing agreements or contracts.<sup>14</sup> This is the shift in library practice that was identified in the opening paragraph of this article.

Copyright is under threat not only on the practical grounds that it is becoming harder to police. The concept, together with the broader but dependent idea of intellectual property, is also being subjected to serious criticism on ethical and philosophical grounds. This article is not the place to do more than notice that this debate is continuing in the writings of such commentators as Ram Samudrala (n.d.), Danny Yee quoted by Brian Martin (1998), and Roderick T. Long (1995), and their opponents such as Matt Rosoff (2000). Some of the views - and they are far from monolithic - that Rosoff takes to task comes from libertarian political extremes of both right and left in the United States and elsewhere, and certainly have little immediate practical value for us as information professionals. Nevertheless, this range of arguments, or similar ones, underpins the activities of the programmers who have given us Napster, Gnutella, Linux and Freenet, and we should certainly be familiar with the debate.

### **Why do writers write and singers sing?**

Copyright literature is replete with what, one hesitates to suggest, is the unthinking use of terms such as “piracy” and “theft”, used to describe the making of copies of documents or files without paying the rights holders. This emotionally loaded terminology derives in part from the by now all-pervasive idea of intellectual property as “property” *tout court*, and that it can be stolen.

It also derives from the idea that creators create for money, and without money they will stop creating and science will grind to a halt. For example, “... copyright is vital in that it provides the framework for creativity in a whole range of activities of which the written word is only one. Without the safeguards provided by copyright, there would be little incentive for writers, artists, sculptors, composers, musicians and a host of other creators to continue their activities” (Owen 1995: 93). Earlier in this paper we quoted from an IFLA policy document that referred to the

“needs of authors and copyright owners to obtain a fair economic return on their intellectual property” [emphasis added].

This type of assertion is quite common in the literature, and yet it is based on a range of untested assumptions. It is self-evident that many people sing, write, paint, sculpt and play musical instruments for the satisfaction that these activities provide, and not in the hope of monetary reward, or even, in many cases, in the hope of very widespread acknowledgement. Indeed, some fairly venerable, but ignored research has even indicated that the supposed law that “rewards promote better performance” is in fact wrong, and that reward, especially “when the performance involves creativity” can actually *lower* levels of interest in a task (Kohn 1987). More recently, Ko Kuwabara’s work provides a sophisticated and nuanced discussion of the motivation of contributors to the Linux project, which includes a whole range of non-economic factors and is almost entirely innocent of financial motivations, and should be required reading for anybody who believes in the simplistic idea that authors write for gain alone (Kuwabara 2000: chapter 5). The foundation simply does not bear the weight of the argument.

### **“Hackers love a challenge”: the struggle for control of information flow**

As we have seen, the move to an access-based library practice governed by contract law is based partly on a recognition that it is a much more powerful means of enforcing compliance than copyright has been. It shifts the balance of power decisively in favour of vendors, enabling service providers to do away with such loopholes of “fair use” or “fair dealing” at a stroke, for example.<sup>15</sup>

But rights holders are also seeking protection by other means. The development of software and hardware devices to prevent unauthorised access or use of digital files, whether they are documents, songs, movies, or software, is proceeding quietly and rapidly. “Computers,” editorialised *The Economist* in 1999, “were supposed to be threatening copyright. Instead, they may end up making it stronger.”

The development of what are termed “digital-rights-management” systems represents a major new direction. Various companies, including such major players as Microsoft and Xerox, are looking to embed “tags” in computer files of all kinds that confer specific rights, such as a right to print, a right to open the file, and so on. In some cases, special embedded software could even contact a financial clearinghouse to facilitate payment, or in an even more ominous scenario, report back to a watchdog organisation. Future generations of personal computers may even carry a so-called “©-chip”, that would check whether files had been tampered with (Digital rights and wrongs 1999: 95-96).

Many people would regard this as little better than snooping. Patricia Samuelson summarises a debate between those who believe that “digital-rights-management” systems should be “dumb”, and those who believe they should be “smart”. Dumb systems, she says, “would simply identify the work with a digital equivalent of the ISBN numbers used in the book world today.” Smart systems, however, would be able to “report back to the copyright owner via the network on what the user was doing with the work, and [would be able to] search the consumer's hard disk and report back on what else was there” (Samuelson 1996).

