

Creative Development: Helping Poor Countries by Building Creative Industries

By Mark Schultz & Alec van Gelder¹

Introduction

Africa's popular musicians are crying out for help, often quite literally. In recent years, they have taken to the streets seeking redress for the failures of their countries' legal systems to support creative activity effectively. The news brings reports of African musicians resorting to noisy street protests and personal confrontations with pirates in Ghana, Ethiopia, Kenya, Uganda, Botswana, and Swaziland.² They contend that their livelihoods are being destroyed by rampant piracy, corruption and the non-collection or diversion of royalties.

Despite the many other problems of poor countries, the struggles of creators and creative businesses are worthy of attention. This paper makes the case that creative industries are a significant, but thus far largely unfulfilled, opportunity for less-developed countries. Where abundant creative talent exists, but local circumstances are otherwise trying, creative industries may be one of the best bets for economic development. Creative sectors, particularly music, tend to rely less on sophisticated infrastructure or capital-intensive investment. Potential is particularly abundant in Africa, where musical creativity is rich, diverse, well-loved, and constantly evolving while drawing on strong traditions. The development of a popular music industry thus represents low-hanging fruit for most African economies

For creative industries to prosper the legal and business environment must be supportive—but in this context, a supportive environment does not require massive, decades-long investment. We offer no grand, one-size-fits-all solutions. Not only have such solutions proven largely ineffectual; they are unnecessary. It would be more effective to concentrate on making the legal system, particularly copyright law, function more effectively and on removing obstacles from the paths of creators and entrepreneurs. Success will come from unleashing the genius and initiative of individuals.

¹ Mark Schultz is a visiting professor at DePaul University College of Law in Chicago, Illinois, U.S.A. and an Assistant Professor at the Southern Illinois University School of Law in Carbondale, Illinois, U.S.A. Alec van Gelder is Network Director at International Policy Network, London. The authors wish to thank Steve Margolis, Paul McGreal, Susan Liemer, and the participants in Mark Schultz's seminar at DePaul for their helpful comments. Special thanks to our colleagues Mike Andrews and Franklin Cudjoe who provided insights into local conditions in Africa. All opinions expressed herein are those of the authors. Other versions of parts of this paper have appeared in a working paper published by the International Policy Network.

² Ghana Police and Musicians Descend On Music Pirates, <http://ghanabase.com/archives/news/2007/995.asp> (April 19, 2007); *Ethiopia: Artists Voice Anger Over 'Impracticality' of Copy Right Law*, <http://allafrica.com/stories/200704241017.html> (April 24, 2007); *Musicians Demonstrate Against Piracy*, <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=114285> (November 22, 2006) (Ghana); *New Vision*, <http://allafrica.com/stories/200609270363.html> (September 27, 2006) (Uganda); *Local Artists Nab Pirates*, <http://allafrica.com/stories/200606080888.html> (June 8, 2006) (Botswana); *Shongwe Attacks Music Pirates*, <http://www.observer.org.sz/main.php?id=22247&Section=main&articledate=Thursday,%20January%201,%201970> (May 30, 2006) (Swaziland).

There is a compelling historical example of how, under the right conditions, a few entrepreneurs can jump-start a music industry to the great benefit of an under-developed economy: The U.S. city of Nashville, often referred to as Music City, U.S.A.³ The usefulness of an example drawn from one of the world's wealthiest countries may not be immediately obvious, but Nashville's history provides surprisingly relevant lessons as to what works. Nashville was once a struggling city in one of the U.S.'s poorest regions. Like much of sub-Saharan Africa today, early 20th century policymakers pinned Nashville's economic hopes on industrial development founded on access to raw materials and large, government-funded public works projects. These hopes were never fully realised, but Nashville found success anyway—from its popular creative industries.

Today, Nashville enjoys enviable economic success as “Music City, U.S.A.” It is home to a multi-billion dollar country music industry and a thriving, diversified economy. Popular music creates billions of dollars of wealth for Nashville's economy, employing tens of thousands of people in the music business and even more in related businesses.

Nashville's ascent serves as an encouraging example of how creative industries can make much from little. Country music was little-regarded as art or commerce. Its success required no extensive investment in formal education or sophisticated infrastructure. Nor did it require the foresight of government planners or successful execution of large, complicated, development projects. Rather, its success largely grew from risks taken by just a few entrepreneurs who saw potential in an otherwise un-exploited resource, the talents and abilities of local creators.

While Nashville's example cannot simply be transplanted to African soil, its example offers many useful insights. Neither Nashville nor the authors of this paper can claim to have all the answers. Nevertheless, a detailed examination of obstacles faced by the African music industry yields several specific suggestions as to how Africa might emulate the bottom-up growth model that made Nashville what it is today.

A few essential reforms could provide Africa's creators with a more stable and reliable environment to harness creativity. One of the first steps is enforcing existing intellectual property right commitments. However, the mere presence of laws is not enough. Creative sectors require a stable enabling environment, free from the most significant obstacles and policies that stifle and undermine individual initiative. We suggest a number of specific proposals to foster this enabling environment, without necessarily relying on financial assistance. These include a political commitment to prioritise creative clusters, a focus on combating piracy that provides for effective remedies, training judges, and a hands-off approach to private organisations that are essential in supporting sophisticated creative industries, such as collecting agencies and business associations.

³ This paper is not the first to recognize the relevance of Nashville as an example. The World Bank's Africa Music project embraced Nashville as an example of its hopes for Africa. Penna, F., Thorman, M., & Finger, J., (2004), “The Africa Music Project”, in Thorman, M., & Finger, J. (eds), *Poor People's Knowledge*, World Bank and Oxford University Press, p.97. We take inspiration from the Africa Music Project's enthusiasm for “African Nashvilles” and share its promoters' belief in grass-roots efforts. We depart from and elaborate on its analysis, however, in our views of the primary benefits from local music industries and the way to achieve them. While the Africa Music Project sought an export market via the Internet, we see great benefits from local and regional markets. We also map out specific legal and institutional reforms focused on the industry and private capacity building, which we believe take precedence over particular marketing schemes.

We advocate specific, pragmatic reforms that could remove obstacles to using copyright to benefit local creative industries. Most discussions about intellectual property and development tend to centre on high-level, somewhat abstract debates about technology transfer, relations between rich and poor countries, the fairness of the international IP system, and concerns about distributive justice. The policy initiatives that get the most attention occur at the level of international institutions like the World Intellectual Property Organisation and the World Health Organisation.⁴ Whatever the merits of these debates, they do not focus on making the most of the available local resources and the laws that countries already have. We would do well to focus also on specific reforms that could use copyright and creative industries to help poor people by removing obstacles at the local level.

A virtue of this bottom-up approach is that resource-constrained policymakers need not embrace all-encompassing, expensive solutions. Nor is success contingent on the presence of an advanced technological, physical, educational, or financial infrastructure. Indeed, we contend that government can best support creative sectors primarily by providing a stable legal foundation and business environment. This role in fostering an enabling environment is crucial, but creators and creative industries can and must do most of the work. Ultimately, success will come from unleashing the genius and initiative of individuals. Based on the talent that already flourishes in difficult conditions, including Nashville in the 1920s, there is every reason to believe that it can help transform local economies if properly encouraged.

The focus on grass-roots solutions is in keeping with much recent thinking on development, which calls for more context-specific, results-oriented, entrepreneurial projects that empower locals. Critics of mainstream development policy such as William Easterly have called for fewer grand plans and more pragmatic approaches that employ local knowledge and adapt to local conditions.⁵ Fostering a local music industry in the ways we advocate here is such a project, as it encourages creators and entrepreneurs to build local businesses based on local strengths and tastes. Crucially, these important reforms will not only help creators by providing them with the right conditions to prosper. They will also generate important ripple effects which will further contribute to entrepreneurial activities in less-developed countries. A successful creative industry alone is neither sufficient nor necessary to a thriving economy, but it is exactly the type of private, locally-based entrepreneurial effort that developing economies need to foster. The development of creative sectors is not a panacea, but the stable institutional environment we call for will empower all entrepreneurs and provide the foundation for growth elsewhere.

Section I places this paper in the context of recent literature and policy debates regarding intellectual property and development, showing how this paper's approach differs from much of what has gone before. Section II describes how creative industries can aid developing countries, particularly focusing on the historical example of Nashville. Even if

⁴ We refer here to various initiatives that seek to curtail intellectual property rights in the name of development, including the movement seeking "Access to Knowledge" by creating exceptions and limitations to international intellectual property obligations, discussions regarding implementing a "Development Agenda" at the World Intellectual Property Organization, initiatives to make greater use of compulsory licensing to override patents on pharmaceuticals, and the effort at the World Health Organization to create an alternative to the patent system for financing drug research. For background on the controversy, see Schultz, M., & Walker, D., (2005), "How Intellectual Property Became Controversial: NGOs and the New International IP Agenda", *Engage*, 6(1), pp.82-98.

⁵ Easterly, W., (2006), *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good*, Penguin, p.4.

one agrees that creative industries are worthy of support, one might ask how best to support them. Section III thus considers various ways to support creative industries, and concludes that copyright-based, private ordering is the best way. Section IV describes the promise and punishing reality of the popular music industry in Africa, where talent and creativity abound but largely go unrewarded. This section examines specific obstacles to success of the music industry in Africa. Section V then develops a number of policy changes and specific reforms that could foster the development of a music industry.

I. The International Controversy About Intellectual Property and Development

This paper advocates a grass-roots, pragmatic approach to intellectual property and development that diverges from a great deal of the current academic and policy debate about IP and development. We are interested in how copyright and related institutions might support bottom-up growth, by encouraging local creators and creative industries to thrive. In this section, we place this paper in the context of the debate, briefly surveying the relevant literature and providing background to the current controversy.

While the approach advocated here is hardly without precedent,⁶ most discussions of IP and development are far more concerned with patents and issues of international relations than copyrights and their potential local benefits.⁷ Technology transfer from rich to poor countries has been viewed as a key to development, and, consequently, concern has centred on the question of whether patents impede or assist such transfer.⁸ (Although discussions commonly refer to intellectual property generally, they really are concerned with patents).

With the passage of the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS),⁹ the longstanding debate regarding the relationship between IPRs and development become even more controversial and even more dominated by relations between wealthy and poor nations. This focus on the IPRs of wealthy countries is unfortunate, as it has obscured the potential of IPRs to help less-developed countries by empowering local creators and innovators and building local industries. The proverbial “eight hundred pound gorilla” of TRIPS often over-simplifies and polarises the discussion of IPRs and development.

Unfortunately, deploying (or not deploying) IP is never a simple solution. Neither the presence nor absence of IPRs is a magic tonic likely to fix everything in less-developed

⁶ See the sources collected *infra* in footnote 12.

⁷ As observed by some of the most prominent researchers who advocate using creative industries to aid developing countries, both developing countries and economic researchers undervalue the contribution of copyright. Birgitte Andersen, Zeljka Kozul-Wright, and Richard Kozul-Wright, *Copyrights, Competition, and Development: The Case of the Music Industry*, UNCTAD Discussion Paper No. 145, 2 (2000), available at http://www.unctad.org/en/docs/dp_145.en.pdf Policymakers in developing countries are reluctant to consider the creative industries as important as other industries, and for researchers, “the focus has remained on the role of intellectual property in industrial research and development, where patents play a key role.” *Ibid.* See also *infra*, notes 15 and 16.

⁸ Because technology transfer is viewed as the key issue, even when copyrights are considered, the focus is sometimes limited to software. See Heald, P., (2003), “Mowing the Playing Field: Addressing Information Distortion and Asymmetry in the TRIPs Game, 88 *Minn L. Rev.* 249, 289 (“The economic concerns of a developing country are probably more directly implicated by restrictions on the distribution of software than by restrictions on the distribution of the newest Metallica album.”),

⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments - Results of the Uruguay Round vol. 31, 33 I.L.M. 81 (1994).

countries. In the discussion that follows, we consider why something more is needed than the mere passage of a copyright law to encourage the development of creative industries.

A. *The Patent-Focused International IP Debate*

Over the last several decades, relatively little of the voluminous discussion of IPRs and developing countries has considered copyright-driven creative industries in poor countries. There are a few reasons for this paucity of analysis. First, attention has centred on IPRs within the context of the international, multilateral system,¹⁰ thus paying less attention to the question of how local industries in poor countries might benefit from greater IPRs.¹¹ In particular, the potential benefits of copyright and the creative industries—as opposed to patents and technology transfer—have been mostly overlooked.¹² Instead, academics and policy makers have most often treated the issue of IPRs and development as a matter of relations between wealthier and poorer countries, concerning how they might gain access to patented products and technological know-how.

