

## *Alternatives to Copyright*

*« On m'a dit l'an dernier que j'imitais Byron... Vous ne savez donc pas qu'il imitait Pulci ?... Rien n'appartient à rien, tout appartient à tous. Il faut être ignorant comme un maître d'école Pour se flatter de dire une seule parole Que personne ici-bas n'ait pu dire avant vous. C'est imiter quelqu'un que de planter des choux. » -- Alfred de Musset*

Copyright is supposed to provide adequate incentives for the creation of intangible intellectual property. It offers a protection against free-riding for works that have a public good aspect to them (Landes 2003)... The advocated benefits of copyright, generously described by the WIPO, will not be presented as such here though. A closer look will rather be given at some of the most negative criticisms of copyright, at alternatives presented recently to replace the current copyright system, and at some of the consequences that such alternatives would have, if taken seriously into consideration.

### Criticism of copyright

Copyrights have not proved to be a satisfactory way to retribute creators: “the market alone, even with the protection and incentive of copyright law, does not sufficiently reward artists” (Towse 2001).

In fact, the main beneficiaries (and most convinced defenders) of copyrights are investors, especially cultural conglomerates. “Indeed, copyright favours the firm rather than the artists in the cultural industries” (Towse 2001).

According to Macmillan (2002), the “very idea of cultural development” (when considered as an aim in itself, beyond mere macroeconomic growth<sup>1</sup>) is threatened by “the build-up of significant bases of private power over cultural output”. She notices that copyright is actually more about “stimulating the commercial exploitation of creative/cultural output” than about “encouraging creativity and protecting the output of that creativity”. Copyright has become “a completely alienable property interest”, its long period of protection “increases the asset value of individual copyright interests” and fair-use (see below) is losing ground.

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<sup>1</sup> Macmillan quotes the UNESCO World Commission on Culture and Development Report, *Our creative diversity*, 1996: “development is seen as a process that enhances the effective freedom of the people involved to pursue whatever they have reason to value”.

Acquiring ownership of copyright has become “one force that has driven [large-scale] mergers and acquisitions” in the last decade, so that a “global domination of the market for cultural output” is shaping up.

Macmillan questions the welfare and equity justifications of such a protection of investors, quoting Waldron (1993): “Where else do we say that it is a matter of equity that investors should make a profit?”

Moreover, such a situation is extremely dangerous for the survival of democracy, Smiers (2003) argues: with oligopolistic private control over cultural expressions, a fundamental tool for the expression of social/cultural/political differences, and thus for a healthy political debate, is being hijacked by few private interests... This is all the more preoccupying when cultural conglomerates are associated to (or even identical to) media conglomerates controlling access to information (Murdock 1990). “The result is that not only are individuals unable to use, develop or reflect upon dominant cultural images; they are also unable to challenge them by subverting them.” (Macmillan 2002)

This danger is real, illustrated by Capling’s (1996, quoted by Macmillan) study about music industry in Australia, with 6 corporations controlling 70% of the market but releasing only 20% of the music (offering “about as much cultural diversity as a Macdonald’s menu”).

Globally, the main beneficiaries of the current copyright system are the US culture and media industries. Macmillan and Smiers both noticed that the TRIPS agreement was pushed primarily by US corporate interests. Towse (2001) recalls David’s (1993) argument that all countries until recent times had started up their industries by copying the ideas and technologies of other countries (the USA not being an exception). In Macroeconomics, this successful strategy was theorized by the Japanese economist Akamatsu (known as ‘flying geese development’<sup>2</sup>). Yet current copyright law puts a stop to this development strategy for the Third World. Towse insists after Bettig (1996) that “the wealthy individuals who dominate the communications and entertainment industries are now globally supported by copyright law and its international enforcement through TRIPS”, and after Reichman (1997), that copyright law makes exaggerate demands on developing countries and is effectively “an IP policy which introduces unfair trading advantage”.