This kind of policing would carry high costs, not least in the level of traffic that would be generated on the Internet as every local document transaction was referred back for the processing of an attached micro-payment.<sup>16</sup> Civil rights, such as the right to privacy, would probably be eroded even further, as data on who was reading or listening to what would be stored. There would, one hopes, be high political and social costs “in establishing an enforcement system that reached into the privacy of people’s homes and forced them to show sales receipts or licences for all the information they possess”, as the NRC has argued (National Research Council 2000).

*The Economist* even predicts, perhaps optimistically, that lawyers may become “wary” of the fact that “copyright holders will be left with too much power.” The weekly quotes a Harvard law professor, Lawrence Lessig, to the effect that we need to start considering “copyduty”, or the (as yet non-existent) legal

obligation to provide public access to information (Digital rights and wrongs 1999). But elsewhere the view is that access to copyrighted information is in fact possibly not an “affirmative right” - and some thinkers even believe that “there is no absolute right of public access to material still under copyright”, a view that most librarians would find shocking (National Research Council 2000). Interestingly enough the South African constitution of 1996 does contain in the Bill of Rights a statement that “everyone has the right of access to ... any information held by the state; and ... any information that is held by another person *and that is required for the exercise or protection of any rights*” [emphasis added] (South African Constitution, 1996, Chapter 2, section 32).

These developments, and any other kind of attempt to legislate or control Internet activities, usually provoke furious and abusive Web discussions. In March 2000, for example, the French Assemblée Nationale approved the first reading of a draft law that would *inter alia* have required anyone running a Web site to identify herself on request.<sup>17</sup> This provoked an enraged stream of e-correspondence on at least one discussion forum over a couple of days, in which courtesy and restrained language were rapidly abandoned.<sup>18</sup>

Hackers, as the saying goes, love a challenge, and the existence of files on the Internet that somebody does not want you to have constitutes just such a challenge. The story of Napster and Gnutella is instructive. As the world knows, these are systems that have made possible the free downloading of digital music files over the Internet, to the predictable outrage of record companies.<sup>19</sup> Part of the response has been to attempt to outlaw technologies that have as their objective the breaking of protection systems, or even any explanation of how they work. In 1995, the North American IITF White Paper, for instance, favoured criminalizing any attempt to import, manufacture or distribute devices or services designed to circumvent any systems designed to protect “any of the exclusive rights of the copyright owner”.<sup>20</sup>

This seems to be a slippery slope. It is perhaps fanciful to imagine that Chester Carlson himself might have ended up in jail under such a regime for inventing the photocopier, but we

have already seen, in the case of Jon Lech Johansen, the kind of “public relations” disaster that does immense damage by raising the emotional temperature. Johansen is a Norwegian 16-year-old who disassembled the DVD encryption code CSS and published the result. There is no suggestion that he acted for profit or gain. However, the Norwegian police, acting on a complaint from the Motion Picture Association of America, raided his home, confiscated his computers, and interrogated him and his father for several hours, enraging civil liberties organisations around the world and making him a folk hero overnight (Braunstein 2000). As the authors of *The digital dilemma* correctly point out, “technology has bred a mind-set that seems to regard all copyrighted works as available for the taking without paying compensation.”

Is policing important in making these arguments? Some writers do not think so: Loundy, for example, is unconcerned with enforcement, arguing that US copyright law ignores policing, which “some people may consider a serious shortcoming” (Loundy 1995: 8)

### **And the rich get richer: intellectual property and the infopoor**

Rights holders in intellectual property are on the offensive, in a campaign to privatise information and knowledge for profit, and copyright law is a weapon in this offensive. Poor countries are suffering from exploitation in this process, as their resources, their very knowledge, is privatised by the North. It is not for nothing that a corner of the World Bank website is devoted to “IK” - the fashionable new abbreviation for indigenous knowledge. This is an idea that is rapidly gaining wider and wider currency around the world. The Director of the Unesco Information and Informatics Division - hardly a representative of the “loony left” - wrote in January 2000, in the sober French monthly *Le Monde Diplomatique*, that “far from being a mere technical adjustment ... the changes to intellectual property law are a political matter.” The multinational corporations, he continues, are “patenting everything they can, ... committing daylight robbery on the common property of

humanity” [emphasis added]. Strong language for an international civil servant (Quéau 2000).