¹⁰ From Edith Penrose's oft-cited work in the 1950s to more recent discussions, IP's relevance to poor countries has largely been analysed in the context of the international IP system. See Penrose, E., (1951), *The Economics of the International Patent System*; Peter Drahos with John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (2002); Symposium Issue, *The International Intellectual Property Regime Complex*, 2007 Mich. St. L. Rev. 1 (collecting papers considering IP and development as part of the "international intellectual property regime complex"); Peter K. Yu, *International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia*.

¹¹ Domestic benefits are not universally dismissed or overlooked, but they are often treated as a secondary consideration.

¹² The benefits of copyright and creative industries to developing countries have been *mostly* overlooked, particularly in the debate about the value of IP for developing countries and in U.S. legal academic literature. There are notable exceptions, particularly where the discussion turns from the general topic of IPRs and development to the specific topic of copyright and development. See, e.g., Diana Barrowclough and Zeljka Kozul-Wright, "Creative Industries and Developing Countries: Voice, Choice, and Economic Growth" (2007); Maskus, K.E., (2004), "Strengthening Intellectual Property Rights in Lebanon", in Fink, C., & Maskus, K.E., *Intellectual Property and Development*, pp.286, 289 (empirical analysis of benefits of IPRs for Lebanon, including copyright); Birgitte Andersen, Zeljka Kozul-Wright, and Richard Kozul-Wright, *Copyrights, Competition, and Development: The Case of the Music Industry*, UNCTAD Discussion Paper No. 145 (2000), available at http://www.unctad.org/en/docs/dp_145.en.pdf (surveying issues related to developing stronger creative sectors in the developing world); Doris Estelle Long, *The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective*, 23 N.C. J. INT'L L. & COM. REG. 229, 280 (1998) (briefly acknowledging potential to increase domestic production, although mainly focused on cultural protection); Hans Peter Kunz-Hallstein, *Recent Trends in Copyright Legislation in Developing Countries*, 13 Int'l Rev. Ind. Prop'y & Copyr. L. 698 (1982) (heralding increased copyright protection by some developing countries). The World Bank has sponsored several projects focused on creative industries, most notably the Africa Music Project, which we examine later in this paper. See Penna, et al., *supra* note 3. WIPO has recently begun to advocate promotion of creative industries as a development tool. See the section of WIPO's website, which collects resources regarding the creative industries and creative clusters. http://www.wipo.int/ip-development/en/creative_industry/ UNCTAD has also recognized this potential for the past several years. UNCTAD, (2008), "Background Paper for Secretary-General's High-Level Panel on the Creative Economy and Industries for Development", TD(XII)/BP/4, available at http://www.unctad.org/en/docs/tdxiibpd4_en.pdf. Copyright's relationship to development has not been entirely overlooked in more sceptical discussions by U.S. legal academics. See Chon, Margaret, (2007) "Intellectual Property from Below: Copyright and Capability for Education", UC Davis Law Review, Vol. 40, p. 803 (arguing that copyright may impede human development by reducing access to educational materials); Neil Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 Vand. L. Rev. 217, 224 (1998) (arguing that TRIPs-imposed copyright might interfere with free speech and democratic values); Marci A. Hamilton, *The TRIPs Agreement: Imperialistic, Outdated, and Overprotective*, 29 Vand. J. Transnat'l L. 613, 620-33 (1996) (arguing that TRIPs copyright provisions may impede democratic values in the era of the Internet).

The emphasis on technology, patents and North-South relations is perhaps understandable, as development is generally viewed as a function of productivity growth, further industrialisation, and greater technological know-how. Considerable theoretical debate and empirical analysis has thus been devoted to the relationships among intellectual property laws and technology transfer, foreign direct investment (“FDI”), foreign trade, and domestic R&D. One view contends that technology transfer is better facilitated if businesses in developing countries are free to copy, unconstrained by IP protection.¹³ An opposing view is that technology transfer requires associated training and know-how, which is unlikely to happen unless businesses in wealthy countries feel comfortable enough with IP laws to establish operations, license technology and sell products.¹⁴

This debate has little to do with copyright and creative industries, which do not implicate the same concerns about technological growth. All too often, however, discussions of IPRs and development lump together all IPRs when they “actually deal with patent rights and inventive activity.”¹⁵ As Walter Park observes “IPRs should not be treated as a homogenous (uni-dimensional) concept.”¹⁶ Park’s empirical study found, perhaps unsurprisingly, that copyright protection did not drive productivity growth, but he suggested that it may be relevant to the output of creative industries.¹⁷ This view is confirmed by the empirical research thus far,¹⁸ case studies,¹⁹ and the anti-piracy campaigns of the relatively few successful creative industries in the developing world.²⁰

¹³ See, e.g., Carlos M. Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options* (2000) (contending that underdevelopment impairs capacity to enjoy benefits of tech transfer); Ruth L. Gana, *Prospects for Developing Countries Under the TRIPS Agreement*, 29 VAND. J. TRANSNAT’L. L. 735, 738 (1996) (contending that without the many conditions present in developed countries, it is unlikely the IP laws will transform developing country economies); Marshall Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 Iowa L. Rev. 273, 282 (1991) (describing such views).

¹⁴ For the expression of this view that heavily influenced support for TRIPs, see Edwin Mansfield’s survey of how IP protection influenced foreign direct investment by U.S. business executives. Mansfield, Edwin (1994), “Intellectual Property Protection, Foreign Direct Investment, and Technology Transfer, International Finance Corporation Discussion Paper No. 19, World Bank, Washington, D.C. See also Branstetter, Lee G., Fisman, Raymond, and Foley, C. Fritz (2006), Do Stronger Intellectual Property Rights Increase International Technology Transfer? Empirical Evidence from U.S. Firm-Level Panel Data, *Quarterly Journal of Economics*, Vol. 121, No. 1, pp. 321-349; Nunnenkamp, Peter and Julius Spatz (2004), *Intellectual Property Rights and Foreign Direct Investment: A Disaggregated Analysis*, *Weltwirtschaftliches Archiv* Vol. 140, No. 3, pp. 393-414; Contractor, Farok (1981), *International Technology Licensing*, D.C. Heath and Company, Massachusetts.

¹⁵ Park, Walter G. (2005), “Do Intellectual Property Rights Stimulate R&D and Productivity Growth? Evidence from Cross-national and Manufacturing Industries Data”, in Jonathan Putnam (ed.), *Intellectual Property and Innovation in the Knowledge-Based Economy*, Industry Canada, Ottawa, pp. 9:1 - 9:51 at 9-3. See also Birgitte Andersen, Zeljka Kozul-Wright, and Richard Kozul-Wright, *Copyrights, Competition, and Development: The Case of the Music Industry*, UNCTAD Discussion Paper No. 145, 2 (2000), available at http://www.unctad.org/en/docs/dp_145.en.pdf.

¹⁶ Park, supra note 15 at 9-40. Michael Ryan also observes that most discussions of IP and development lump all types of IP together, although usually only factors most relevant to patents are being discussed. Ryan, M.P., (2002), “Knowledge-Economy Elites, the International Law of Intellectual Property and Trade, and Economic Development”, *Cardozo Journal of International and Comparative Law*, volume 10, pp. 271 (2002). He criticizes academics and policymakers for failing to distinguish among types of intellectual property—patents, copyrights, trade secrets, and trademarks—and the needs of different industries in intellectual property discussions. *Ibid* at 302. He concludes that “Conclusions are thereby drawn and policy prescriptions are offered without regard for policy area or industry sector.” *Ibid*. He advocates a far more nuanced analysis, where the business risks inherent in the production of things like music are recognized. *Ibid* at 289 -90

¹⁷ Park, supra note 15 at 9-40 – 9-41.

¹⁸ Keith Maskus found that increased copyright protection was beneficial to local creative industries in Lebanon. Maskus, K.E., (2004), “Strengthening Intellectual Property Rights in Lebanon”, in Fink, C., & Maskus, K.E., *Intellectual Property and Development*, pp.286, 289.

A great deal of energy *has* been devoted to seeking protection for the traditional knowledge of developing countries—collective works of expression such as stories, songs, folklore, and proverbs.²¹ While discussion of such proposals on their own terms is outside the scope of this paper, we note that some proponents justify them with the assertion that poor countries do not produce the sorts of works that benefit from copyright protection.²² In any event, the advocacy of traditional knowledge protection on such grounds further undervalues the potential of individual creators and the creative industries in the developing world.

B. TRIPs and the IP and Development Debate

TRIPs has further diverted attention from the potential of IPRs to help foster domestic creative industries. TRIPs linked IP to trade, with poor countries supposed to receive greater access to developed country markets in exchange for protecting the IP of developed country businesses. This linkage has only reinforced the long-standing view of IP as a North-South issue. As a result, policymakers and scholars are preoccupied by concerns far removed from using IPRs to help local people and industries in poor countries. Instead, much of the debate focuses on (a) strategic bargaining regarding the trade agenda, (b) concerns about process and policy flexibility, and (c) distributive justice concerns.

After TRIPs, IP is unfortunately just one of several items on the trade agenda, rather than a domestic development strategy. As such, it is just one more “bargaining chip” in trade negotiations for policymakers.²³ Moreover, as Robert Sherwood observes, those in charge of trade negotiations are rarely the policymakers with the greatest understanding of the value of intellectual property.²⁴ He reports that officials from developing countries have insisted that they must stall improvements to their intellectual property laws to preserve leverage in trade

¹⁹ See, e.g., Penna, et al., *supra* note 3 (discussing potential of African music industry); Sherwood, R.M., (1990), *Intellectual Property and Economic Development* (providing case studies of benefits or potential benefits of IP protection in various countries).

²⁰ Primo Braga, C. (1990) “SECTOR ISSUES I: Pharmaceuticals and Chemicals; Information; The Audio, Video, and Publishing Industries” in Siebeck, E.W. (ed.) (1990), *Strengthening Protection of Intellectual Property in Developing Countries. A Survey of the Literature*. World Bank Discussion Papers, No.112. Washington D.C.: The World Bank, pp.47, 55 (discussion actions of Indian film industry and Brazilian TV network).

²¹ Traditional Knowledge also includes biological resources that might be incorporated into patentable inventions.

²² This view seems to us condescending, although many would criticize *our* view as a culturally-determined, individualistic, Western view of creativity. William P. Alford, (1996), *To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization*; Marci A. Hamilton, *The TRIPs Agreement: Imperialistic, Outdated, and Overprotective*, 29 *Vand. J. Transnat'l L.* 613, 620-33 (1996).

²³ Sherwood, R.M., “Intellectual Property: A Chip Withheld in Error”, in Lippert, O. (ed), (1999), *Competitive Strategies for the Protection of Intellectual Property*, The Fraser Institute, pp.73-84. “When viewed only as a trade issue, policy analysts have a hard time assessing the value of intellectual property for increased economic growth in developing countries. . . Academics and policy analysts tend to condemn higher levels of IP protection as the unfair requirement of trade pressure, without going further to consider the possible benefits to local industry and commerce.” Sherwood, R.S., (2002), “Some Things Cannot Be Legislated”, *Cardozo Journal of International and Comparative Law*, 10, pp.37, 39.

²⁴ He observes that “[i]t is rare that the minister responsible for industrial growth or increased exports is directly involved in preparing for and conducting the negotiations. The ministry of agriculture may not even be consulted.” Sherwood, R.S., (2002), “Some Things Cannot Be Legislated”, *Cardozo Journal of International and Comparative Law*, 10, pp. 37, 38-39.

negotiations.²⁵ In the TRIPs era, protecting IP has come to be understood as protecting the IP of one's trading partners. Sherwood explains that this understanding has obscured the potential benefits for local creators:

When viewed only as a trade issue, policy analysts have a hard time assessing the value of intellectual property for increased economic growth in developing countries. . . Academics and policy analysts tend to condemn higher levels of IP protection as the unfair requirement of trade pressure, without going further to consider the possible benefits to local industry and commerce.²⁶

The top-down application of TRIPs has also caused critics to be more concerned with IP laws as a limit on policy flexibility than as a tool for growth. Commentators have particularly criticised TRIPs for impinging on domestic "policy space" and failing to balance public concerns against IPRs.²⁷ Many have devoted considerable analysis to crafting legal arguments to avoid some of the more restrictive aspects of TRIPs.²⁸ Whatever the merits of these concerns, they represent further attention and energy directed toward issues of process and particularly toward reducing IPRs, rather than improving the institutional environment for local businesses. Although scholars and policymakers are most concerned with getting access to the IPRs of businesses in wealthy countries (particularly with ensuring access to pharmaceuticals),²⁹ the side effect is a lack of solicitude for the IPRs of local businesses.

The way that reaction to TRIPs has framed the IP and development debate has encouraged scepticism about the value of IPRs and the fairness of TRIPs. Numerous academic commentators have claimed that TRIPs imposes an unfair, unequal system on

²⁵ *Ibid* at 39. The authors have observed much the same phenomenon while attending the lengthy negotiations at WIPO regarding the adoption of a Development Agenda. Various delegates related that informal communication by some developing world delegations linked their demands for relaxed IP obligations at WIPO to the Doha round negotiations occurring at the same time at the WTO. This linkage, of course, was a turnabout from the developed countries' original linkage of trade to IPRs in TRIPs.

