

**Whistle while you work?
Copyright, education, and the ‘man in the street’**

Jonathan McKeown-Green – School of Philosophy, University of Auckland

Trevor Thwaites – Faculty of Education, University of Auckland

Abstract:

In a globalised world which purports to encourage the rapid dissemination of information and knowledge there is an increasing use of constraints which set up limitations and boundaries, and often silences many in the so-called ‘knowledge society’. This paper questions the fairness and effectiveness of copyright law as well as the coherence of the Intellectual Property doctrine that motivates it. We illustrate with aspects of music, but our remarks apply to copyright everywhere.

We will argue that any Copyright Act unfairly imposes an arbitrary boundary between the activities it protects and those it does not. We will also argue that those who create and develop bear a parental, not proprietary, relationship to their output and cast doubt on the notion of ownership as a creative and intellectual pursuit. In viewing education as a significant casualty of draconian copyright practices, our arguments seek to empower those whom it most affects, both creator and perpetrator.

Key words: copyright law, intellectual property, ownership, constraints, morality, power.

The twentieth century's information revolution fuelled an expanding set of expectations about what we can know as well as how soon we can know it. The pace and intensity of global communication was equalled by marketing and commerce. Information, rather than being a public good, came to mean - like water supplies, indigenous DNA samples, or cures for the Aids virus - something to own, something to make money from. The advent of the twenty-first century has not changed this perception, rather, digital technologies and the escalation of the "Net" have brought about calls for increased convenience, constraints and controls. This paper looks at the ownership of ideas, what some call "intellectual property", in two ways: firstly we look through the lens of morality and secondly, we explore notions of power and its association with ownership, revolution and delegation.

Let us suppose you want to teach your class the difference between white and brown sugar. A good strategy is to ring the sugar refinery and get permission for a class visit. Better: do they have an education officer or guided tours suitable for school groups? Another scenario: imagine you teach in the city and some members of the class have never seen lambing. A good strategy is to make contact with a farmer and get permission to visit in season. A bad strategy would be to stroll into the refinery or onto the farm without permission and unfurl your lesson plan. Bad because it promotes disrespect for the law and interferes with the owner's right to do what they want with their patch. It's no good complaining about how tomorrow's farmers might well include students of ours, or about how it is a good investment in the business and the community to allow educators unsought access without demanding acknowledgment. Refiners, farmers and private citizens in their castles are protected, by law and by common consent, against trespass and invasion.

Now doesn't the same apply if, instead of straying into your domain in the quest for knowledge and understanding, I whistle your music, or read your novel aloud or download your music? Don't songwriters and novelists have the same proprietary privileges as refiners and farmers? And doesn't the law do its best to protect these privileges because this is right and proper? Isn't that why we have copyright and patent legislation?

Before we all chorus in the affirmative, notice that if the milkman whistled your music in the mid-1960s and you are Beatle Paul McCartney, you might rejoice! “I’ve made it!” you might say. “The man-in-the-street knows my tune!” This is an occasion for celebration, not prosecution. But the credo of the Australasian Performing Rights Association (APRA) is, if it is recognisable by the ‘man in the street’, copyright is payable (telephone conversation with APRA lawyer Anthony Healey, September 2001). This would mean, in 2003, that McCartney would have been perfectly within his rights to rush downstairs and demand that his milkman purchase performance rights.

Now let us consider The Rutles, who were a group of English comedians responsible for putting together a parody of the Beatles for Rutland Weekend Television in 1978. The group met with such success that they released a soundtrack to a TV movie, *All You Need Is Cash*, in which they changed the lyrics to several of the Beatles songs. LA lawyers soon alleged breach of copyright even though the melodies and lyrics were different from their originals. Meanwhile, the Beatles themselves loved the Rutles. John Lennon memorised several of the send-ups. Their own songs, however, were no longer their own property. In this instance Paul could not have challenged the milkman as his song was owned by someone else!

We submit that whistling your tune is significantly like sharing a piece of non-sensitive, non-confidential information and significantly unlike invading your refinery. We challenge the doctrine that tunes and novels are intellectual chattels which I may access only with your permission. We are with John Perry Barlow, lyricist for the Grateful Dead, who believes “intellectual property is a misnomer” (Schwartz in Alderman, 2001: xv). We would do better to posit an intellectual *relationship* between artist and audience. Our arguments are not conclusive; our aim is to sow doubt and uncertainty, rather than to clinch the deal. But there's more. Even if we assume that the intellectual chattels doctrine holds water, it still turns out, we argue, that the rightful owners of symphonies and novels according to that doctrine get little or no protection from any kind of copyright law, for copyright law is not so much a safeguard of intellectual property as a system for

controlling the distribution of power. In sum, copyright law fails to protect the owners, and especially the authors, of intellectual property, either because there is no such thing as intellectual property or because the legislation cannot ensure that owners/authors get their due.