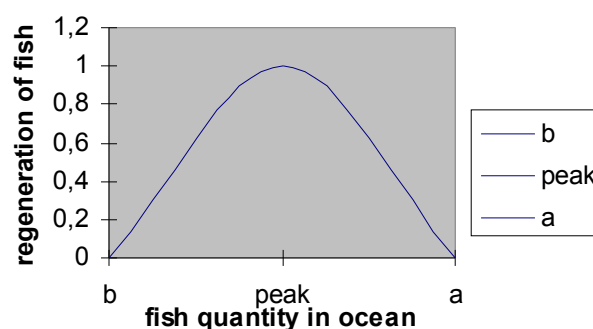
According to Landes (2003), “too much copyright protection can reduce the number of new works created” because “some creators will be deterred from building upon prior works”.

<sup>2</sup> K. Akamatsu, “A historical pattern of economic growth in developing countries”, *The Developing Economies*, March-September 1962

Towse (2001) uses a fish-pond metaphor in the same perspective<sup>3</sup>. Macmillan, quoting Waldron, links this phenomenon to the restrictions to cultural development and democracy (that were described above): “The private appropriation of the public realm of cultural artefacts restricts and controls the moves that can be made therein by the rest of us.” I will push the fish-pond metaphor a little forward (using precisely the insights of ecology about the contemporary depletion of oceans):

Like an ecosystem, artistic production needs to have a certain level of activity and diversity, in order to sustain itself. The following graph (read from right to left) is taken from the imaginary situation of an ocean with fishes in it. Between the maximum number of fishes in the ocean and the peak-point of the graph (corresponding to the maximum reproduction-rate of the fish), i.e. slope a, the ocean can regenerate itself after being used by fishermen. But if fishermen over-use the ocean, the number of fish will go below the peak-point, and the regeneration capacity of the ocean will be ever weaker (slope b)<sup>4</sup> so that even decreased fishing can lead to a quick destruction of the entire ecosystem. Market mechanisms (with their inability to foster collective preventive long-term-thinking action) will inevitably lead to the destruction of the ecosystem (this is what’s happening to world oceans by the way). Why? Because the externalities of over-using environmental resources get taken into account on the market only when the point of irreversible damage to the concerned ecosystem is crossed.

### The fisheries

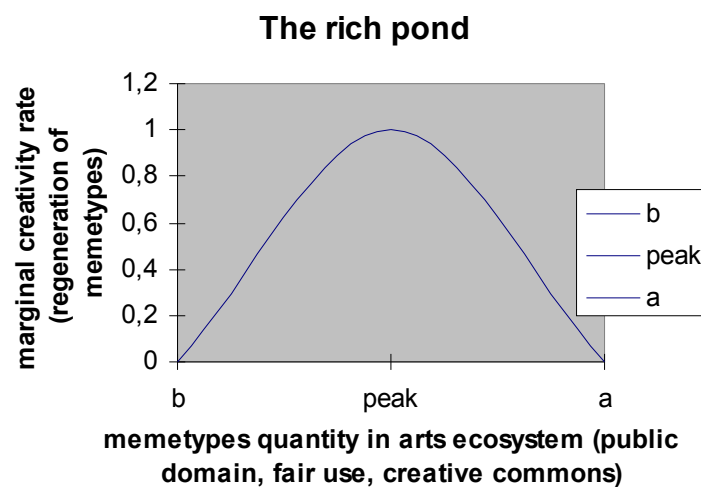


Does this have anything to do with the arts? Let’s imagine that in the arts ecosystem, a similar process could take place: Market-mechanisms, with existing copyright laws, will

<sup>3</sup> “Imagine authors fishing for ways of expressing their ideas for in a tank of water that is public; the more works they produce and copyright at any one time, fewer the fish in the tank and it gets harder it gets for authors to catch them. How many fish are there depends on how often supplies are renewed by fish being released into the tank, the public domain, by the expiry of earlier copyrights, on how many authors are fishing and how good they are at fishing. The longer copyright lasts, the less often stocks of fish are renewed.” (Towse 2001)

<sup>4</sup> This phenomenon, and the fundamental inability of the market to prevent its own irreversibly destructive mechanism, as described a few lines below, has been theoretically described in the now classic work of David Pearce, *Environmental Economics*, Longman, 1976.

foster a level of copyrighting that will be beyond the peak level, thus endangering cultural creativity. Even a point of economic equilibrium would go too far: Viewed statically, it would indeed equate costs and benefits of copyright for creativity, but viewed dynamically, it would be revealing externalities because it would already cross the threshold-level where the creative potential of the 'freely available cultural expressions'-pond would be declining. The worst thing is that, as the pond shrinks, on the long run, every new copyright has a worse impact on creativity because the creative potential (or creative capacity) of the system is already at a low level (close to b).