²⁶ *Ibid*.

²⁷ See, e.g., Yu, Peter K., (2007), "The International Enclosure Movement", *Indiana Law Journal*, 82, p. 827 (critiquing one-size-fits-all solutions that do not allow autonomy); Sell, Susan K., (2003) *Private Power, Public Law: The Globalization of Intellectual Property* 174 (2003) (complaining that in TRIPs, "[t]he public-regarding side of the balance is vastly overshadowed by the private side of the ledger."); Okediji, Ruth L., (2003), "Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement", *Emory Int'l L. Rev.*, 17, p. 819 (regretting absence of governing principles in international IP law).

²⁸ For example, see a series of articles by Graeme Dinwoodie and Rochelle Cooper Dreyfuss advocating interpreting TRIPs so as to preserve policy space on issues like patents on research tools, patentable subject matter, compulsory licensing, and numerous other issues. Dinwoodie, Graeme B. and Dreyfuss, Rochelle Cooper, (2006), *Patenting Science: Protecting the Domain of Accessible Knowledge*, in *The Future Of The Public Domain* (Guibault and Hugenholtz eds. 2006); Dinwoodie, Graeme B. and Dreyfuss, Rochelle Cooper, *WTO Dispute Resolution and the Preservation of the Public Domain of Science under International Law*, in *International Public Goods And Transfer Of Technology Under A Globalized Intellectual Property Regime* (Keith E. Maskus & J. H. Reichman eds., Cambridge U. Press, 2005); Graeme B. Dinwoodie and Rochelle Cooper Dreyfuss, *International Intellectual Property Law and the Public Domain of Science*, 7 *J. Int'l Econ. L.* 431 (2004); Graeme B. Dinwoodie & Rochelle Dreyfuss, *TRIPS and the Dynamics of Intellectual Property Lawmaking*, 36 *CASE W. RES. J. INT'L L.* 95 (2004).

²⁹ The issue of access to medicine and compulsory licensing of pharmaceuticals has been the primary concern and subject of debate. See Yu, Enclosure Movement, *supra* note 27; Thomas F. Cotter, *Market Fundamentalism and the TRIPS Agreement*, 22 *Cardozo Arts & Ent. L.J.* 307 (2004). This debate has grown ever-greater since the Doha Declaration, which expanded the ability of TRIPs members to take advantage of compulsory licenses in pharmaceuticals. World Trade Organization, *Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/2, 41 *I.L.M.* 755 (2002).

developing countries.³⁰ Some have suggested that the international IP system ought to be re-worked to address concerns of distributive justice to ensure that poor countries have access to educational materials, medicine, and other innovations and expressive works produced in wealthy countries.³¹ In recent years, international forums have been considering proposals largely sceptical of the benefits of IPRs for developing countries—in particular, WIPO has been considering the Development Agenda and the World Health Organisation has been considering proposals for alternative R&D funding for diseases that afflict poor countries.

One result of all this controversy is that the last thing on the minds of most commentators and policymakers is how IPRs might be harnessed to help local industries, particularly creative industries. In the current debate, innovation and creativity are effectively treated as the exclusive dominion of people in wealthy countries. Very few would intentionally dismiss the creative and innovative capacity of people in poor countries, but the cumulative debate has had this disheartening effect. Whatever the merits and outcomes of the various policy initiatives being discussed today, they relentlessly portray poor countries and people as the users, rather than the originators, of innovations and creative works. This result gives far too little credit to people in poorer countries and pays too little attention to their prospects for success.

C. *Just Passing IP Laws Is Not Enough*

Although policymakers and academics have spent a lot of time discussing the international dimensions of IP, one might rightly ask whether the content of these discussions makes a difference as to whether copyright laws can benefit local creators and entrepreneurs in developing countries. After all, regardless of whether anybody is talking about local benefits, many developing countries have had IP laws for decades. In particular, many have been members of the Berne Copyright Convention.³² Since TRIPs, those without copyright laws have added them.³³ The Berne Convention and TRIPs both obligate signatories to hew to minimum standards of copyright protection. Nations have not ignored these obligations—especially under TRIPs, which has “teeth” in the form of potentially regressive trade sanctions should a Member be found guilty of non-compliance.³⁴ Most of the resulting laws

³⁰ See, e.g., Carlos M. Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options* (2000); Comm’n On Intellectual Prop. Rights, *Integrating Intellectual Property Rights And Development Policy* 17-18 (2002), *available at* http://www.iprcommission.org/graphic/documents/final_report.htm; Peter Drahos with John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* 11 (2002); Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, 40 U.C. Davis L. Rev. 717 (2007).

³¹ Denis Borges Barbosa, Margaret Chon & Andres Moncayo von Hase, *Slouching Towards Development in International Intellectual Property*, 2007 Mich. St. L. Rev. 71; Chon, Margaret, (2007) “Intellectual Property from Below: Copyright and Capability for Education”, *UC Davis Law Review*, Vol. 40, p. 803; Margaret Chon, *Intellectual Property and the Development Divide*, 27 *Cardozo L. Rev.* 2821 (2006); Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 *Cal. L. Rev.* 1331 (2004).

³² See the WIPO website at <http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf> for a list of Berne members with dates each joined.

³³ Least-developed countries have an extended period to comply full with TRIPs—as of the latest negotiated extensions, LDCs need not provide patent protection for pharmaceuticals until 2016 and have until 2012 to implement other types of IP protection. As of this writing, 32 of the members of TRIPs are classes as LDCs. World Trade Organization, *Understanding the WTO: Least Developed Countries* http://www.wto.org/english/thewto_e/what_is_e/tif_e/org7_e.htm.

³⁴ A Member State can be taken to the WTO Dispute Resolution Tribunal if it fails to implement WTO-administered agreements and trade sanctions can eventually be imposed – or unlawful trade barriers forced open, in specific cases. A recent case involving the United States taking China to the Dispute Resolution body

are not technically perfect, but they do exist. One might thus expect IP laws to have whatever domestic impact they are going to have, regardless of what academics and policymakers happen to be debating.

Unfortunately, the experience of creative industries in poor countries shows that mere passage of a copyright law is not enough to benefit creators. If only the recipe for success were as simple as “take talent and then add copyright.” The post-TRIPS experience of African nations challenges both critics and proponents of international harmonisation of IP laws. On the one hand, IPRs are widely recognised as key to competing in a knowledge-based economy.³⁵ Empirical research increasingly indicates that effectively strengthened IPRs in the post-TRIPs era are positively associated with a number of important economic indicators in developing countries, like R&D spending and FDI.³⁶ Creative, inventive people are one of a nation’s most essential resources, and developing countries must unleash their citizen’s creativity by increasing IP protection, lest they fall even further behind.³⁷

On the other hand, strengthening IPR laws has not proven to be as helpful to local people as some advocates for TRIPS had hoped. Increased protection for IPRs has proven to be a necessary but not sufficient condition for encouraging foreign direct investment (FDI), technology transfer and development of domestic creative clusters. As Professor Keith Maskus has observed, FDI and technology transfer depend on many factors, including IPRs, but also freedom of markets, deregulation, and taxation.³⁸ Development of local creative clusters is not just contingent on passing IPR laws, but rather on enforcing them.³⁹ The likelihood of enforcement and reliability of courts—in short, the rule of law—are key factors determining whether IPR laws actually serve to encourage development.⁴⁰

Merely enacting TRIPS-compliant legislation and complying with obligations toward trading partners is not sufficient to create an “enabling environment” for the development of local IP-based industries.⁴¹ As Robert Sherwood has observed, TRIPS “is largely irrelevant

for failing to protect intellectual property rights of American companies is the first such WTO case involving intellectual property.

³⁵ See Sherwood, R.M., (2002), *Global Prospects for the Role of Intellectual Property in Technology Transfer*, IDEA, 42, (citing World Bank research), p.30.

³⁶ See Park, W. G. and D. C. Lippoldt (2008), “Technology Transfer and the Economic Implications of the Strengthening of Intellectual Property Rights in Developing Countries”, OECD Trade Policy Working Papers, No. 62, OECD Publishing. Park and Lippoldt use more recent data than previous studies, most of which use data from the pre-TRIPs era. One must recognize, however, that the benefits of IP remain greatly contested, as demonstrated by many of the other theoretical and empirical studies cited in this paper. Moreover, the costs and benefits of stronger copyright remain largely the subject of case studies and anecdotal evidence, such as is presented here.

³⁷ Ryan, M.P., (2002), “Knowledge-Economy Elites, the International Law of Intellectual Property and Trade, and Economic Development”, *Cardozo Journal of International and Comparative Law*, volume 10, pp. 271 (2002)

³⁸ Maskus, K.E., (2004), “Intellectual Property Rights in Encouraging FDI and Technology Transfer, in Intellectual Property and Development”, in Fink, C., & Maskus, K.E., *Intellectual Property and Development*, pp.70-71.

³⁹ See Sherwood, R.M., (2002), *Global Prospects for the Role of Intellectual Property in Technology Transfer*, IDEA, 42, pp.27,33.

⁴⁰ *Ibid.*

⁴¹ Yu, P.K., (2007), “Intellectual Property, Economic Development, and the China Puzzle”, in Gervais, D.J., *Intellectual Property, Trade and Development: Strategies To Optimize Economic Development In A Trips Plus Era*, pp.173, 213–16, (discussing the need for an “enabling environment” for effective intellectual property protection and development).

to what really matters for developing countries.”⁴² Since TRIPS treats IP as a trade issue, its focus is largely outward—promoting fair treatment of trade partners rather than boosting local industries. Mere compliance with TRIPS is often just strong enough to foster foreign direct investment and the importation of foreign goods, but not enough to promote the development of local creative and innovative industries.⁴³ Although such foreign direct investment is very beneficial and essential for development, TRIPS’ outward focus on trading partners and their IP is insufficient to foster local R&D, innovation, creativity, and private capital investment directly.⁴⁴

Finally, even the best-designed laws mean little if they are not enforced effectively. As we discuss in detail later, a lack of effective enforcement has greatly detracted from the benefits that might be realised by laws that putatively protect local creators and creative industries.

Passing laws is thus not enough on its own to stimulate the growth of creative industries. Effective design and implementation is essential.

D. Toward a Pragmatic Focus on Using Copyright to Help Local Creative Industries

The time is ripe to take a specific, pragmatic look at how to deploy copyright to benefit local creators. People in every nation, poor or rich, are just as creative and innovative as anywhere else. Their opportunity to utilise their abilities to make a living, however, depends largely on the legal and business environments of the countries in which they live. We contend that it would be tremendously helpful to focus on specific reforms that could empower people and businesses at the local level. IP strategies in under-developed countries should strive to support and promote local inventors or creators.

This paper seeks to contribute by helping to fill the gap left by much of the more high-level discussion of IP and development. While there is a great deal of thoughtful, subtle discussion of these points, the debate often coalesces around warring abstractions. On the one hand, some claim that increased IPRs will lift countries out of poverty. On the other hand, some claim that creating a myriad of exceptions to IPRs will promote important goals like public health, education, and technology transfer. Thus, the frequent juxtaposition of stronger intellectual property laws versus access to knowledge.

⁴² Sherwood, R.M., (2002), “Global Prospects for the Role of Intellectual Property in Technology Transfer”, *IDEA*, 42, pp.27, 30.

⁴³ Sherwood found that TRIPS-level protection appears sufficient to support parts manufacture and assembly work for foreign companies, but does not appear to be sufficient to support local creative and innovative activity, absent additional supporting institutions. Sherwood, R.M., (1997), “Intellectual Property Systems and Investment Stimulation: The Rating Systems in Eighteen Developing Countries”, *IDEA*, 37, p.261. See also, Sherwood, R.M., (2002), “Some Things Cannot Be Legislated”, *Cardozo Journal of International and Comparative Law*, 10, pp.37, 39-40; Gervais, D.J., (2005), “Intellectual Property, Trade & Development: The State of Play”, *Fordham Law Review*, 74, pp.505, 510. Of course, as Sherwood, Gervais, and many others have noted FDI also does not inevitably follow stronger IP laws, as several other conditions are required, such as effective enforcement of those laws and an otherwise favorable legal and business environment.

⁴⁴ Gervais, D.J., (2005), “Intellectual Property, Trade & Development: The State of Play”, *Fordham Law Review*, 74, pp.505, 510.