These conclusions have much the same bearing on education as they have on the retail sector, the art world and the downloaders of MP3 files. As our arguments unfold, we draw particular attention to their implications for educators. Plausibly, educators can and should lead the way towards reformed thought and reformed practice.

What is there to steal?

In encouraging the music industry to move faster into the Web, Edgar Bronfman Jr of Universal Music and heir to the Seagram empire, addressed the Real Conference, 2000 in San Jose, California,

For all of us, 'property' rights are well understood and universally accepted. You own a home. You own a car. They're yours – they belong to you. They are your property. Well, your ideas belong to you too. And intellectual property is property, period. If intellectual property is not protected – across the board, in every case, with no exceptions and no sophistry, about a changing world – what will happen? Intellectual property will suffer the fate of the buffalo (quoted in Alderman, 2001: 138).

Is Mr Bronfman on safe ground here? Consider the ethical status of various acts:

- It's immoral, because it is dishonest, to pass someone else's work off as my own - to claim that I had a hand in creating it when I had no such thing.

- It's immoral, again because it's dishonest to alter or distort someone's creation and pass it off as the original. I shouldn't say that I'm quoting you if I change what you said or take it out of context.
- It's immoral, because it is negligent, to refrain from giving credit to the creator of something which I appropriate for my own purpose. If I perform a snatch of your sonata or quote you in my essay, I should acknowledge that this is what I am doing.

However, is it immoral, and if so why, to photocopy the whole of your novel without permission from the copyright holder? And is it immoral to make an unauthorised digital copy of your CD or to play it loudly in a public place without permission from the copyright-holder? Well, it's clearly *illegal* to do these things. So if it is always immoral to break the law, then unauthorised copying and broadcasting (as we shall call it henceforth) is indeed immoral. But set the connection between legality and morality aside. After all, laws are sometimes unjust: many hold that laws allowing capital punishment or laws that sanction press censorship are unjust. Imagine yourself in the pre-legislative 'dreamtime' wondering whether to make unauthorised copies or broadcast illegally on the grounds that such things are evil. What should we decide?

That is the central question about the intellectual property doctrine: independently of any pre-established law, is it wrong for me, without some sort of explicit permission, to make copies or broadcasts of material which required your creative effort and original ideas to produce? The standard answer is: "Yes, it's wrong because it is a kind of stealing!" David Basskin, executive director of the Canadian Music Publishers Association believes: "There's no difference between someone who posts a guitar tablature [a form of guitar notation] online and someone who throws a brick through [a record store] front window" (quoted in Alderman, 2001: 106). It's this infusion of theft into the discussion that makes our question one about property.

So what gets stolen, and from whom? If I buy a book or CD and copy it or read it through a loudhailer, then an item which I have purchased and now own is being used in a way of

which I, the owner, approves. Where is the theft? I even have music DVDs which forbid my *lending* them to anyone, meaning I cannot share my passions and interests with friends despite my holding a bill of sale.

Here is the basis of the standard reply: it turns out on analysis that really you don't literally *own* the novel or the music. Your purchase agreement accepts that you own the paper that the novel is written on or the plastic disk on which the recorded information is encoded, but the information that makes up the creative work is something which you are only *licensed to access*. There is an owner of the information who doles out the licences and maybe there are conditions on the licence. If you flout the conditions, you are using the information contrary to the owner's instructions and this is theft, near enough. Maybe it is indeed morally wrong of me to use an item contrary to the licence agreement I have made with the owner, but this reply on behalf of the theft camp only works if there's a decent story about how somebody other than me gets to own the information. Who is this individual? Is it always the creator? Why do they own the information and why don't I own it?

When considering these questions the defender of the theft charge should note something odd about attaching notions like property and theft to abstract objects like novels and symphonies. Martin (1995:1) remarks that assigning property rights with respect to a thing makes good sense when the thing is a pair of shoes - a thing to which only a limited number of people can get access at one time. We can't all wear the same shoes at once, so it makes good sense to institute a system which awards some individual or group the exclusive right to wear the shoes now. We can then avoid, or resolve, conflicts and confusions about access. Property rights serve this function well, but once we move away from shoes and other individual material items, once we strike effective mass production processes which offer unlimited access to information, we can no longer justify assigning property rights in terms of this need for rationing. While I am whistling your tune, Madonna might be singing it, Oscar Peterson improvising on it and my techno-savvy cousin emailing it to 5000 friends. Martin's point is that it's hard to see how you can steal

a thing from somebody if that somebody has the same unlimited access to the thing as they had before!