But why should we compare the reproduction of fish with the available public domain in a society's culture? Here again, we can come back to the ecosystem metaphor: Production, consumption and co-production<sup>5</sup> in the arts ecosystem are binded by relationships of cross-fertilization. An ecosystem can be sustained and develops itself through the crossings between the different genes available in a diversity of life forms. In a similar way, an arts ecosystem can be sustained and improve itself through the crossings between the different *memes*<sup>6</sup> available in a diversity of art activities. One particular similarity is that the loss of a certain genotype corresponding to a certain life species is an irrecoverable loss for the ecosystem... In the case of the arts and culture, the loss of a particular *memetype* (linked to an indigenous culture, a certain art-form, a certain clan, a certain audience, etc.) also has irreversible

<sup>5</sup> *Co-production*: The arts engage artists and their publics in shared production of meanings. The production of symbols is a collective, inter-subjective, socially constructive process. Thus the art-'producer' is not the sole producer of symbolic products. This co-production also spills over in the wider economy/society which it enriches (a case of positive externalities).

<sup>6</sup> From 'memetics', the cultural counterpart of genetics (and a popular concept in evolutionist theories on culture) ... As an ecosystem depends on genomes, an arts ecosystem depends on *memomes*, organized sets of memes sustaining themselves into units of artistic-cultural reality.

consequences on the general arts ecosystem of the culture sustaining this endangered *memetype*.

These dangers (see also Cowen 2003 below) are clearly pointed at by Smiers (2002, 2003) in the case of indigenous cultures: he worries about the pillage of traditional community forms of expression, especially in the Third World. Macmillan argues similarly that copyright law has great “difficulties with concepts of group ownership”.

To some analysts, in a similar perspective, it is then the whole copyright system that hinders creation, however tempered it may be. That is the view of Smiers, who questions the very legitimacy of concepts such as *appropriability* (a concept used as legitimizing criterion but itself left unquestioned by Farchy and Rochelandet 2002). Smiers argues that the concept of the originality of creation by a unique individual author is not only erroneous; it hampers the social process of creativity:

“It has always been customary in all cultures to use ideas and segments borrowed from the works of predecessors. Only the system of copyrights hampered this self-evident process of ongoing creation. It freezes the ongoing creation and pretends that there is a cultural end station” (Smiers 2002). Smiers quotes Soulillou (1999) to prove that claiming absolute originality is absurd: “Plagiarism assumes that the trace back to A exhausts itself in A”. After Coombe (1998), Smiers claims that creativity (and cultural expression) stems from a dialogic practice that is opposite to the monologue of the copyright. In this, he joins quantum physicist David Bohm’s definition of creativity (and more generally, of thought) as a collective rather than individual process<sup>7</sup>.

### Exceptions and voluntary contractual alternatives:

Some analysts will find a radical alternative to copyrights to be an unrealistic proposal. According to Macmillan, “there is little that can be done to break it down [and] any attempt to do so would cause massive economic and social destabilization.” She sees solutions rather in “removing some of the props on which the power rests so that it loses some of its ability to self-perpetuate and grow exponentially [and in] making private power more publicly accountable.”

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<sup>7</sup> D. Bohm, *The special theory of relativity*, W.A. Benjamin, 1965; D. Bohm, *Wholeness and the implicate order*, Ark paperbacks, 1983; D. Bohm and F.D. Peat, *Science, order and creativity*, Bantam, 1987.