The somewhat abstract post-TRIPS debate reflects a problem that has been identified in development policy generally—a lack of grass roots, locally-generated solutions. For decades, development efforts have usually centred on ambitious plans with laudable goals like ending poverty.⁴⁵ While the objectives are uplifting, the results have sadly proven less inspiring. As development economist William Easterly has said, it is a “tragedy” that the West has spent “\$2.3 billion on foreign aid over the last five decades and still had not managed” to deliver the most inexpensive essential medicines, alleviate the infant mortality rate, or provide education to most of the poor.⁴⁶ Easterly lays a good part of the blame for failure on the inherent limitations of big plans: they are too abstract; do not impose accountability; and offer top-down, one-size-fits-all global solutions from the outside.⁴⁷ He contrasts these big, often disappointing projects, with down-to-earth grassroots efforts, which succeed more often. These more modest efforts are demand-driven; employ local knowledge to adapt to complex local conditions and institutions; and are driven by and benefit local people.⁴⁸ Easterly applauds reforms that empower those he calls “seekers,” the promoters of entrepreneurial, grass-roots, local-based development solutions, in contrast to “planners,” the promoters of vast, ambitious, but often futile, projects.⁴⁹

Such grass-roots, demand-driven assistance is exactly what the mandates of various international organisations call for. For example, article 67 of TRIPS calls upon wealthy countries to provide assistance in implementing the agreement. Indeed, the authors observed a desire for such solutions while attending meetings for the past few years regarding a Development Agenda at the World Intellectual Property Organisation.⁵⁰ The Development Agenda items that garnered the broadest support—and perhaps sustained the negotiations through seeming impasses—were the ones that would invigorate technical assistance to developing countries in better designing and implementing their intellectual property laws.⁵¹ Nations from the African Group were particularly concerned that they receive more assistance that helped them to build IP systems that benefitted their people. This paper is motivated in part by that observation.

In addition, consideration of this topic is timely, as international institutions and other policymakers have begun to recognise the potential of creative industries to development. Several U.N. agencies recently launched an effort to promote the creative industries as a tool for development.⁵² They and other organisations⁵³ are working to assess the economic

⁴⁵ See, e.g., Sachs, J., (2006), *The End of Poverty: Economic Possibilities for Our Time*, Penguin.

⁴⁶ Easterly, W., (2006), *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good*, Penguin, p.4. See also Garrett, L., (2007), “The Challenge of Global Health”, *Foreign Affairs*, 86(1). Garrett chronicles the sadly disappointing results of the extraordinary rise in public and private donations directed to public health spending in the developing world in recent years. The fundamental problems of lack of trained health professionals, shortcomings in sanitation and infrastructure, and corruption have frustrated much of this generosity. See *ibid*.

⁴⁷ *Ibid*, pp.4–5, and generally.

⁴⁸ *Ibid*

⁴⁹ *Ibid*

⁵⁰ See Mark Schultz, Reports on the June 2007 WIPO Development Agenda Meetings available at http://www.fed-soc.org/publications/pubID.326/pub_detail.asp.

⁵¹ See WIPO, “The 45 Agreed Recommendations under the WIPO Development Agenda,” Cluster A: Technical Assistance and Capacity Building, http://www.wipo.int/ip-development/en/agenda/cdip_recommendations.html.

⁵² The United Nations Council on Trade and Development (UNCTAD); the United Nations Development Programme (UNDP) Special Unit for South-South Cooperation; the United Nations Educational, Scientific and Cultural Organization (UNESCO); the World Intellectual Property Organization (WIPO); and the International Trade Centre (ITC) are all cooperating on the project. UNCTAD Press Release, “Report, debate, show of African art and music to highlight development promise of creative economy,”

impact of creative industries⁵⁴ and to determine ways to improve the institutional climate for creators in developing countries.

Finally, there is an additional reason to look beyond today's many contentious debates about IP and development and find ways to leverage copyright to work for local creators and creative businesses in poor countries. No matter how much TRIPs is criticised, it is unlikely to go away anytime soon. Whatever exceptions might be made with respect to specific issues,⁵⁵ WTO members are too invested in the international trading system, and its linkage to TRIPs, to abandon international IP obligations.⁵⁶ TRIPs will thus continue to pressure poor countries to acknowledge and protect the rights of foreign IP owners. It is essential for them to seek ways to benefit local creators and innovators as well. Where there are specific reforms that could benefit these talented local people—whether simply complementary to TRIPs-level protection or in addition to—they should be implemented.⁵⁷

The experience of poor countries with TRIPs thus need not be a failure. The reforms we suggest in this paper would help countries to take the essential next step beyond stronger IP laws to building institutions that competently employ IPRs to foster local creativity and innovation.

As we see it, the creative industries, particularly popular music could greatly benefit Africans in particular. Their development requires less investment and government-led oversight than many may think, and certainly far less than heavy industries or more technologically advanced businesses. Given slightly better circumstances, creative individuals can do most of the hard work of building a prosperous industry. The next section offers by way of anecdote the experience of Nashville—Music City, U.S.A., where talent, entrepreneurship, and the right institutions combined to create a thriving creative industry in economically challenging circumstances.

II. Popular Music as a Grass Roots Economic Development Strategy

The city of Nashville is nicknamed “Music City U.S.A.” with good reason.⁵⁸ The United States is blessed with several locales where popular music thrives both creatively and financially, but nowhere else is music so central to the local economy and identity.⁵⁹ A

<http://www.unctadxi.org/en/Media/Press-Releases/Report-debate-show-of-African-art-and-music-to-highlight-development-promise-of-creative-economy/> (April 20, 2008).

⁵³ See, e.g., International Music Council, World Forum on Music

<http://www.unesco.org/imc/site.php?typ=10&subsitem=17>,

⁵⁴ See WIPO Guide on Surveying the Economic Contribution of the Copyright-Based Industries (2003).

⁵⁵ For example, the Doha Declaration's concessions with respect to compulsory licensing of pharmaceuticals.

⁵⁶ There have been too many gains from trade, with too much potential in the future, for developing countries to abandon the international trading system. They have, of course, been disappointed by the fact that the Doha Round has faltered, and with it the hopes of developing countries for liberalisation of agricultural trade with developed nations.

⁵⁷ National treatment provisions in TRIPs and other international IP agreements will, of course, obligate developing nations to provide the same treatment to foreign IP owners. However, local industries may enjoy a comparative advantage in adapting their businesses to suit local needs, especially with respect to the creative industries, where popularity often depends on cultural context and other very localized tastes.

⁵⁸ For a history chronicling how Nashville became “Music City”, see Kosser, M. “How Nashville Became Music City U.S.A.: 50 years of music row” Hal Leonard Corporation, 2006

⁵⁹ For example, other U.S. musical hotspots include Seattle, Austin, Memphis, and the state of Georgia. A recent study estimates that Nashville's local music industry contributes twice as much to Nashville's local economy as all those other places *combined* contribute to their own local economies. Raines, P., & Brown, L.,

recent study estimates that music contributes over \$6 billion a year to Nashville's economy.⁶⁰ About 20,000 jobs in the Nashville area are directly related to music production, accounting for over \$700 million in annual wages.⁶¹ Nashville is home to "80 record labels, 130 music publishers, more than 180 recording studios, 40 national producers of ad jingles, 27 entertainment publications and some 5,000 working union musicians."⁶² The study estimates that 35,000 additional local spill-over jobs exist because of the music industry in fields such as music-related tourism.⁶³ Since Nashville is a relatively small city with a population of 1.2 million people, the music industry's benefits to the local economy are particularly significant.⁶⁴

What country wouldn't envy such economic benefits? Indeed, a team of World Bank Staffers created the Africa Music Project to promote the African music industry with Nashville partly in mind, saying that their "dream" was that "African countries would create their own Nashvilles."⁶⁵ Creating such centres of economic activity is more than just a dream; it can also be a viable development strategy given the right circumstances. "Creative clusters" have the potential to transform developing economies in a way that decades of development aid have so far failed to do. But, as the example of Nashville illustrates, certain conditions must be met before talent and ability can meet growth and success.

A. Clusters and Development

Recent work on economic development has focused attention on the importance of local centres of excellence and expertise to the economic prospects of a region. As Michael Porter has written in his widely-heralded work on competitive strategy and economic policy, regions and nations are most likely to prosper in the global economy if they foster strong "clusters" of economic activities.⁶⁶ According to Porter clusters are "geographic concentrations of interconnected companies, specialised suppliers, service providers, firms in related industries, and associated institutions (e.g., universities, standards agencies, and trade associations) in particular fields"⁶⁷

In Porter's view, clusters provide a sustained competitive advantage through a self-reinforcing dynamic of cooperation and competition among related businesses. They exploit economies of scale and build up networks of skills, knowledge, and business relationships. Both employees and ideas circulate among competitors, building up a collective advantage over firms from outside the region. Well-known examples include the microelectronics

(2006), *The Economic Impact of the Music Industry in the Nashville-Davidson-Murfreesboro MSA* 4, Nashville Area Chamber of Commerce, available at

<http://www.nashvillechamber.com/president/musicindustryimpactstudy.pdf>. While New York and Los Angeles also have very large music industries, they do not define the local identity as they span more genres and are less central to the local economy.

⁶⁰ *Ibid* p.4.

⁶¹ *Ibid* pp.15-20.

⁶² *Ibid* p.6.

⁶³ *Ibid*

⁶⁴ *Ibid* p.6.

⁶⁵ Penna, et al., *supra* note 3, p.97.

⁶⁶ Porter, M.E., (1998), *The Competitive Advantage of Nations*, Free Press.

⁶⁷ Porter, M.E., (2000), "Locations, Clusters, and Company Strategy", in Clark, G.L., Gertler, M.S., & Feldman, M.P. (eds.), *Oxford Handbook of Economic Geography*, Oxford University Press, p.253.

industry in Silicon Valley, high-performance auto companies in southern Germany, high-end fashion shoes in Italy, and wine industries in South Africa, France and New Zealand.⁶⁸

Celebrated examples such as Nashville and Hollywood show that clusters of competitive advantage can form around creative industries. Such creative clusters are not confined, however, to wealthy countries, as some of the most important ones arise in less-developed countries. Tyler Cowen has documented how specific cultural sectors in poor countries can thrive under globalisation, as local creativity benefits from exposure to new technology, wealth, and outside creative influences.⁶⁹ Examples he cites include Congolese soukous music, Jamaican reggae, Haitian painting, Persian textiles, Cuban music, and amateur painting from Guerrero, Mexico.^{70 71}

There are several reasons why creative clusters would work well in poor countries: first, they play to local strengths, taking advantage of skills and forms of expression that arise from local culture, and are thus, by definition, largely unique and non-duplicable. Second, they suffer less from the deficiencies of poor countries than do many other activities, as they typically do not require (at least not initially) cutting-edge technology, large capital investments, or a robust infrastructure.⁷² Instead, they rely on local knowledge, local skills, and materials that usually are in ready supply. Creative clusters can thus exist nearly anywhere. Third, although creative work often requires a significant personal investment in training and development, it typically does not require the sort of extensive formal educational system that still remains unavailable to the poor in many developing countries.

The relative advantages of creative clusters for less-developed countries are precisely what motivated the authors of the Africa Music Project to promote the development of music industry clusters in Senegal and other African countries. They believe that the music industry can play an essential role in economic development by providing immediate economic benefits to the poor, supporting local culture, and boosting further development by providing both psychological and economic validation to local efforts.⁷³ The question then is what it will take to create “Music Cities” in the less-developed countries. A useful way to provide an answer is to see how a currently thriving “Music City” emerged from similarly unfortunate circumstances to a multi-billion dollar industry today.

B. The Nashville Story

Nashville’s transformation into “Music City” shows just how much a region’s culture can aid its economic development, given enough talent, adequate incentives for

⁶⁸ Porter, M.E., (1998), “Clusters and the New Economics of Competition”, *Harvard Business Review*, 76(6).

⁶⁹ Cowen, T., (2002), *Creative Destruction: How Globalization Is Changing the World’s Cultures*, Princeton University Press.

⁷⁰ *Ibid* pp.21–46.

⁷¹ Cowen, T., (2005), *Markets and Cultural Voices: Liberty vs. Power in the Lives of Mexican Amate Painters*, University of Michigan Press.

⁷² As Keith Maskus has observed, most economies in poor countries are unlikely to reap the rewards of capital and knowledge-intensive industries immediately. In order for countries to benefit from these types of industries they need to enhance capacity in three areas to benefit from IPRs: First, they need “strong levels of educational attainment and sizeable endowments of human capital;” second, local firms must invest in research and development; and third, “financial markets [must be] capable of managing the significant risks involved in technology development.” Maskus, K.E., (2000), “Intellectual Property Rights and Economic Development”, *Case Western Journal of International Law*, 32, pp.471,497.

⁷³ Penna, et al., *supra* note 3, p.98.

entrepreneurs, the right laws and supporting institutions. Although Nashville resides in one of the world's wealthiest countries, it was once a struggling city in the U.S.'s most underdeveloped region. Nashville now has a thriving, modern economy. The music industry is not the only reason that Nashville is doing well, but the creative cluster centred on country music is one of the major reasons.⁷⁴ The country music industry played an essential part in Nashville's transformation into a world-class city, sustaining it through difficult times and contributing enormously to its modern economy, cultural identity, and business reputation.