We can go further and wonder whether it makes any sense at all to think of art-works and ideas as ownable. The instructions for making a cake, performing a symphony or building an aerodrome are like the message that the beer is in the fridge, snippets of information. Usually such information is not sensitive: the terrorists will not have won if somebody makes my cake or plays my symphony. And usually such information is not confidential; on the contrary, the more incarnations of my cake and performances of my symphony, the better.

No doubt an upholder of the theft model can appeal to some more general conception of private property - one which is not tied so intimately to exclusivity rights. No doubt they can say something about what entitles you to own an idea or snippet of information. Still, we have taken this exchange far enough to establish that if there is something wrong with unauthorised copying or broadcast, it is at least not glaringly obvious that the wrong-doing counts as theft.

Opponents of unauthorised copying and broadcasting should entertain the possibility that if there is wrong-doing here, it is best understood, not as the *misappropriation* of *another's* property, but rather as the *misuse* of *one's own* property. Forget about whether ideas, symphonies and novels can be owned and return to the more modest claim that I can come to own a CD or a copy of a novel by visiting the shop. Now common-sense dictates that we require a moral code which sometimes restricts what you can do with your own possessions. We think it is wrong for you to murder people with your own guns, pile all your own white-wear up in the middle of a busy highway or mistreat your pet rabbit. So we cannot assume that owning something - or getting the blessing of the owner - allows you to do whatever you like with it. Maybe one of the things it is wrong to do with a book or CD that you own is to copy or broadcast it. If so, we may be able to describe what's

wrong with unauthorised copying and broadcasting without talking about *intellectual* property at all.

In short, talk of intellectual property just obscures the issue. Let's ask our master question again: What if anything is morally wrong with unauthorised copying and broadcasting? Let us try to describe the purported wrong-doing instead of merely giving it a name.

Here is the intuition that we think is behind our moral qualms about copying and broadcasting. People who invest time, effort, or ingenuity, and thereby create something that benefits others, deserve support for their endeavours and recompense for their investment. This support and recompense may (though it need not) act as an incentive to create or a means of earning a livelihood. It should be in proportion to the potential benefits of the product to society. Whenever I share the benefits I receive from accessing your creative work - by photocopying your novel, say - this generates a debt to you. Why? Because if your creative product is great or has the potential to benefit millions, it is worth far more than it would be if it were poor or if the appreciative audience for it were tiny. Every time a new person gets enriched through contact with your creative work, this is proof of its potential and that should be acknowledged with an appropriate payment to you.

We claim that the above sentiments are part of received wisdom and that this is why it is taken to be morally wrong for us to copy or broadcast unauthorised material. Not everybody will agree with this package of intuitions and you may well be suspicious of much of it. Let that lie for now, but notice what the package *doesn't* contain.

For starters, there's nothing in it anywhere about ownership of anything. No reason is included for attributing ownership of an idea, art-work or snippet of information to its producer and no reason is given for thinking that the producer has the right to decide who gets access to the product. To be sure, the debt of support and recompense allegedly due to the creator could be construed as analogous to, say, the rent payable to the owner of a

manufacturer's mould. But it could just as well be regarded as akin to the fees payable to a surgeon, or even to the support and loyalty owed by a child to a parent. The latter model is particularly tempting: one generates and nurtures one's progeny with something of the care and craft that attends the creation of one's own art-work. Both child and art-work can, as we know, take on a life of their own, independent of those who create and tend them. Yet Bach's sundry children are not numbered among Bach's creative belongings; so maybe his B Minor Mass isn't either.

However fanciful this line of thought might be, the message to our intuitions about a creator's rights are not necessarily intuitions about *property* rights. When we explore how those intuitions should be codified in conventional morality, common law or statute, surely we should recall that the creator supplies information. We should take seriously the question: What is the best way to support and recompense the purveyor of information? We should not assume without argument that we can answer this question by assimilating information flow to a trade in private property.