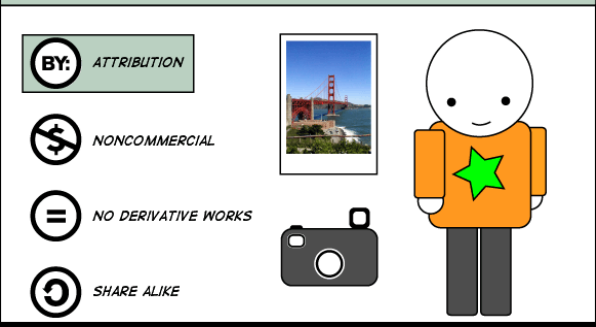
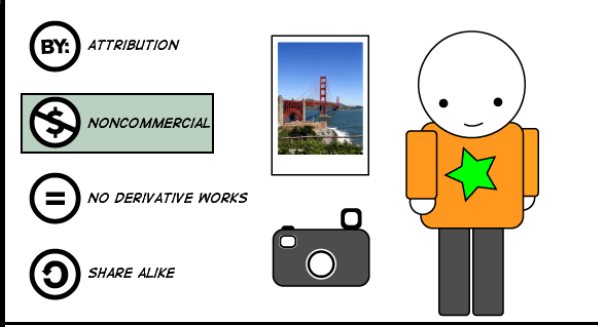
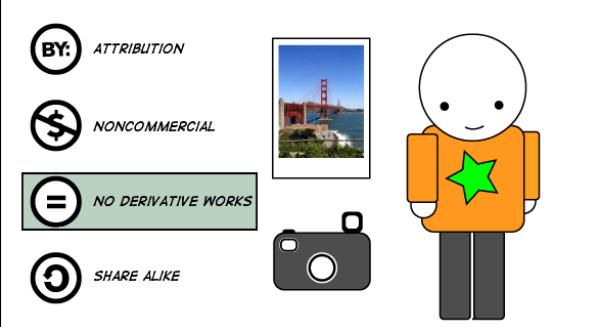
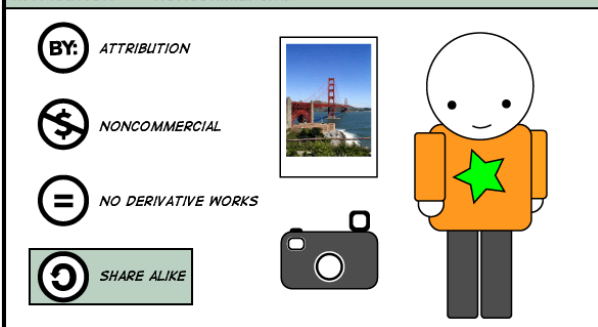
Limitations and exceptions to copyrights already exist, under the heading of ‘fair use’. By instance, Towse (2001) after Gordon (1982) argues that “the public interest may be served in some cases by allowing free use of new technology since the adoption of new technology promotes wealth maximization. Fragile markets in new technology must be encouraged”. Free use will “contribute to developing consumption-habits and to large-scale diffusion of the product” (Farchy and Rochelandet 2002, after Takeyama 1994). But these instances of fair use are by definition exceptional and/or temporary, and do not respond to the fundamental criticisms of copyright we reported earlier.

Illegal copying of music through the Internet “can also be interpreted as a natural reaction of consumers confronted with a highly concentrated market, in which copyright law essentially protects the monopoly of the major companies” (Farchy and Rochelandet 2002, commenting on Ramello and Silva 1997). But here again, this exception is by definition fragile as long as it remains illegal (nor is it a carefully thought-through solution). However, Farchy and Rochelandet’s so-called “less questionable” claim (after Johnson 1985) that copying would have negative long-run effects on diversity of production flies in the face of facts described by Capling about the strategies of the corporate music industry, which does not use its profits to foster diversity of production. On the contrary, private copying, through damaging primarily the profits from star-products<sup>8</sup>, could raise the opportunity-costs of massive marketing...

Some special contractual licenses can also offer exceptions under the general regime of copyrights. This strategy, halfway between acceptance of copyright and its abolition in favour of a radically different system, is followed in the case of “Creative Commons”. I will leave the floor for a moment to the comics made by Creative Commons: they speak by themselves...