In the modern global economy, the enforcement of intellectual property rights - IPR's, or copyright, patents, and trademarks - is a brutal and extremely high stakes game. Poor countries have relatively little chance of being heard with claims about such intangibles as “social justice” and the “free flow of information”. South Africa is still feeling the effects, for example, of an attempt to legalise the sale of generic pharmaceutical products. This may seem far removed from the day-to-day concerns of working librarians, but it is nevertheless part of the same broad process as the struggle with the details of database licensing, and the same interests are threatened.

South Africa was only removed from a US blacklist of countries that fail to respect IPR's after President Thabo Mbeki's visit to the United States in December 1999. The rights holders, however, returned to the attack soon afterwards. In March 2000, the president of the American Chamber of Commerce, Mr. Jim Myers, made headlines in South Africa when he warned that United States investors had suffered assaults on what he termed, in an extraordinary and revealing turn of phrase, the “sanctity of [their] brands” in this country. Myers also claimed that losses because of copyright and trademark piracy, *excluding entertainment titles and software*, amounted to an astonishing R500 billion.<sup>21</sup> This was followed by a similar call from another US business association for South Africa to be put back on the blacklist, provoking outrage from the South African Chamber of Business (SACOB).<sup>22</sup> The South African case is instructive, because South Africa has the most advanced telecommunications infrastructure on the continent and by far the highest level of Internet access. In the rest of the continent, as Justin Chisenga has pointed out, global trends may well marginalise African information users even more, as they lack infrastructure and in any case cannot afford to pay their way into the databases. Copyright laws are so rusty in many African states, and copyright violation so routine, that electronic publishers may well feel that they should rely on whatever other protection is available to them, technological or legal. “Libraries [in Africa],” he concludes nonetheless,

“should promote respect for copyright law and act against copyright infringements” (Chisenga 1998).

### **Conclusion: stumbling towards enlightenment**

There are three reasons, it seems, why copyright in the traditional sense as a device for protecting the interests of electronic publishers, or rights owners, may diminish in importance sometime in the future, perhaps sooner than we expect.

The first reason is that contract law is, as we have seen, a much more effective way of defining what can and cannot be done with the access that vendors grant to their databases, and it has the huge advantage from their viewpoint that it does not depend entirely on the increasingly shaky idea of what constitutes a “copy”.

The second reason is if technological protection systems improve - and this is a big ‘if’ - the doors to the library will be locked against all comers in any case. As Samuelson argues, “If the technology to protect intellectual property becomes very effective, and if attempts to defeat it are made illegal, it would seem that ... copyright law itself, might become obsolete. Why would one need copyright protection ... if it becomes virtually impossible to copy a work because of the technological protection attached to it?” (Samuelson 1994, In: Loundy 1995: 42).

The third reason - incompatible with the first one - is that, for individuals, copyright policing may be unenforceable, and the principle that “rights unenforced are rights abandoned” may have to be recognised. Revenue flow will be obtained elsewhere in any case, through blanket licences and database contracts. In the meantime, some marginal violation of copyright may be the price that we agree to pay to live in free societies, as the National Research Council itself has argued in *The digital dilemma* (2000).

Where does this leave us now? Is there anything to be done? Loundy argues that “[a]uthors should be provided with the incentive to create, but not at a usurious cost to society” (2000: 46). If the balance shifts any further in favour of the rights holders, negative social

consequences will likely follow. Berry has pointed out that it is highly likely, for all kinds of reasons, that “we [librarians] will not reverse the trend towards greater statutory protection of intellectual property.” However, what we can do is to continue to bear witness to what Berry terms “the exalted original purpose of copyright”; to argue that there is “little evidence that copyright is what protects publisher profits”; and above all, to affirm that “free access to information makes everything in ... society work better” (Berry 2000). All that, and hold thumbs.