Furthermore, if we've got the intuition right, the duties owed to a creator of ideas are owed to him or her alone. They cannot be purchased or taken over by a third party any more than the praise due to an artist can become somebody else's. When we admire the dexterity, logic and musical inventiveness that Herbie Hancock displays in his solo on 'Speak Like a Child', we want to praise him for his work and I want to see him supported and repaid for enriching the lives of people like us. It would be unusual if we praised Blue Note Records for the dexterity, logic and musical inventiveness which they display in that solo - though we might praise them for the loyalty they show to young jazz artists. Equally, it would be odd if we thought that they deserved support and recompense for the creative work in the solo; although they may deserve my material support for some other aspect of the project. Our moral duty to the creator of an idea is not a moral duty to anybody else. Of course, Herbie Hancock may decide that any fees or royalties he earns will go to a favorite charity or to Blue Note and I may want to honour his wishes, but the moral duty I owe him as a

creator is not a duty to any of his potential rightful beneficiaries any more than the duty to congratulate him on his artistry is.

We now have an intuition that the creator should be supported and recompensed for their creative doings. There are various ways of putting this intuition to work in a social setting. Like the Soviet Union and parts of Africa, we could designate certain individuals as creators, supply them with the tools of their trade and guarantee them a decent livelihood. Like the Universities, we could identify talented inventors and discoverers, setting them to work as both creators and instructors. Or we could stick to the model that flourishes throughout the industrialised West where publishers, record companies and other disseminators of information collect on the creator's, and their own behalf.

Plausibly, all of these implementations of the underlying intuition are imperfect because they cannot ensure that all and only creators get their due. Consider, for example, the woefully opaque procedures for collecting music copyright fees in New Zealand. In March 2003 a Dunedin lunch bar was confronted with a demand that it pay for the right to play a radio from behind the counter to add an ambience to the room. In considering the moral right of Australasian Performing Rights Association (APRA) to challenge the lunch bar owners, we must ask where precisely or to whom does the small amount of money (approximately \$50.00) go? APRA never asked which radio stations were being played, or what type of music was being broadcast; the proprietors may have even preferred the talk-back stations. What if the radio had been placed out the back, in the kitchen, yet was still clearly audible to the customers? Would they have been in similar trouble if they whistled while working instead of turning on the radio?

Crucially, rejecting a particular implementation of the intuition that we should support and recompense creative people does not seem to entail a rejection of the intuition itself. Even if you agree that creators should be rewarded, you might still reject the industrialised-modernist model with its copyrights and its patents. You might see nothing wrong with

copying and broadcasting without a copyright owner's permission *and yet still believe* that the creator is entitled to something in return.

Music, Power and the Copyright Debate

The rise of digital recording has meant that it is now possible to make high quality copies of your favourite recordings in the comfort of your own home. The quality of a copy is as good as the original, whereas in cassette tape copying the quality deteriorated with successive copying. CD burners are the means by which CDs can be copied, these may be free-standing or built into a computer. The music industry is so concerned that they are presently trialing the notching of CDs to prevent them from being copied more than once. The problem with this system is that some older CD players are unable to now read the doctored CDs. Questions have been raised about the legality of this but the music industry is a powerful body, more so because of alternative corporate interests which also back the record companies. Another anti-copying method tried was to notch the blank CDs to prevent information being transmitted to them from other CDs. When suggested, this idea threw many businesses into a panic as much of their business transactions and accounting information is regularly transferred onto blank CDs for back-up filing. CD burners generate considerable paranoia in the industry, but one new arrival, Napster in 1999, really got things going. Napster relied on another form of transmission, the Internet.

When file-sharing music provider Napster went online in 1999 millions of college students hooked in and downloaded all the songs they could think of in possibly less time than it would take to drive to a record retail outlet and select and purchase a single CD! Since most of the songs were copyrighted, this appeared to constitute theft. But to a teenager sitting alone in a bedroom, a couple of mouse-clicks seems perfectly innocent; no one appears harmed, in fact there is no inter-human interaction at all.

At the same time, some in the music industry were recognising the value of Internet downloading. Thomas Middelhoff, CEO of BMG records acknowledged this when referring to the activities of Napster:

Let's be honest. Despite all the dangers, Napster is pretty cool. (*The system has*) an excellent music brand transporting the following characteristics: high quality, free delivery of music directly into your home, simple use, global selection from the repertory of all labels, prompt service and uncoupled programme selection... File-sharing as a system (*is*) a great idea, (*but Napster's mistake was*) not having developed a complementary system for the protection of intellectual property rights and combining the two" (quote from the PopKomm conference in Cologne, Germany in Alderman, 2001: 116).