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<sup>8</sup> “a majority of copied works are those produced by stars” (Farchy and Rochelandet 2002)

<p>THERE ARE FOUR CONDITIONS YOU CAN APPLY WITH A CREATIVE COMMONS LICENSE. THE FIRST IS AN <b>ATTRIBUTION REQUIREMENT</b>. LET'S SAY THAT I'M A BUDDING PHOTOGRAPHER AND WANT TO GET MY NAME AND WORK OUT ON THE WEB. THE <b>ATTRIBUTION</b> OPTION LETS PEOPLE FREELY REDISTRIBUTE MY PHOTOS AS LONG AS THEY GIVE ME CREDIT.</p>	<p>ANOTHER OPTION IS TO SPECIFY <b>NO COMMERCIAL USE</b>. THIS LETS ME SHARE MY PHOTOGRAPH WITH THE WORLD BUT PROHIBITS OTHERS FROM MAKING MONEY OFF IT. IF SOMEONE WANTS TO USE MY PHOTO FOR COMMERCIAL PURPOSES, THEY HAVE TO GET MY PERMISSION FIRST. THAT'S WHEN I MIGHT ASK THEM FOR SOME MONEY!</p>
 <p>The diagram shows a person with a camera and a photo of the Golden Gate Bridge. Four icons are displayed: 'BY: ATTRIBUTION' (a person icon), 'NONCOMMERCIAL' (a crossed-out dollar sign), 'NO DERIVATIVE WORKS' (an equals sign), and 'SHARE ALIKE' (a circular arrow icon).</p>	 <p>The diagram is identical to the one on the left, showing the same person, camera, photo, and four license icons.</p>
<p>THE THIRD OPTION IS TO DECLARE <b>NO DERIVATIVE WORKS</b>. THIS LETS OTHERS COPY AND REDISTRIBUTE MY PHOTO -- BUT ONLY IF THEY DO SO WITHOUT ALTERING OR TRANSFORMING IT. I MIGHT CHOOSE THIS OPTION IF I WANT MY PHOTOS DISTRIBUTED ONLY IN THEIR WHOLE, ORIGINAL STATE.</p>	<p>THE LAST OPTION IS SOMETHING WE CALL <b>SHARE ALIKE</b>. <b>SHARE ALIKE</b> REQUIRES PEOPLE WHO TRANSFORM OR BUILD ON MY ORIGINAL PHOTOGRAPH TO MAKE THE RESULTING WORK AVAILABLE ON THE SAME TERMS I GAVE THEM. LET'S SAY I PICK A LICENSE THAT INCLUDES THE <b>SHARE ALIKE</b> OPTION AS WELL AS THE <b>ATTRIBUTION</b> AND <b>NONCOMMERCIAL</b> CONDITIONS.</p>
 <p>The diagram is identical to the one in the top-left panel, showing the same person, camera, photo, and four license icons.</p>	 <p>The diagram is identical to the one in the top-left panel, showing the same person, camera, photo, and four license icons.</p>

Other, more radical (and less flexible) forms of licensing exist: the GNU-Public-license also known as *copyleft*, and its adaptations to art-products (open audio license, free art license). They systematically allow copying and (limited) transformation of works by their users, with attribution requirement and without the 'no commercial use' requirement.

However, the unequal contracting power in the relationship between cultural conglomerates and artists, casts doubts on the large-scale relevance of voluntary solutions such as Creative Commons. In the current system, they are likely to remain curiosities and exceptions.

### A large-scale systemic alternative:

The idea to develop alternatives to copyright is not new: Towse (2001) mentions that some economists<sup>9</sup>, along the 20<sup>th</sup> century, "proposed that private or public patronage in the form of grants and prizes be instituted to replace copyright. [...] All these writers considered that a system of patronage and prizes could provide the same incentive as copyright".

<sup>9</sup> The authors mentioned are Plant (1934), Hurt and Schuchman (1966) and Breyer (1970).

Moreover, Breyer pointed at the lower cost of access to works through this alternative solution. On that point, Landes and Posner (1989, as reported in Towse 2001) went one step further in the analysis, by pointing at the increasing<sup>10</sup> cost of productive access and thus of creating new works (for artists whose work would have benefited from access to others' work).

Smiers proposes the abolition of copyrights and its replacement by a system of taxation<sup>11</sup> of the use of artistic material. The beneficiaries of the tax would be divided in three categories: artistic activities, individual artists, and Third World arts.

The revenue of artists (and their producers) being disconnected from the number of copies of industrial products sold, this system would lead to a dramatic end of the star-system, according to Smiers (wishing that the majority of artists be “undisturbed by the market domination of stars”): “It makes no sense to invest heavily in such eye- and ear-catching phenomena any more if companies cannot exclusively exploit them” (Smiers 2002).