### **Endnotes**

1. I am grateful to Janetta van der Merwe, Publishing Liaison Officer at the Adamastor Trust in Cape Town, for her criticisms of earlier drafts of this paper. The quotation in the title is from Seneca (3 B.C. -65 C.E.). The article was first presented to the Conference on “National Libraries in an African Renaissance” National Library of South Africa, Pretoria, 31 October -2 November 2000; later versions were presented at the University of Cape Town Vice-Chancellor's Open Planning Forum, 14 May 2001; and the Law Librarians' Symposium, Johannesburg, 20 November 2001.

2. See my “The unsustainable library: does the Internet really help us in Africa?” *Progressive librarian* 17 Summer 2000: 35-37, for a brief summary of this debate.

3. In the “Enclosure Movement” in England in the 18th century wealthy landowners hedged off common grazing land for their own use, usually to raise sheep. As a result, the rural poor lost their livelihood, and had to move to the new industrial urban centres to work in factories.

4. For a dry but succinct factual summary, see Owen Dean, “Copyright,” paper presented to DoE/EU Copyright Workshop, Pretoria, 1-2 October 1998.

5. In the United States, case law precedent has established that the “fair use” defence cannot rest on any generally applicable definition, and each case must be decided on its own facts (Loundy 1995: 8).

6. The case is extensively discussed on the Internet, and the URLs are too many to reproduce here.

7. The term *right* is employed here in a popular and not in a legalistic sense.

8. The term “fair use” is used in the United States; in South Africa we prefer “fair dealing”.

9. The right of a library to sell or lend its books is known in US law as the “first sale doctrine” - once a work is “alienated” (usually meaning sold) for the first time, copyright law *cannot prevent* further transfers. For a short treatment of this, see Loundy (1995: 37).

10. Two key documents are available on the Web. They are the pioneering Dutch-German principles of 27 October 1997. Available:

<http://cwis.kub.nl/~dbi/english/license/licprinc.htm> 18 October 2000.

The ICOLC principles, a mainly North American equivalent, are available as “Statement of current perspective and preferred practices for the selection and purchase of electronic information”, March 1998. Available:

<http://www.library.yale.edu/consortia/statement.html> 18 October 2000.

11. The discussion is of extremely variable quality. See “Information as a public good,” *Slashdot* 12 May 2000. Available:

<http://slashdot.org/articles/00/05/12/1246239.shtml> 4 September 2000.

12. Loundy (1995: 10), offers the conventional view in United States law - and the difficulties become immediately apparent after even a cursory reading.

13. The phrases are taken, respectively, from Barlow and Loundy.

14. See, for example, Loundy (1995: 38) quoting approvingly from Pamela Samuelson, “Copyright in digital libraries,” *Communications of the ACM* vol. 15 (1995).

15. For a slightly outdated account of the difficulties, see Robert L. Jacobson, “Fair use impasse: educators and copyright holders still at odds over guidelines for cyberspace,” *Chronicle of higher education* 18 August 1995: A19, A22.

16. Serious work is being done in this area. See for instance the description of a “pay-per-click” system in Amir Herzberg, “Safeguarding digital library contents: charging for online content,” *D-Lib magazine* January 1998. Available: <http://www.dlib.org/dlib/january98/ibm/01herzberg.html> 18 August 2000.

17. The drafts of the law and the debates are available, in French, at the Web site of the French National Assembly. Available:

<http://www.assemblee-nat.fr/2/dossiers/communic/2com.htm> 11 August 2000.

18. “Anonymous Web hosting banned In France”, *Slashdot (News for nerds. Stuff that matters)*. Available: <http://slashdot.org/articles/00/03/24/1240210.shtml> 11 August 2000.

19. There is, of course, a vast “webliography” on this fast-changing topic, which I will not attempt to reproduce here.

20. White House Information Infrastructure Task Force (IITF), Report of the Working Group on Intellectual Property Rights (September 1995). Available:

<http://www.uspto.gov/web/offices/com/doc/ipnii/>.

Their legislative proposals are contained in an unpaginated appendix. See specifically section 1201. Available: <http://www.uspto.gov/web/offices/com/doc/ipnii/appena.pdf> 19 October 2000.

21. His guess, of course, is as good as anyone else’s. See “Copyright risks scare off investors,” *Business report* 16 March 2000.

22. SACOB accused the US of trying to “sneak protectionist policies through the back door”: *Business report on Sunday* 19 March 2000.

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