The costs of distributing one copy of a song on the Internet and 50 million of them are practically the same. Digital distribution means that music is no longer tied to an object such as a record, tape, or CD, but becomes, as it is being shared and consumed, something more ethereal (Alderman, 2001: 4). How does one protect their property which is being reproduced all over the globe, and done so without the artist's knowledge of its co-existence or of the fact that it has left their possession? The Recording Industry Association of America (RIAA) eventually succeeded in having Napster closed down, but this only spawned different forms of file-sharing. The most popular of the new breed is Kazaa, but where Napster was reliant on a central server, making its closure mere formality, Kazaa is built around a floating distributed network of individual PCs that has no centre. The decentralised business strategy relies on PC user partnerships with each other and with Sharman networks, the official owner which is based on Vanuatu. The industry's strategy to deal with this is to use electronic counter-measures such as "spoofing", whereby dummy versions of popular songs are released onto the file-sharing networks but when they are downloaded there is no music on the file.

It is a massive world of access to art forms out there on the Internet, and some artists are anxious to be a part of it. David Bowie has turned much of his fan base into paying customers on his internet service provider/fan site (BowieNet). The Beastie Boys, who first noted the promise of MP3s, and the Eurythmics Dave Stewart have similarly utilised the Net's potential.

Music on the Internet presents an interesting juxtaposition in the balance of power between the record companies and the server providers and their supporters. Here we find a reflection of what Nietzsche called the 'will-to-power' – the notion that humanity is driven by a search for power, which proves useful when analysing human or corporate motive. Acts which appear noble or honourably disinterested are revealed as being self-interested or even decadent. Therefore, when those on one side claim to be working in the best interest of the artists and those on the other claim to work in the best interests of music access we can begin to see a competitive struggle in the making. What was once done for the sake of God is now done for money, and money gives one a sense of power.

Foucault presented another perspective on power, one he labelled as 'power/knowledge', and this can be seen as dialectically compatible with Nietzsche's concept. Foucault believed that power would be fragile if its only function were to repress and, if it were asked, worked only as a mode of censorship, exclusion, blockage and repression, operating only in a negative way. The copyright debate, while it often views the copyright holder as repressive, has, through the growing process of rationalisation, organisation, and homogenisation, the power to normalise the situation. Givens do not remain constant, constancy is often short-lived, particularly in the postmodern age where permanency is fleeting and translucent. While power may not causally determine particular actions, it can make them more probable through the exercise of power rather than its possession. Power is exercised in the effect of one action on another action, this has been seen in the RIAA/Napster

debate as record companies and file-sharing groups justify their actions in a range of ways.

Copyright constraints are often seen as the exercise of power - in this case by the record companies - on any resistance by, or deviancy from, groups of opposing views. The reiteration of power by those who flaunt the copyright laws seems to support Foucault's view that power is not something that some possess and others lack. If control is a symptom of power, then the battle for control of the potential of the Internet brings to the foreground specific identities. These identities might be motivated by profit, rights, desires, and rebellion, yet all speak the same language, that of liberation. This might be seen on the part of Napster as a liberation from control and on the part of the RIAA as a liberation from the need to control. By liberation I imply freedom, yet freedom is both the condition and the effect of power. Liberation might be extended to the emancipating power of the new technologies which mediate and liberate the transmission of music while often sublimating human agency.

Power is always contested; what becomes problematic is how power is legitimated. For Lukes (1974:26) power is a concept "which is ineradicably value-dependent" and "essentially contested" and which "inevitably involve(s) endless disputes about... proper use on the part of... users". Educational institutions have a moral right to challenge knowledge and power structures and this places them in an invidious position when their students model this position through the breaking of copyright laws.

In New Zealand, artists Dave Dobbyn, Bic Runga and Neil Finn were recruited to reinforce music industry values and to fight illegal copying, schools being one of the targets. The artists point out that the industry could collapse if sales fell, and that this would limit the environment for future artists to grow, is a valid one, until one remembers that all three have off-shore contracts and their music sales do little for the

economy of the local (NZ) music industry. Dobbyn and head of Sony Music in New Zealand, Michael Glading, launched the BRN>BRNT campaign. The idea did not originate in New Zealand, but the use of text messaging codes is an interesting strategy. At the launch Glading stated that every school was being written to, asking them to stop illegal trading of pirate CDs in the schoolgrounds (*Dominion*, 23 November, 2001). Glading rejected arguments that the high cost of CDs was fuelling the black market. "Cars are expensive, but that doesn't entitle you to steal a car" (New Zealand NetGuide, Issue 59, February 2002:14). At other times Glading likened copying CDs to actually stealing a car. The legal implications for schools found condoning (through inaction) the exchange of CD copies could be significant if followed through by APRA. It matters little that these might be the actions of students keen to exchange 'information' and their subculture with their peers – the knowledge society does not extend its moral capacity this far.