The disappearance of the star-system may also have beneficial effects for social welfare, through the reduction of ‘contests over the definition of cultural space’ (Eckersley 2003 after Nadel 2003)<sup>12</sup>: “Optimal cultural production can occur only when the rewards for information goods are not just an increasing function of demand or value for the good, but also a decreasing function of the resources dissipated in embedding them in networks of cultural externalities. This is not the case in an ordinary marketplace.”

## Copyright has some advantages... What would be the consequences of its abolition?

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<sup>10</sup> Increasing... with copyrights

<sup>11</sup> Smiers (2003) evokes “a tax on a certain percentage of the turnover of those enterprises that use or sell artistic material in one way or another [...] the tax should be related more or less to the intensity of the use of the artistic material by a specific enterprise, and the economic importance it has for such an enterprise.”

<sup>12</sup> “It seems that many cultural goods create a subtle system of network externalities. Ordinary human interactions are regularly filled with references to popular (or niche) culture, and our perspectives on the world are unavoidably coloured by the art and entertainment we consume. Naturally, building and exploiting networks around their products is an important strategy for copyright owners. As Nadel points out, the existence of cultural externalities results in “marketing contests” over the definition of cultural space. There are innumerable tunes which are capable of capturing the human psyche, but only a few of them will top the charts. [...] there will be an excess of investment in marketing a few costly cultural products, while society would be better off with more diverse investment in cultural creation — combined with an open market for works, the best of which will evolve to define “cultural space”.”



A short discussion of the consequences of the abolition of copyrights will follow. It is tentative and incomplete. For a study of the microeconomic consequences of the replacement of copyrights with public grants, see Peter Eckersley (2003)<sup>13</sup>. The detailed analyses in his article go beyond the limited scope of this essay. We can though reveal his conclusion: “well-designed systems of public funding may well produce better social welfare outcomes than DRM-based copyright. [...] The best policy response is not the enactment of new legislation to mandate the use of Digital Rights/Restrictions Management technologies. Instead, legislatures would be well advised to begin considering whether and how they could implement alternatives.”

Copyright is part of market mechanisms, thus driving cultural industries to “please the public taste for novelty” (Towse 2001). This reliance upon market mechanisms may be beneficial to creativity and cultural innovation, especially through niche markets, as Cowen (1998) argued. Yet the same Cowen later argued in *Creative destruction* (2003) that “the diversity of modern commercial society nonetheless presents a paradox: a growing menu of choice in a particular society may limit the menu of choice for the world as a whole. As commercialism spreads, fewer societies will serve as a world apart from Western experience.” Cowen thus recognizes that a globalized market mechanism may be detrimental to cultural diversity at the world level. But at the level of the Western countries, his former (1998) claims still stand up. Indeed, they may point at a possible weak point in alternatives to copyright... Can they reward creativity adequately?

Moreover, according to Towse, artists are ill-informed gamblers: “potential high prizes are a lure to would-be artists who risk considerable forgone incomes to try their luck” (Towse 2001). This raises the question of the motivation of artists: Is it purely oriented towards monetary rewards (and is the artist more or less risk-averse, therefore more or less inclined to prefer regular guaranteed revenues vs. irregular but maybe exceptional revenues)? Does it also involve non-monetary rewards (‘intrinsic motivation, in Frey’s terms)?

Determining the extent of risk-aversion, and motivation towards monetary vs. non-monetary rewards, of the creator, would be essential to the understanding of the impact of alternatives to copyright in terms of incentives. It can already be said that non-monetary

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<sup>13</sup> P. Eckersley, *The economic evaluation of alternatives to digital copyright*, Serciac, 2003.

rewards play an essential role in the motivation of artists, given their specific behavior forsaking higher-income for more time spent on art and self-subsidizing their artistic activities (Abbing 2002).

Copyright is also beneficial to the existence of gatekeepers, ensuring the work of selection among the large supply of artistic productions, ‘making it easier’ for the final consumer. The expectation of high returns from copyright “provides the incentive for a host of ‘middlemen’, people and organization whose function is to search and promote talented newcomers” (Towse 2001).