Nashville's country music success was not part of any grand centrally-orchestrated blueprint. Rather, it resulted from the actions of a few early 20th century music business pioneers—the sort of grass roots entrepreneurs who the more forward-looking development economists would laud.⁷⁵ Important lessons can be drawn from their actions and from the conditions that aided their success.

In the early twentieth century, Nashville and its surrounding region once faced economic challenges similar to those faced by today's developing economies. During the first part of the 20th Century, the American South was far less developed than other regions of the United States.⁷⁶ The South's industries were significantly less advanced, with economic activity focused mainly on agriculture or local industry.⁷⁷ "Nashville shared the South's dilemma of being unable to move beyond local resources and local markets."⁷⁸ Conditions in the rural regions outside of Nashville were particularly daunting. In the early 1930s, per capita incomes in the Tennessee Valley were about 40 percent of the U.S. national average.⁷⁹ Subsistence, tenant farming was still common. As one scholar recently noted, the South's socio-economic system was considered so backward that the contemporary mass media "casually referred" to it "as 'feudalism.'"⁸⁰ "The low incomes and general economic distress of the South made it impossible to develop educational institutions and public health facilities to the standards attained in most other sections of the United States."⁸¹ In fact, 30% of the population in the Tennessee Valley was infected with malaria in the early 1930s.⁸²

The strategies advocated to promote development in Tennessee during the early twentieth century are also quite similar to those proposed in the developing world in more

⁷⁴ Nashville has a diversified economy, with the music industry at least the second-most important industry (depending on how one accounts for the impact of music-related tourism and other music-related economic activity), and healthcare, higher education, and the automotive industry also playing a role. See Raines, P., & Brown, L., (2006), *The Economic Impact of the Music Industry in the Nashville-Davidson-Murfreesboro MSA 4*, Nashville Area Chamber of Commerce.

⁷⁵ See, e.g., Easterly, W., (2006), *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good*, Penguin, Easterly lauds modest projects with measurable, accountable goals that involve locals.

⁷⁶ Curtis, H.A., (1952), "The TVA and the Tennessee Valley—What of the Future?", *Land Economics*, 28(4), p.333.

⁷⁷ *Ibid*, p.333.

⁷⁸ Kyriakoudes, L.M., (2003), *The Social Origins Of The Urban South: Race, Gender, And Migration In Nashville And Middle Tennessee, 1890–1930*, The University Of North Carolina Press, p.39.

⁷⁹ Cole, W.E., (1950), "The Impact of TVA Upon the Southeast", *Social Forces*, 28, pp.435, 438.

⁸⁰ Ekbladh, D., (2002), "'Mr. TVA': Grass-Roots Development, David Lilienthal, and the Rise and Fall of the Tennessee Valley Authority as a Symbol for U.S. Overseas Development, 1933–1973", *Diplomatic History*, 26(3), pp. 335-374, (quoting Hutchinson, P., (1934), "Revolution by Electricity", *Scribners Magazine*, Oct 1934, pp.193-200).

⁸¹ Curtis, H.A., (1952), "The TVA and the Tennessee Valley—What of the Future?", *Land Economics*, 28(4), p.334.

⁸² U.S. Department of Health and Human Service, Center for Disease Control, *The History of Malaria, an Ancient Disease*, available at <http://www.cdc.gov/malaria/history/index.htm> (last accessed January 15, 2008).

recent years. Like many least-developed economies today, Nashville initially pinned its economic hopes on easy access to natural resources, hoping that it would become a major manufacturing centre for steel and textile production.⁸³ These aspirations were never fully realised—as other regions have also found, the mere presence of raw materials did not translate into hoped-for manufacturing prowess.⁸⁴

Hopes for Tennessee's development then turned to the sort of grand projects that have been so favoured by Western development agencies in Africa. In 1933, the Tennessee Valley Authority ("TVA") was established to build massive infrastructure projects to promote development in the Tennessee region. The TVA built dams, power plants and other public works, while promoting agricultural and educational programmes. For decades after WWII, the TVA was enthusiastically embraced as the model for development projects around the world—from Aswan Dam in Egypt to the Three Gorges Dam project in China, cement factories in Nigeria, and aluminium smelters in Ghana, governments have seen TVA-style massive public works as a development panacea. Over the decades, however, the legacy of the TVA in the United States has become more controversial while enthusiasm for similarly massive projects in poorer countries has declined precipitously.⁸⁵ "Many members of the development community . . . find these efforts questionable, if not dangerous. . . . Too often . . . the imposition of these vast undertakings hurt the people in their path as the grand, 'high modernist' visions at the core of these programmes ignore people's needs, values, experience, and knowledge."⁸⁶

Whatever the costs or benefits of such large projects, Nashville's "Music City" success sprang from far more modest seeds. Eighty years ago, conventional wisdom never would have predicted that country music would become the centrepiece of its economy. Developing this underappreciated and unexploited resource did not require grandiose plans orchestrated by a centralised authority. Rather, initial events hinged on the private actions, skills and insights of a handful of individuals—the musical talents of country music pioneers like Jimmie Rodgers and the Carter Family and the business acumen of entrepreneurs like Ralph Peer, a record producer and aspiring music publisher. Their success may seem almost accidental, a case of enterprising performers and businesspeople being fortunate enough to find and shape an untapped popular taste for their product. There is, however, far more to the story than luck. The institutional climate in the United States encouraged the success of such a venture.

⁸³ Kyriakoudes, L.M., (2003), *The Social Origins Of The Urban South: Race, Gender, And Migration In Nashville And Middle Tennessee, 1890–1930*, The University Of North Carolina Press, pp.31, 33, 37.

⁸⁴ "The hopes that Nashville would emerge as the South's leading iron or textile center were never realized. While the city did develop other industries based upon access to the raw materials and markets in its hinterland—lumber, wheat, and livestock—these resources did not develop the city into a great manufacturing center." *Ibid*, p.39.

⁸⁵ The TVA was long heralded as one of the successes of the New Deal. It built a great deal of impressive infrastructure, improved economic conditions in the Tennessee Valley, and unambiguously succeeded in some of its ancillary programmes like eradicating malaria. Over the years, however, it has come to be criticized by some as an inefficient wealth transfer programme that may have impeded the growth of the region. See, e.g., Chandler, W.U., (1984), "The Myth of the TVA: Conservation and Development in the Tennessee Valley, 1933–80", *Journal of Policy Analysis and Management*, 4(1). Chandler argues that nearby regions with similar economic challenges that were not served by the TVA grew faster. He contended that the TVA would have been more successful if it had focused on projects with more direct, immediate benefits to local people rather than massive projects.

⁸⁶ Ekbladh, D., (2002), "'Mr. TVA': Grass-Roots Development, David Lilienthal, and the Rise and Fall of the Tennessee Valley Authority as a Symbol for U.S. Overseas Development, 1933–1973", *Diplomatic History*, 26(3), p.336.

The initial factor in Nashville's musical success was the unique musical tradition of the rural south and nearby Appalachian region. Music was an essential part of people's daily lives. Folk music was one of the chief forms of family and community entertainment and central to religious worship in the region's many, diverse Protestant religious denominations.⁸⁷ A mix of history, geographic isolation, and culture had combined to foster a musical heritage that was both unique and popular.

By the mid-1920s, people were beginning to see that this folk music tradition might be converted into a more commercial art form. Some performers, such as Jimmie Rodgers were playing engagements throughout the region, and a few, such as "Uncle" Dave Macon, had broken out of local engagements to tour the East Coast.⁸⁸ Two high-powered radio stations that reached large parts of the country, WLS in Chicago and WSM in Nashville, began broadcasting weekly live country music shows that quickly proved to be very popular. (WSM's *Grand Ole Opry Radio Show*, is still running today.) Perhaps most consequentially, a New York record producer, Ralph Peer, co-produced what is known as the first commercial country music recording, Fiddlin' John Carson's "That Old Hen Cackled and the Rooster's Goin' to Crow," for Okeh Records.⁸⁹ Despite the poor quality of the recording, it quickly sold out, convincing Peer of the potential popularity of country music.⁹⁰

Fortunately for Peer and the musicians whose careers he launched, Peer was able to secure the financial backing to pursue his insight that there was a market in country music. Peer left Okeh, formed his own publishing company, and entered into a joint venture with the Victor Talking Machine Company.⁹¹ In the summer of 1927, Victor supplied Peer with US\$60,000 in financing for an expedition to the American South to record country music.⁹² Up to that point, few rural, Southern artists had been recorded, as the then-current analogue recording equipment was bulky and essentially non-movable, thus necessitating a prohibitively costly trip to New York.⁹³ With the advent of electronic recording technology in the late '20s, Peer was able, at a significant but feasible cost, to take the equipment to the talent. Peer used the money to send out a team of advance scouts to find musicians and ship recording equipment to Bristol, Tennessee, where he set up a temporary recording studio.⁹⁴

⁸⁷ Raitz, K.B., et al., (1984), *Appalachia: A Regional Geography*, Westview Press, pp.138–140.

⁸⁸ Macon was a regular on the East Coast vaudeville circuit. *Uncle Dave Macon*, Country Music Hall of Fame and Museum, available at <http://www.countrymusicHalloffame.com/site/inductees.aspx?cid=142> (adapted from Kingsbury, P. (ed.), *The Encyclopedia of Country Music*, compiled by Country Music Hall of Fame and Museum, Oxford University Press).

⁸⁹ See Peer Music's "Company History", available at <http://www.peermusic.com/aboutus/companyhistory.cfm>

⁹⁰ *Ibid*

⁹¹ Peer, R., (c.1953), *Ralph Peer Remembers Jimmy Rodgers*, available at http://www.peermusic.com/news/press_detail.cfm?announcement_id=273&back=press (last visited August 19, 2007) (the article was written by Peer circa 1953, according to the Bluegrass West site, <http://www.bluegrasswest.com/ideas/jr-rpeer.htm>).

⁹² Maeder, J., (2003), "Bristol Celebrates Birthplace of Country Music", *The Appalachian Voice*, available at <http://www.ncpress.net/cgi-local/search.cgi?gffd=774>

⁹³ A number of country musicians did make the trip to New York, experiencing enough early success to indicate the existence of a market. For example, "Uncle" Dave Macon, a successful performer on the East Coast vaudeville circuit, had a number of hits recorded by New York labels in the mid to late '20s. *Uncle Dave Macon*, Country Music Hall of Fame and Museum, <http://www.countrymusicHalloffame.com/site/inductees.aspx?cid=142> (adapted from Kingsbury, P. (ed.), *The Encyclopedia of Country Music*, compiled by Country Music Hall of Fame and Museum, Oxford University Press). But the country music market fully materialized once the Bristol sessions brought performers together with recording technology, finally giving them a national audience.

⁹⁴ *Ibid.*, and Wolfe at 21.

Peer's recording session in Bristol established the commercial viability of country music. Johnny Cash called the Bristol Sessions "the single most important event that ever took place in the history of music."⁹⁵ Over the course of 15 days, Peer and his crew recorded a total of 76 songs performed by 19 different acts, capturing "an almost perfect representation of early country music: fiddle and banjo tunes, old traditional ballads, gospel music, old popular and vaudeville songs, and rustic comedy."⁹⁶ The recordings quickly turned into commercial success, leading to the discovery of both a mass market for the genre and the first country music superstars, Jimmie Rodgers and the Carter Family. "In a 3-month span a year after the Bristol sessions recordings first went on sale, Peer's Southern Music publishing company earned \$250,000 in royalties."⁹⁷ Later that year, Peer recorded Rodgers singing *Blue Yodel (T for Texas)*, a huge hit selling a million copies.⁹⁸

While the Bristol Sessions were a gold mine for Peer and the most successful performers, they were an important economic opportunity for everybody involved in a place where few opportunities existed. When Peer used stories in the local media to advertise the amounts he was paying performers,⁹⁹ the response was overwhelming. Peer "was deluged with long-distance calls from the surrounding mountain region. Groups of singers who had not visited Bristol during their entire lifetime arrived by bus, horse and buggy, trains or on foot."¹⁰⁰ The royalties that Peer and Victor paid were substantial by the measure of incomes of the day: Peer typically paid a recording fee of \$50 per song and a royalty of about 2 ½ cents per record side sold.¹⁰¹ This was a significant opportunity in a region where one of the major industries, coal mining, paid about 76 cents an hour on average in 1926.¹⁰² Thus, a single recording session paid far more than an average week's wages for a coal miner, and sales of fewer than 6000 copies of a record would produce royalties equivalent to a month's wages.¹⁰³

The potential advantages to less-developed economies from exploiting recording technologies remain similar. The typical range of jobs available in most poor economies are labour-intensive and low-productivity—for example, 70% of employment in sub-Saharan

⁹⁵ Wolfe, C.K., (2005), "The Legend That Peer Built: Reappraising the Bristol Sessions", in Olson, T., & Wolfe, C.K., (eds.), *The Bristol Sessions: Writings About the Big Bang of Country Music*, p.18.