Dahl describes an "intuitive idea of power" (in Lukes: 11) which offers firstly the potential of A to get B to do what they would not otherwise do, and later as A's successful attempt to get B to do something they would not otherwise do. The first deals with capacity to get B to do something, and the second deals with A's specific success in actually getting B to conform. Conflict between preferences tests power attributions and is necessary for the exercise of power and in defining the objectivity of interests (p14). For former CEO of the RIAA, Hilary Rosen, "marketing and promotion...adds value and vigour to the creative community" (Alderman, 2001:99). Powerfully persuasive rhetoric such as this is hard to refute. Markets and the prospect of financial reward, the will-to-power, are significant incentives to some creative artists. The rewards for creative works have seen the rise of a breed of creative persons whose driving force is the will to get rich quick. The global mass music markets offer pretty good odds for the creative and the shrewd. In trying to ensure that consumer compliance with purchasing agreements also includes on-line dealings, the RIAA frequently use the public arena as this example from Rosen shows:

How do we accelerate the legitimate music market online? Everything that we've done, whether it's lawsuits, whether it's marketing and education – it has all been geared with that goal (Alderman: 88).

New forms of coercion were introduced when the recording industry enlisted the help of some of its key artists in persuading the global band of Napster users to rethink their position and curb the online downloads. Drummer Lars Ulrich from the band *Metallica* was particularly outspoken and he made the valid point that if you can afford \$3-4,000 for a computer and software then you can afford to *buy* their (*Metallica*) Cd. Entertainer Eminem also spoke out against piracy using his trademark abusive methods to make his point – “Whoever put my s—t on the Internet, I want to meet that motherf—er and beat the s—t out of him” (quote from *Wall of Sound* in Alderman, 2001:114).

If we take the view that popular music is a product of the working classes, then it is easy to adapt Gramsci's notion of hegemony to reflect the domination of the recording industry bourgeoisie. A culture industry dominated by the social classes in power within the industry itself, building power on the backs of the creative artist/workers, even using its workers such as Ulrich, Eminem and Dobbyn, to defend its right to rule. Modernity altered modes of cultural production and reproduction as the process came to be rationalised and Taylorised, while new technologies unsettled established norms and values. This is seen in the ways that relations of production were themselves changed as new cultural formations and a new aesthetic emerged in forms of mass culture. The Napster phenomenon clearly represents the unsettling of the industry as it challenged modes of distribution.

Foucault also takes the view of the modern period being one which favours the disciplinary society. In this sense, for Foucault, power is everywhere: “overcoming, co-opting, infinitely detailed, and inelucable (*inevitable*) in the growth of its domination” (Said in Hoy: 150). Within the context of CD burning or the Napster

debate, the operators broke the rules and conventions which the RIAA had put in place. The challenge to those rules with attitudes that there should be no rules relating to the accessing of music smacks of anarchy, but might in fact be the users of the new technologies asserting their position using a global downloading proletariat to drive its revolution. Gramsci referred to these real interests and conceptions of the world which occasionally manifest themselves into action, where a “group is acting in organic totality” (Gramsci, 1971: 327).

Let us use a non-musical example of inevitability of expressions of power when governments back certain groups in society whose self-interest smacks of ‘common-sense’, while criminalising those whose voices might not be so financially viable. In 1995 photographer Charles Gentle photographed the I.M. Perling building in Cleveland, Ohio. Gentle took a lot of photographs around Cleveland and his business was the selling of artistic posters of scenes in and around the city. The I.M. Perling building housed the new (at the time) *Rock ‘n’ Roll Hall of Fame and Museum* and Gentle was unaware that the Museum had taken out a trademark on its own images. The museum subsequently sued Gentle for ‘capturing’ their image (in Martin, 1995: 5). Many might support the right to own images of buildings, but the implications could be severe for photographers and visual artists keen to capture the ‘moment’, or the play of light and shade, or just pay homage to a setting. In the new digital age what images reflect the real, what the simulacra, and what the in-between is a significant question? In Auckland, at the corner of Wellesley and Queen Street, sits the HSBC building. The building is several stories high and is sheathed in gold mirror glass. Standing to cross the road, pedestrians can see the image of the Civic Theatre reflected in the glass of the HSBC, a pre-digital replication. Should the owners of the Civic choose to trademark their image, as did the Cleveland Museum, what then of mirrored reflections? At what point does privately owned world end and the public world begin and what would governments rule?