If copyrights were to disappear, which mechanism would provide such gatekeepers, at least for the benefit of those people who will still express the desire to consume through ‘gate-kept’ channels? Would forms of subscriptions (memberships to readers’ clubs and such) provide a lead? Could they be linked to contractual conditions under which a work would only be released when a sufficient number of customers would have subscribed to it (and covered the fixed costs of authorship)?

Meanwhile, one must also beware of a generalization of public gatekeeping, through a biased understanding of Smiers’ proposal, into the replacement of copyrights by grant-giving: “There is [...] a moral hazard element to this policy [...] there is a danger of mutual back-scratching by a self-serving professional elite [blocking] outside criticism”.

Smiers (2003) describes provisions in his proposal (arts councils with turning membership that would be open to many sections of society), to prevent that problem.

However, the risk still remains that if the choice is made to subsidize producers, then this “is likely to provide a disincentive for them to innovate”. However, as this paper argues, motivations for innovations can be more complex, in some situations, than the simple profit-seeking behavior of the typical private firm on a market<sup>14</sup>. But, if this issue was to remain relevant, a partial complement to Smiers’ subsidies to artists could be a system of vouchers for consumers, a-la-Peacock.

In his time, Plant (1934, as reported in Towse 2001) argued that the publisher of a new artistic or intellectual expression had sufficient lead time to establish his product on the market. Though the argument has lost direct validity (lead time has been reduced to a few minutes at worst in the age of Internet), it may point at an interesting feature for a future

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<sup>14</sup> See below, and the attached appendix on economics of conventions

alternative to copyright: i.e. a system offering an artificial lead-time to the original producers (this lead-time could be adapted, for each industry, to match the time necessary to cover fixed costs).

Copyright prevents direct State involvement. Through copyright law, States can act “without committing any funds, since a change in the law mostly redistributes rewards between participants” (Towse 2001). This would not exactly be the case with Smiers’ subsidization system however, unless the system is managed by an inter-professional semi-public agency (such as is currently the case for Social Security in France). An interesting perspective may even be found in the recombination of the ‘Intermittents’ regime and an inspiration from Smiers’ proposal.

In parallel, Smiers’ solution, as it creates a new form of taxation that takes the space left empty by the abolished copyright-levy, is not subjected to Johnson’s (1985, quoted by Farchy and Rochelandet) criticism on public subsidy to private producers of cultural content (i.e. (1) that such use of general public funds would have an opportunity-cost, when compared to other possible uses for such funds and (2) that it would be inequitable, since small consumers would subsidize the large-scale consumers of works).

With copyrights, “great rewards fall to the chosen few” (Towse 2001). Are the “high income superstars” “outstandingly talented personalities” as Towse argues, or the result of mass-marketing as Smiers claims? To put the question boldly: Do stars deserve to be stars? Is superstardom a beneficial phenomenon that supports high-quality creativity?

The issue rests on the observer’s position towards ‘consumer sovereignty’: A standard economist will look for even the slightest hint of differences in talent justifying the phenomena of superstars, whereas a non-economist will be less tied to the depiction of a sovereign and autonomous choice of rational individual consumers and therefore will perceive the violently persuasive strength of marketing by cultural conglomerates. The heterodox economist may listen more carefully to the arguments of the later, and end up considering superstardom and the associated idea of talent to be part of a convention, a set of rationalizing beliefs, that could evolve<sup>15</sup>.

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<sup>15</sup> I ask the reader to read the appendix, a working document I am working on as part of my MA-thesis; document which give a more detailed account of the ‘economics of conventions’.

If a convention changes, rationalization by individuals changes accordingly, and then the motivation of artists (around diverse forms of rewards as seen above) will enter a new configuration. For example, if the ‘creative commons’ were to be more highly valued and respected in society, the intrinsic rewards would raise for the creator, accompanied by a higher ‘crowding out’ with respect to monetary payments in forms of copyright (the ‘status-conferring’ argument about copyright being weak, given the low threshold on copyright’s definition of an original work, and given that the mere moral attribution of authorship could be attributed with other means)...

Such an evolution is precisely what Smiers (2003) evokes, when he argues for a “paradigmatic shift”. Such a shift would mean moving away from the individualistic concept of the author. It might however take a while to change such an ingrained cornerstone of capitalism...

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