⁹⁶ *Ibid*, p.31.

⁹⁷ Maeder, J., (2003), "Bristol Celebrates Birthplace of Country Music", *The Appalachian Voice*, available at <http://www.ncpress.net/cgi-local/search.cgi?gffd=774>

⁹⁸ Available at <http://www.alamhof.org/rodgersj.htm>

⁹⁹ Peer, a consummate salesman, persuaded local newspapers to assist him with recruiting acts to record. As he later recalled: "I then appealed to the editor of a local newspaper, explaining to him the great advantages to the community of my enterprise. He thought that I had a good idea and ran a half column on his front page. This worked like dynamite . . ." Peer, R., (c.1953), *Ralph Peer Remembers Jimmy Rodgers*, available at http://www.peermusic.com/news/press_detail.cfm?announcement_id=273&back=press (last visited August 19, 2007). Newspapers noted the relatively princely sums earned by other recording artists previously recorded by Victor: "[Ernest] Stoneman [received] \$100, and each of his assistants \$25 per day. Stoneman . . . received from the company \$3,600 last year as his share of the proceeds on his records." Wolfe at 25.

¹⁰⁰ Wolfe, C., (1987), *Liner Notes of The Bristol Sessions*, Country Music Foundation, available at <http://www.birthplaceofcountrymusic.org/node/32>

¹⁰¹ *Ibid*.

¹⁰² The 1928 Statistical Abstract of the United States 336, United States Government Printing Office. The .76 number is the general average hourly wage for all jobs in the bituminous coal industry.

¹⁰³ See *ibid*. The numbers are based on the assumption that workers worked 48 hour work weeks as mines operated on a 48 hour work week, although the Statistical Abstract notes that many miners worked fewer hours.

Africa is agriculture-related, much of it subsistence farming.¹⁰⁴ The same amount of work put into developing a recording is likely to yield a much higher return for all involved. Even a recording with modest sales produces a great deal of economic value that can be divided among the performers, producers, and distributors. The relative differences in productivity and profitability are vast, and few high-productivity activities are as open to people in poor countries as creative work.

As the developers of the Africa Music Project have observed, a successful creative cluster can give hope and prestige to a downtrodden people and economy. The success of the Bristol Sessions performers gave credibility to an obscure, once-dismissed type of music. As Peer wrote of Jimmie Rodgers, the “impetus which he gave to so-called hillbilly music . . . set in motion the factors which resulted in making this sector of the amusement business into a matter of world-wide importance and a source for a high percentage of our popular hits.”¹⁰⁵ This is the sort of role that Bob Marley would much later play for Reggae music and Jamaica.

In drawing lessons from the birth of country music and Nashville’s status as “Music City,” it is essential to understand the importance of copyright law. For Peer, copyright was the foundation of the entire Bristol enterprise. Peer took only US\$1 a year in salary from Victor, but in exchange he sought the right for his newly formed music publishing company to control the copyrights in the compositions he recorded.¹⁰⁶ “Peer’s genius lay in structuring his publishing company based on royalties, making copyrights profitable for the artist as well as himself – the financial model of the modern music industry.”¹⁰⁷ Peer understood the entrepreneurial value of copyright, as he was the first record executive to encourage his performers to avoid old, copyrighted standards and public domain works in favour of new compositions.¹⁰⁸ The new compositions had the dual virtues of being copyrightable and more relevant and commercial than older works.¹⁰⁹ Indeed, once Peer and others showed the value of new, copyrightable material, commercial incentives motivated rural Southern musicians to abandon folk music for royalty producing works.¹¹⁰ Copyright did not play as direct of a role in Victor’s financing of the Bristol Sessions, but only because sound recording piracy was not then common or feasible.¹¹¹ Today, Victor would almost certainly need the assurance of

¹⁰⁴ *Office of the United States Trade Representative*, “The Benefits of Trade for Developing Countries” Trade Facts, June 2006. <http://usmission.ch/Press2006/0701TradeFacts.pdf>.

¹⁰⁵ Peer, R., (c.1953), *Ralph Peer Remembers Jimmy Rodgers*, available at http://www.peermusic.com/news/press_detail.cfm?announcement_id=273&back=press (last accessed August 19, 2007).

¹⁰⁶ Maeder, J., (2003), “Bristol Celebrates Birthplace of Country Music”, *The Appalachian Voice*, available at <http://www.ncpress.net/cgi-local/search.cgi?gffd=774>

¹⁰⁷ *Ibid.*

¹⁰⁸ Georgia Music Hall of Fame, “Ralph Peer Biography”, available at <http://www.georgiamusicstore.com/artist/P219557/>.

¹⁰⁹ For example, Jimmie Rodgers’ first big hit, *Blue Yodel (T for Texas)*, was one of six songs that Rodgers recorded during his first two recording sessions with Peer. Comber, C., & Paris, M., (1975), “Jimmie Rodgers” in Malone, B.C., & McCulloh, J. (eds.), *Stars of Country Music*, University of Illinois Press, pp.127 – 128. Of the six, only *Blue Yodel* was completely original. *Ibid.*

¹¹⁰ Kyriakoudes, L.M., (2003), *The Social Origins Of The Urban South: Race, Gender, And Migration In Nashville And Middle Tennessee, 1890–1930*, The University Of North Carolina Press, p.8. The Southern traditionalist intellectual Donald Davidson bemoaned the abandonment of folk music in favour of “new songs—quasi folk songs or frankly popular ditties—which will bring [the musician] royalties from phonograph records and music sheets.” Davidson, D., (1957), “Current Attitudes Toward Folklore” in *Still Rebels, Still Yankees and Other Essays*, LSU Press, p.134.

¹¹¹ Under U.S. law, sound recordings were protected from piracy by a patchwork of state laws until 1972 when they were brought under the U.S. Copyright Act. The original musical compositions embodied on the sound

copyright protection to make such a substantial investment in producing sound recordings because of the threat of piracy.

Once the Bristol Sessions established the commercial viability of country music, other music business entrepreneurs seized upon the opportunity Peer had revealed. Regional talent, the efforts of entrepreneurs, and supportive institutions such as copyright combined to establish Nashville as the home of a thriving creative cluster. Investments in the music business soon followed Peer's footsteps into the region, seeking more country music stars. Efforts focused on Nashville, in part because it was the most economically important city in this region rich with country music talent. Although a great deal of country music recording took place outside of the region, Nashville solidified its position as the home of the country music industry within a couple of decades.

Regional talent, local entrepreneurs, and supportive institutions such as copyright all combined to establish Nashville as the home of a thriving creative cluster. The concentration of talent and knowledge about the country music genre was the first essential ingredient. Nashville was home to the *Grand Ole Opry* Radio show and other important early country music institutions.¹¹² Country music talent came to Nashville to play the show, which drew record producers, which in turn drew more talent. This local talent and expertise created an opportunity for entrepreneurs, who saw an advantage in setting up recording studios and record labels close to the talent in Nashville.¹¹³ For the music business, Nashville's advantages outweighed any challenges presented by how backward Nashville may have been at that time. As discussed previously, creative clusters typically do not require the sophisticated physical infrastructure that many other industries require. As Nashville's example shows, a thriving creative cluster can kick-start the development of this related infrastructure, as thriving industries stimulate demand for other competitive sectors to follow. Crucially, Nashville offered superior talent while providing as good of a legal environment as any other U.S. city. Nashville's entrepreneurs could count on copyright and related institutions to protect their investment in creative works. Once this base of expertise was established, other music-related businesses flourished—including other record labels and recording studios, music publishers, collecting societies, record stores, performance venues, and other essential institutions. Those early institutions started the helpful dynamic of competition, cooperation, and shared expertise that characterises such clusters. This dynamic continues to this day.

As told here, the presence of a reliable IPR regime that included copyright protection formed a key component in the transformation of Nashville into a "Music City." While the creative sector is not alone in contributing to the city's economy today, its growth and ongoing success provide a significant source of new wealth and employment. In spite of the musical culture that is by now ingrained in the city's recent history, copyright and the related institutions that ensure it can be used as an effective tool to promote creativity and economic

recordings had been protected under U.S. law since the early 19th century, although the 1909 U.S. Copyright Act allowed performers to record new versions of original compositions under a compulsory "mechanical" license.

¹¹² Kyriakoudes, L.M., (2003), *The Social Origins Of The Urban South: Race, Gender, And Migration In Nashville And Middle Tennessee, 1890–1930*, The University Of North Carolina Press, p.18.

¹¹³ Some of these entrepreneurs included Roy Acuff and Harold Rose, who established the future powerhouse of music publishing Acuff-Rose in the 1940s, and Owen and Harold Bradley who founded the first recording studio on what was to become Nashville's famous "Music Row, where they recorded Patsy Cline and many other legends. See Kosser, M. "How Nashville Became Music City U.S.A.: 50 years of music row" Hal Leonard Corporation, 2006, 10 – 14; 19 – 26.

growth remain as important today as they were during the time of Ralph Peer and the “Bristol Sessions.”

III. Is Copyright Protection the Best Way to Build a Creative Industry?

While most countries would welcome a thriving music industry, the path to achieving one may not seem entirely clear. Since the early 18th century, the music of wealthy countries—particularly the West—has proven to be both culturally *and* commercially successful. During that time, seemingly every type of institutional arrangement has been employed to support music, including patronage, government support, philanthropy, tax policy, tenured university positions, live performance, and commercial exploitation secured by copyright. Although our case study of the birth of country music and Nashville’s success indicates that copyright can be very important to fostering a creative cluster built around music, a policymaker might rightly ask whether copyright is *necessary* given the plethora of alternatives.

This Section briefly surveys and assesses the various institutions that might be deployed to encourage the growth of a music industry. It might seem expedient to some simply to kick-start the music industry by providing government¹¹⁴ or philanthropic support to musicians, rather than waiting on the entrepreneurial activities of modern, local incarnations of entrepreneurs like Ralph Peer and musicians like Jimmie Rodgers. Alternatively, some modern copyright sceptics contend that musicians can now flourish in the absence of copyright by embracing new, “free” business models enabled by changing technology. We contend that neither government support nor free business models is likely to yield a flourishing music industry. Despite recent controversies regarding the best design for copyright law, copyright is the best institutional choice for supporting the development of a commercial music industry.¹¹⁵

We survey the institutions used to support the production of music in three groupings, considering their advantages and disadvantages. First, we examine those that employ direct, centralised means to support musicians, including government subsidies or large-scale philanthropic efforts. Second, we consider alternative, non-commercial forms of distribution and production of music. Finally, we consider the comparative benefits of copyright as an institution for encouraging the development of a commercial music industry.

A. *The Feasibility of Direct Subsidies as a Tool for Building a Music Industry*

¹¹⁴ For example, *The Wall Street Journal* recently reported that “governments are ramping up efforts to export pop music. New Zealand, for instance, has formed a music commission with a \$400,000 budget to support the country’s music acts on tours abroad.” Jurgenson, J., U.S. Repels British Invasion, *The Wall Street Journal*, Saturday/Sunday, September 15 – 16, 2007, W1, W6. At best, such efforts likely represent modestly helpful giveaways to local music industries—minor luxuries in the large budgets of wealthy countries, rather than development strategies.

¹¹⁵ This paper makes the case for copyright as an institution, arguing that artists and their countries would be best served by some form of copyright that is credibly enforced. Given many of today’s debates, this general case clearly still needs to be made. It is thus not our goal to address more specific issues regarding the design of the system, which include issues of scope and duration. Questions of institutional design are indeed essential to a well-functioning property system. Perhaps no better example exists than Hernando de Soto’s landmark work regarding how more effective titling and recording systems could empower the poor. See de Soto, H. (2000), *The Mystery of Capital*, Basic Books.

Direct subsidies are a poor foundation for the development of a music industry because governments and donors are ill-suited to judging commercial viability and encouraging artistic exploration. While large, centrally-directed subsidies have proven counter-productive in many contexts, there are three problems particular to the context of commercial music. First, the information problem: subsidies take decisions out of the hands of those with the best, most relevant information about how to create art that consumers want—the artists and consumers. Second, the artistic independence problem: subsidies tend to interfere with independent artistic judgment. Third, the resource problem: subsidies are a poor use of resources that poor countries in particular can ill-afford.

i. The Information Problem

Philanthropy and direct government subsidy are inefficient ways to foster the creation of a *commercial* music industry because donors and government officials are likely to do a relatively poor job of anticipating consumer tastes well enough to “seed” a music industry. No matter how decentralised governments or charities may be, one great disadvantage they face is in obtaining and processing information. This was one of Friedrich Hayek’s great insights: some systems are too complex for individual humans to comprehend and manage.¹¹⁶ Markets process and coordinate information and transactions far beyond the capability of any institution that centralises authority in individuals. Culture is a very dynamic and complex system, arising from tremendously individualised and unique talents, skills, knowledge, and tastes. Considering the difficulty that centralised economies have in delivering even the most mundane commodities, it seems hubris to think that they could comprehend and control a far more complex system like culture. Market institutions like property rights (the most relevant here being copyright) are far more effective, in part because they push decision-making down to the broadest, most distributed level.