If an organisation devotes its energies into reinforcing its values in order to limit the scope of opposing views, the way the organisation creates or reinforces its barriers define the extent of its power. This is because, in Schattschneider's words: "organisation is the mobilisation of bias" (Lukes:16). This might lead us to a typology of 'power' that embraces coercion, influence, authority, force, and manipulation (p17-18). In analysis, this form of power involves examining both decision-making and non-decision-making, which Bachrach and Baratz (p18) see as a balance between "alternative modes of action" to make decisions and, "changing existing allocations, benefits and privileges" to stifle opposition before it is voiced. We earlier quoted from Edgar Bronfman Jr's speech at the Real Conference 2000; here are some more comments from the extract:

We now live in an era in which a few clicks of your mouse will make it possible for you to summon every book ever written in any language, every movie ever made, every television show ever produced, and every piece of music ever recorded. ...The great ferment of works and ideas, including your own, if taken at will and without restraint, have no chance of surviving... I am warring against the culture of the Internet, threatening to depopulate Silicon Valley as I move a Roman legion or two of Wall Street lawyers to litigate in Belevue and San Jose. I have moved these lawyers – or some of them- but I have done so, and will continue to do so - not to attack the Internet and its culture but for its benefit and to protect it. *For its benefit* (quoted in Alderman, 2001: 138).

In his speech, Bronfman chooses to ignore the durability and sustainability of the great unprotected works from The Bible and Plato to Shakespeare, Bach, Beethoven and Brahms, but he was, to some extent, suggesting alternative modes of action. Nevertheless, Bronfman still could not suggest viable new alternatives and so resorted to the well-used method of legal threats couched in military terms, outlining the RIAA's personal 'war on internet terror'.

It is possible to see the essence of power and authority as resting on opinion, rather than being consensual, and we can conceive a situation which defines power as a legitimate force, a condition: enabling a group of people to think in terms of the “means-end category” (Arendt in Lukes, 1974: 29). This moves us away from power relationships to a locus of ‘capacity’, ‘facility’, and ‘ability’ as means of securing compliance (Lukes:31). The question of whether radical persuasion is a form of power suggests a fundamental antimony between causality and autonomy, and this is what needs to be embarked upon if we are to uncover the ‘real interests’ of groups involved in the copyright dispute and resultant struggles, particularly with regard to education.

In a brochure entitled *Copyright in Educational Institutions* (Copyright Licensing Ltd, Northcote, Auckland) the opening paragraph states: “The purpose of copyright law is to balance the rights of creators to earn a living from their works against the need for public access to those works”. This operates in much the same way as the AMCOS licence run by APRA. The schools Public Performance and Print Licence which costs approximately \$1 per student includes public performances of music works (many public performances are for student submissions for examination purposes, photocopying and reproduction of printed music - which most schools do to avoid losing the original masters), a licence for listening to recordings and making audio and video recordings. It does not apply to the school musical which is a separate licence negotiated with the publishers. A site licence gives educational institutions certain rights to reproduce portions of works for educational purposes - usually 3%.

Each year a sampling survey is carried out which is intended to be interpreted by a statistician so that the artists get their monetary rewards to help “earn a living”. However, out of two surveys conducted over the past three years, the last in October 2003, only *one* Auckland music department out of the sixty surveyed had been asked for a sample in the six years of their involvement and this throws into question the validity of the claim. If the copyright collection agencies do not collect the necessary information, then to whom does the money get paid? Presumably schools agree to pay

copyright fees because ethically they believe in the creative artist's right to be rewarded for their endeavours. APRA claims that it collects information in the form of samples from schools which enables them to distribute "the royalties collected accurately to the composers whose works have been used". This policy is inherently flawed because if the limited sampling, as we have seen, is inaccurate for correctly identifying these composers, then where does the money go? Different schools perform, listen to and access vastly different works, including cultural, many of which are outside the copyright regime (dead for over fifty years), or are not a part of the APRA register of approved composers, so who wins – and who loses? Even if the agency does know to whom payment should be made, many times the creator is not the copyright holder, and for some artists in the United States, their contracts nullify monies earned outside that country.