Despite the challenge, some governments have nevertheless tried to subsidise and coordinate culture in a centralised manner. The disappointing results tend to prove the futility of the strategy, at least as a means to the ends of economic development and cultural influence. The most notable example is France, with its Ministry of Culture, which has a budget of about EU 3 billion and well over 1000 employees. France’s strategy is often seen as a counter-point to the US’s perceived non-strategy, which subsidises culture largely through indirect means, if at all, preferring the market to support it. American culture output has proven demonstrably more successful in the world marketplace than French culture. Even the French line up for American movies and listen to American music.

The consolation of many supporters of cultural policy has been that while French culture may be less *commercially* successful, commercially-driven culture is artistically worthless. Even that contention has come under fire. American culture may produce low culture, but it is also responsible for producing an extremely diverse range of highly-valued and enduring works. Movies like *Casablanca* and *Citizen Kane*, jazz artists like Duke Ellington and Count Basie, blues musicians like Muddy Waters and B.B. King, and rock ‘n’ rollers like Elvis Presley and the Beach Boys have enjoyed both commercial and artistic success. As Tyler Cowen has argued, the difference between high and low culture is often only the passage of time and the sorting of gold from dross that occurs with it.¹¹⁷ The conventional wisdom regarding the barrenness of American culture may be wavering a bit even in France, where French cultural critic Frédéric Martel has achieved success with his

¹¹⁶ See Hayek, F.A., (1988), *The Fatal Conceit*, University of Chicago Press.

¹¹⁷ Cowen, T., (1998), *In Praise of Commercial Culture*, Harvard University Press, pp.40-43.

2006 book *De la Culture en Amérique* (On Culture in America).¹¹⁸ Martel documents the flourishing of cultural life of America. He has engendered debate in France by contending that French culture would greatly benefit from decentralisation that would drive more commercialisation of cultural policy. Martel's thesis is supported by the work of Jean-François Revel, who contends that subsidies to the arts have contributed to the demise of the influence of French culture.¹¹⁹

One cannot deny, however, that philanthropy and government subsidies can produce cultural and aesthetic (as opposed to commercial) successes. Sometimes art forms do not find sustainable support in the marketplace but some think they are worth encouraging and fostering. Absent patronage, these activities are typically subsidised through philanthropy or direct government support. For example, symphony orchestras and opera companies would be difficult to support solely through ordinary ticket sales. Demand for live classical and orchestral performances has decreased as popular tastes have gravitated toward other types of music. Those who remained devoted fans found a wealth of less costly substitutes, including live broadcasts and readily available, high quality recordings.¹²⁰ Without charitable organisations, government subsidies, and corporate, individual, and foundation donors, there would be far fewer live performances of classical music.

Whatever the successes of philanthropic and government support for the fine arts, however, subsidies are second-best solutions to supporting the arts. The reason that orchestras and other fine arts organisations seek non-commercial support is because they must. The subsidy model indicates the lack of a healthy, functioning commercial market of the type most desirable to poor countries. It certainly is not the basis for development of a commercial music industry.

ii. *The Artistic Independence Problem*

Government and donor support can also interfere with the artist's input into creative and market processes by reducing his independence. The more centralised funding is, the more it threatens to dampen creativity and interfere with creative freedom. Government decision-makers and, to some degree, philanthropists, will almost inevitably base funding decisions on incomplete, idiosyncratic, or arguably inappropriate criteria. In more centralised systems, the preferences of particular bureaucrats and donors are likely to dominate. While their tastes may be sophisticated they may not be particularly diverse or widely-informed. Elites tend to control decision-making about art funding,¹²¹ and the tastes of the elites are subject to fads and conventional wisdom¹²² (which can be either stodgy or avant garde).¹²³

¹¹⁸ Martel, F., "*De la Culture en Amérique*", Editions Gallimard, 11/2006

¹¹⁹ Revel, J., (2003), "The anti-American obsession", *The New Criterion*, 22(10), p.12.

¹²⁰ For example, J.S. Bach's collected works – 155 CDs of material in the public domain – can be purchased in its entirety for just over \$100. See http://www.amazon.com/Bach-Complete-Works-155-Box/dp/B000HRME5U/ref=sr_1_1/103-0514521-8486202?ie=UTF8&s=music&qid=1178200506&sr=1-1

¹²¹ "A large majority of art lovers and, not surprisingly, politicians and public officials, abhor the idea of letting citizens participate in decisions regarding art. They are absolutely convinced that an elite must decide. They believe, of course, that they themselves belong to those chosen few, and that the decisions taken by them are far better than if they were left up to the public." Frey, B., (2002), "Creativity, Government and the Arts", *De Economist*, 150(4), p.146.

¹²² Frey observed that the repertoires of privately funded not-for-profit opera companies in North America and the repertoires of publicly-funded opera houses in Germany were both dominated by Mozart, Verdi, and Puccini (with the understandable addition of Wagner, Strauss, and Lortzing in Germany). *Ibid* pp.109-110.

¹²³ Cowen notes that "Germany and France, for instance, deliberately sacrifice contemporary popular culture to both older, high culture and to the contemporary avant-garde. These governments restore old cathedrals and

Perhaps more troubling is that government funding is subject to interest group pressures. As public choice theory explains, narrow, well-organised interests have a tremendous advantage in the political process over the more diffuse interests of the public. Particular artists and groups may thus benefit from this dynamic at the expense of the public and other artists. They may do so either by capturing arts funding agencies with their particular views of art, or more crudely, through simple cronyism. Such capture would be a particular concern in countries where government institutions are less credible and where corruption is a problem.

Although funding processes can be designed so as to insulate them from the most overt political pressure, run-of-the mill bureaucratic demands can also have a debilitating effect on artistic freedom. For example, Bruno Frey observes that the uniform, prosaic criteria for government funding tend to clash with the more independent and unique visions of artists. Financial incentives lead bureaucratic mandates to “crowd out” the more creative, intrinsic motivations that drive good art. “In the extreme we have the (so-called) ‘artist’ whose artistic zeal has been completely destroyed by the funds received, who produces junk and is even aware of this.”¹²⁴

iii. *The Resource Problem*

Another disadvantage of government subsidy and philanthropy may override all other considerations with respect to developing countries. These activities depend on the existence of great wealth. They are projects most likely to be undertaken by wealthy governments and individuals.

Even the best-designed subsidy programmes cannot overcome the resource problem, as they rely on the availability of significant disposable income and multiple funders. For example, Tyler Cowen heralds the vast, but extremely distributed, subsidy to the arts that results from the tax deductibility of charitable deductions in the U.S. (representing \$US 26 to 41 billion annually in taxes foregone for donations to the arts).¹²⁵ Bruno Frey similarly notes that where government is decentralised and contributes to the arts at all levels, the varying sources of funding contribute to artistic freedom because artists and art groups need not hew to a single conception of “‘good art’ or even ‘art’ as such”¹²⁶ Such decentralised, individualised and varied systems work at the margins, in some instances preserving well-loved, traditional art forms like the symphony orchestra while in others serving as seed funding for cutting edge new art. The examples provided by Cowen and Frey, however, both depend on the existence of a large amount of wealth. In either case, society must have many individuals wealthy enough to donate their own funds or to pay taxes to numerous government entities that redistribute wealth to the arts.

Even where some resources do exist, governments in poor countries should have higher priorities for the demands they place on taxpayers. They almost certainly will need to find another way to support the arts.

subsidize classic opera and theatre, while simultaneously supporting the extreme avant-garde, such as Boulez, Stockhausen, and Beuys.” Cowen, “Creative Destruction” at 39.

¹²⁴ Frey, B., (2002), “Creativity, Government and the Arts”, *De Economist*, 150(4), p.150.

¹²⁵ Cowen, T., (2006), *Good & Plenty: The Creative Successes of American Arts Funding*, Princeton University Press, p.34. Cowen’s position is particularly notable because he is generally seen as a proponent of free markets.

¹²⁶ Frey, B., (2002), “Creativity, Government and the Arts”, *De Economist*, 150(4), pp.146-148.

B. The Feasibility of Using Technology to Enable Alternative, Non-Commercial Modes of Production as Tools for Building a Music Industry

The possibilities of digital technology have excited great hopes, leading some to suggest that musicians in under-developed countries might be able to succeed outside of the traditional copyright-centred, commercial music industry models. For example, Gilberto Gil, Brazil's culture minister and a successful popular musician, has endorsed a proposal that would place all Brazilian music in an online archive where it would be freely available to download.¹²⁷ Gil asserted that a "world opened up by communications cannot remain closed up in a feudal vision of property. . . . No country, not the US, not Europe, can stand in the way of it."¹²⁸ The most common benefits cited by those who advocate new models enabled by technology are that free distribution can be powerful marketing and that online collaboration is a powerful new low-cost form of production.

Although individual musicians can greatly benefit from employing parts of these models to their advantage, they are ill-suited as the foundation for an entire commercial music industry, particularly in the under-developed world. These new models do not promise to provide musicians, the music business, or their countries with the means to make a living or support significant new commercial activity.

i. Free Music as Advertising

Giving away free samples is undoubtedly an ancient form of marketing, but new technology has made it more attractive than ever for creative works. Newspaper articles, pictures, songs, and other content can be distributed at very low cost in digital form. Therefore, using the internet and other low-cost means of digital distribution to provide free copies is an inexpensive way to introduce consumers to one's work in hopes of driving further demand.

A number of bands have greatly benefited from this strategy. A prominent example in the UK is the Arctic Monkeys, a young "indie-rock" group from the north of England, who gained fame and unprecedented commercial success after distributing free demos at concerts and allowing fans to distribute them freely on the Internet. The foursome spent years hoping to break through in their hometown of Leeds, but only gained nation-wide notoriety after giving away their music. Taking stock of their new found popularity, an independent label, Domino, signed the Arctic Monkeys to a multi-album recording contract. Surpassing all expectations, the band's first album has been the fastest selling debut album in UK history – despite the fact its contents largely reproduced the version to which fans already had access online.¹²⁹ The group continues to do well and at the time of this writing, is enjoying the phenomenal success of its second album, "Favourite Worst Nightmare."

Some argue that the success of bands like the Arctic Monkeys shows that society can now support music production in a fundamentally different manner.¹³⁰ They contend that

¹²⁷ Dibbel, J., (2004), "We Pledge Allegiance to the Penguin", *Wired Magazine*, 12(11), available at http://www.wired.com/wired/archive/12.11/linux_pr.html.

¹²⁸ *Ibid*

¹²⁹ BBC News, (2006), "Arctic Monkeys make chart history", January 29, 2006, available at <http://news.bbc.co.uk/1/hi/entertainment/4660394.stm>, accessed 24 April 2007.

¹³⁰ See, e.g., Anderson, C., (2007), "Give Away the Music and Sell the Show", *The Long Tail Blog*, January 28, 2007, available at http://www.longtail.com/the_long_tail/2007/01/give_away_the_m.html. Anderson, an influential best-selling business book author and editor-in-chief of *Wired Magazine*, contends that "[m]usic as a

new technology has enabled a way to sustain culture at a lesser expense to society, as creative content can now be “transferred at (next to) zero cost”.¹³¹ Without copyright protection, it is argued, the low-cost distribution enabled by the Internet would free people to mix and share existing content, which then would enable and inspire further creation.

One mistake that some proponents of free digital music make is confusing a successful marketing strategy for a particular band like the Arctic Monkeys with a business model for the entire music industry. As Stan Liebowitz and Richard Watt have observed, “even if file sharing helps establish a new musical group . . . it is likely that the sales generated by that new group come at the expense of some other established or up-and-coming group, and that it would be incorrect to generalise this benefit that accrues to a single entity to the entire industry.”¹³²

Another problem with the free advertising model is that any give-away must serve as advertising for *some* revenue producing product or service. Some have proposed that recordings might increase demand for live performances, and that musicians might earn revenue from performing. The problem with this proposal is that musicians in poor countries have long earned what revenue they could from performing. So far, these activities have not resulted in a robust commercial industry. Performance is an activity limited to a particular time and place. In a well-functioning music industry, recordings greatly expand the earning power and productivity of musicians, allowing them to earn revenue anywhere and anytime their recordings can reach.