One counter-argument might be that rather than 'using' copyrighted material, schools in fact promote the material, and so should receive monies for their advertising activities. It would seem that a new discourse needs to be mounted to question the existing, and seemingly unquestionably 'legitimate' one in place. Copyright prevents young people from doing what they have always done with people they admire, they erect iconic tributes to them. Before the Internet they would pin posters to their bedroom wall, now they can build websites in their celebrities honour. That is they could, except many young websites are closed down because of a breach in trademarked symbols. This might be pictures of the star, logos from TV shows, but rather than being seen as a fan club (these usually are run by the corporate copyright holders) they are seen as breaking the law.

Many around the world believe that copyright laws have gotten so out of hand that they are causing the death of culture and the loss of the world's intellectual history. A war against copyright "hoarders" is being waged by the new technologies. "The period of copyright primacy is going to end up as a huge hole in the cultural record". Stanford-based Professor Lessig says that some copyrighted material simply vanishes

because the corporations aren't interested in keeping all that they own commercially available. Copyright laws now also preclude "derivative use" of copyright material, people cannot develop new material based on copyrighted work without permission. Lessig says that this radically changes how human culture will evolve, since "the property owner has control over how that subsequent culture is built". Barlow (in Lillington, 2001) maintains: "Kids don't own their own culture".

What the industry fails to acknowledge is that young people are all the time discovering new music and new identities. The ways that they discover new music is of little interest to them, the discovery is. The Web is a ready-made access to even more music and knowledge for them to discover. Cast your eyes around the average record store and see not what is evident, but what is absent - what music the record distribution channels choose not to display or make available. Downloading gives unparalleled access to a wide range of musics unavailable through the market. The only reason record companies and copyright agencies might give for the opposition to the practice is that, like Monsanto and its control over seeds, they wish to control what music is heard and when, decided purely on the basis of profitability.

Meanwhile, educational institutions contribute to the substantial copyright revenue and have a right to know how this money is dispensed. The prime function of education would seem to be basic literacy and numeracy, its purpose though is more diverse and socially useful, that of cultural maintenance, dissemination and practice. If schools are prevented from this by the trivial tolls charged by the Americanisation of ownership, what hope is there for the diversity and individuality of knowledge in the world? Knowledge and creative practices are there first and foremost to serve society, and not the other way around.

It would seem that the situation is little better than in the first century when book merchants employed slave scribes to produce highly priced editions, the authors themselves having little or no protection for their work and commanding almost

nothing for their ‘manuscripts’. It was a seller’s market, controlled increasingly by the merchants and the situation is little different today. We close with a question that must be asked: is copyright and the notion of intellectual property about adequately recompensing those whose creations we value, or about market and cultural control and censorship at the expense of educational access to heritage and knowledge?

References

- Alderman, J. (2001). *Sonic boom – Napster, P2P and the battle for the future of music*. London: Fourth Estate.
- APRA/AMCOS. *Information for schools*. Retrieved from <http://www.apra.co.nz> on 28 October 2003.
- Danaher, G., Schirato, T., & Webb, J. (2000). *Understanding Foucault*. St Leonards (NSW): Allen & Unwin.
- Drahos, P. (1994). “Decentring communications – the dark side of intellectual property” in Campbell, T., & Sadurski, W. (Eds.). *Freedom of communication*. Aldershot: Dartmouth. (p249-279.)
- Gramsci, A., Hoare, Q. (trans.) & Nowell-Smith, G. (1968/1971). *Selections from the Prison Notebooks of Antonio Gramsci*. London: Lawrence and Wishart.
- Hoy, D. (Ed.). (1986). *Foucault – a critical reader*. Oxford: Basil Blackwell.
- Kirkpatrick, D. (1997). Brilliant minds may think alike, but brilliant lines can cost you. *Wall Street Journal*, 27 January 1997.
- Lillington, K. (2001). *Why copyright laws hurt culture*. Retrieved from <http://www.wired.com/news/culture/0,1284,48625,00.html> on 30 May 2003.
- Lukes, S. (1974). *Power – a radical view*. London: MacMillan Press Ltd.
- Macey, D. (2000). *The Penguin dictionary of critical theory*. Harmondsworth: Penguin Books Ltd.
- McHoul, A., & Grace, W. (1998). *A Foucault Primer – discourse, power and the subject*. Dunedin: University of Otago Press.
- Martin, B. (1995). Retrieved from http://danny.oz.au/free-software/advocacy/against_IP.html on 30 May 2003.