Technology is greatly changing the music business, but it would be a mistake to conclude that this success heralds an entirely new way of doing business. The modes of marketing are changing. The role of record labels is changing. Many music industry players will not survive these changes. But musicians still need to earn a living. Production costs have declined, but they will always exist. Distribution and marketing costs have declined, but they will always exist. Food, shelter, and other necessities of life needed by those who produce music (as well as the rest of us) are still costly.

Nevertheless, some believe that the digital tide will wash away all copyright-based business models because of the enormous enforcement challenge it presents. The ease of digital copying, networked communications, and consumer electronics innovations such as the iPod all have combined to make file-sharing the bane of the music industry in wealthy countries. One might ask what chance a music industry has in poorer countries in the face of such challenges. We see plenty of cause to answer this question optimistically. First, something that is a challenge in most contexts works to the benefit of the music industry in poorer countries. As a recent study of file-sharing in Vietnam showed, on-line piracy has yet to become a serious issue for creators in less developed countries because of the relative

digital product enjoys near-zero costs of production and distribution--classic abundance economics. When costs are near zero, you might as well make the price zero, too, something thousands of bands have figured out. Meanwhile, the one thing that you can't digitize and distribute with full fidelity is a live show. That's scarcity economics.” As of this writing Anderson is promoting his forthcoming book advocating free business models. See Anderson, C., (2008), “Free! Why \$0.00 Is the Future of Business”, *Wired Magazine*, 16(3), available at http://www.wired.com/techbiz/it/magazine/16-03/ff_free

¹³¹ Robertson, G., (2006), “Interview with DefectiveByDesign”, Digital Music (weblog), August 1st 2006, available at <http://digitalmusic.weblogsinc.com/2006/08/01/interview-with-defectivebydesign/>. Accessed April 25, 2007.

¹³² Liebowitz, S., & Watt, R., (2006), “How to Best Ensure Remuneration for Creators in the Market for Music? Copyright and its Alternatives”, *Journal of Economic Surveys*, 20(4), pp.513, 529.

dearth of Internet penetration in these areas.¹³³ By the time broadband access improves, the experience of creative industries in wealthier countries likely will have shown some ways to co-exist successfully with new technologies.

In fact, we see something better than mere coexistence with technology as the future of the music industry. New technology is drastically reducing distribution, production, and marketing costs. These changes are empowering smaller businesses and individual creators, as they can now reach fans and markets inexpensively and without reliance on major labels and other intermediaries. These new, more streamlined, less cost-intensive business models will particularly suit creative industries in poorer countries, where the margins are thinner and resources more scarce. For these creators, the opportunity to disseminate their own material poses a significant opportunity to capture new marketplaces. This opportunity, we argue, is more significant and will have more of a positive impact than the potential threat posed by file-sharing.

ii. *Peer Production*

Peer production of creative works is a more recent institutional innovation heralded by many as the beginning of the end of the need for pecuniary incentives. The free and open source software movement is the most prominent example of the peer production phenomenon. The online encyclopaedia, Wikipedia, is another. Under this model, volunteers collaborate, donating their time and work to contribute pieces to a collective project. They are typically motivated by some combination of the desire for recognition, altruism, or community spirit. Distribution is facilitated by the extremely low costs of Internet communication. Proponents such as Yochai Benkler see peer production as a liberating force, democratising the production and use of content by freeing it from pecuniary constraints.¹³⁴

While peer production can be an extremely powerful model, it undermines the independence of creators if it is the sole model for supporting creative work. The great virtue of peer production is that it empowers volunteers to overcome collective action problems to produce professional-quality collaborative work. As one of many models of production, it can help build useful tools and thriving communities. If it were the only or primary mode of production, it would tend to undermine creative independence. For example, large systems integrators like IBM value open source programmes because they help them to sell services and products without the cost of proprietary software. IBM and other systems integrators thus pay employees to work on open source projects, and, as employees, they do as their employer requires. If an IBM programmer wishes to pursue his own independent vision, however, property rights such as patents, copyrights, and trade secrets make such a choice far more practicable. With these rights, he can attempt to bargain with investors, define his collaborations with others, and secure revenue from licensees.

¹³³ Domon, K. and Nakamura, K. (2007), "Unauthorized Copying and Copyright Enforcement in Developing Countries: A Vietnam Case Study," *Review of Economic Research on Copyright Issues*, 2007, vol. 4(1), pp. 87-96. The authors found that despite high levels of CD piracy, filesharing was not a significant phenomenon in Vietnam. In fact, interview subjects noted that most people did not know how to use P2P programs. *Ibid* at 92. The authors attributed this lack of file-sharing to conditions still common in most poor countries: most internet access was through internet cafes, as the price of home computers and internet access was prohibitive; few people had MP3 players as they were too expensive; and the use of internet cafes was not conducive to P2P usage, because connections were slow, few computers had CD burners or USB ports, and the charge for access was metered according to time. *Ibid* at 91 - 92.

¹³⁴ See Benkler, Y., (2006), *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, Yale University Press.

Without such property rights, he would find it much harder to secure independence, because he would have no asset other than his labour. He is much more likely to need to work at somebody else's direction as a salaried employee.¹³⁵

Peer production is also ill-suited to artistic works that require the most creative independence—works that require a substantial investment of time and the unique or risky vision of one or a few individuals. Some creative works are not likely to be created by passionate amateurs and hobbyists. Professor Jane Ginsburg describes such works—books, movies, and music—as “sustained works of authorship.”¹³⁶ At the very least, creators need a way to earn a living while they prepare such works, and, more often than not, they need substantial resources to create the works. Creators often use their control of copyright to ensure remuneration for such projects, either attracting investment to support the making of the work or relying on cash flow from earlier projects while creating new works.

If musicians cannot effectively own and control their own works, then they are likely either to remain amateurs or go to work for an employer that makes its revenue in ways other than selling music. The difficulty with such a choice between being either an amateur or an employee lies in the inherent trade-off between artistic freedom and the chance to hone and develop one's talents by earning a living as a musician. Neither model is likely to produce the most talented, creative music. Neither model empowers the artist.

In addition, neither model is likely to fuel economic development based on goods whose primary use is to be enjoyed. Open source software and information goods like Wikipedia created through peer production may indeed serve as infrastructure for other productive activities. Music is less likely to serve as infrastructure and more likely to serve as the “main attraction” around which other activity like concerts, production work, and marketing revolve.

iii. *The Resource Problem*

Even if advertising and peer production were practical business models for the music industry, these business models are unlikely to work in poor countries because of a lack of resources. Some of the more economically advanced mid-income countries like Brazil have a sufficient technology base to enjoy many of the benefits of the Internet and digital technology. It is unrealistic, however, to believe that the music industry in least developed countries will have the resources to employ such technology-intensive models anytime soon. In wealthy countries, sophisticated technology and abundant time and resources provide interesting opportunities for creators in wealthy countries to experiment with radical, new business models. For those whose primary concern is broad-based, basic commercial development, however, there is no need to re-invent the wheel as copyright-based business models have many proven advantages.

¹³⁵ “Open source software and service businesses make life more complicated for employees.” Riehle, D. (2007), “The Economic Motivation of Open Source Software: Stakeholder Perspectives”, *IEEE Computer*, 40(4), pp.25-32. Riehle argues that open source makes employees both more replaceable and mobile, as there are fewer firm-specific skill sets. Employees who are community leaders on open source projects—“committers” in Riehle's terms—have more bargaining power as employees, because of the credibility and cachet they bring. The analogy here would be to a performance hall hiring musicians. Some have more of a following than others and thus may get paid more. But without property rights, they are still employees dependent on their salaries rather than the more liberating possibilities that come with control of one's own creative works.

¹³⁶ Ginsburg, J.C. (1995), “Putting Cars on the ‘Information Superhighway’: Authors, Exploiters, and Copyright in Cyberspace”, *Columbia Law Review*, 95(6) pp.1466,1499.

C. *The Benefits of Copyright*

Copyright is the institution that best serves as the basis for the development of a commercial music industry. Its primary advantages mirror the disadvantages of public subsidies: first, copyright decentralises and widely distributes control over decisions about producing and paying for creative works, making it more likely to foster a popular, commercially-successful industry. Second, copyright vests ownership in the original creator of the work, with the resulting independence and control providing greater economic and creative opportunities. Third, copyright enables creators and their collaborators in the music industry to use their own resources to finance musical creativity, while also placing the risks firmly on their shoulders.

In fact, no other set of institutional arrangements appears to be sufficient to foster commercial cultural industries. All nations have culture, but a commercial industry that supports the creation of mass market films, books, and recorded music has little prospect of developing without copyright and its enforcement. On this point, Keith Maskus' empirical studies conclude that the benefits of copyright are "unambiguous."¹³⁷

i. *The De-Centralisation and Delegation Advantage*

Markets are incredibly efficient systems for processing information. No central authority is responsible for speculating which genres and musicians might best serve as the basis for a successful music industry. Instead, musicians and record labels are left to their own devices to try to determine consumer demand. And it is fairly easy to determine what consumers want—they reveal their preferences by buying music.

The market will provide these signals so long as it is enabled to function effectively enough to entice willing suppliers and willing buyers to participate. Copyright plays an important role in building effective markets in the case of easily copied creative works like music. Musicians and record labels are unlikely to risk the market absent some protection from copying.

The market-making function of copyright also delegates decision-making to those with the most information about what sorts of music are creatively and commercially desirable: Musicians, marketers, and consumers. The people who actually play and consume music are far better judges of the market for music than any centralised authority.

ii. *The Independence Advantage*

As an institution, copyright's decentralised nature makes it both efficient and liberating. Both decisions and risks are widely distributed. Copyright serves as one of the important checks on the potential of other institutions to control culture and ensures there are no centralised arbiters to determine what is appropriate. There only need to be willing creators and willing buyers. Copyright thus encourages social and artistic freedom, preventing governments and philanthropists from using the power of the purse to wield too much influence over culture.

¹³⁷ Maskus, K.E., (2004), "Strengthening Intellectual Property Rights in Lebanon", in Fink, C., & Maskus, K.E., *Intellectual Property and Development*, pp.286, 289.

Copyright allows for greater experimentation among business models and creative visions. Those in the music business are free to take both creative and business risks. They can experiment with new genres, new production methods, and new business models. Some of these experiments will work well. Some will not. But the distributed nature of copyright allows many things to be tried, thus creating a greater chance we will find out what does work.

Another advantage of the independence accorded by copyright is that it enables creators to take advantage of the other institutions described in this Section—patronage, performance, philanthropy, government subsidy, or indirect support. Copyright, like all other property rights, leaves a vast amount of discretion to the owner. Creators can choose to work with a patron, they can take government grants, they can sell their music to corporations, or they can give it away. Copyright creates the possibility of economic independence, but it does not require the creator to pursue this opportunity.

iii. The Resource Advantage

Copyright provides musicians and the music business with the resources they need to finance their own efforts and the responsibility to bear their own risks. The economic foundation of a music industry based on copyright is the ability to own, license, and sell copies of one's own work rather than the dubious prospect of attracting subsidies from cash-strapped governments. Just as important, such payments provide the music industry with the ability to finance its own efforts and to pay for new technology. The prospect of being able to secure a return on successful recordings makes entrepreneurs, companies, and musicians willing to risk investing in new music, equipment, and methods of production and distribution. Even in the context of resource-strapped countries, such pay-as-you-go arrangements are far more viable than other indirect arrangements like subsidies.

iv. What About the Copying Business?

Some policymakers in poor countries may question the value of copyright, as it will inevitably displace workers involved in industries that copy. There seems even greater cause to be sceptical when discussions frame the problem as a trade-off between local jobs and greater profits for foreign record companies, software firms, movie studios, and other non-local creators. This characterisation gives far too little credit to the people in these countries. They are just as creative as people in wealthier countries, and, if supported by copyright and other essential institutions, their efforts will benefit the local economy and culture in excess of any costs.

First, the new business generated by greater domestic protection of copyright is likely to benefit local creators and creative industries the most. Without effective copyright protection, the market for local creative works in less developed countries is likely to be undermined by pirated foreign works. Although the copyright owners of foreign works justifiably object to lost sales and the marginal harm to their business, their work is still likely to be produced, as profits from countries that do protect copyright will support their work. As a result, developing markets with high rates of piracy are flooded with pirated foreign works “subsidised” by profits from foreign consumers. Local creators—and culture—are undermined by this competition, as they cannot finance their work at a competitive price.¹³⁸

¹³⁸ Maskus, K.E., (2000), “Intellectual Property Rights and Economic Development”, *Case Western Journal of International Law*, 32, pp.471, 481. American authors complained of this very problem in the 19th century. See Letters from American Authors, (1886) “International Copyright, Plain Speech from American Authors”, *Century Illustrated Magazine* Feb. 1886, 627-634. Since U.S. law did not protect foreign authors, but imposed

The harm to local creators from piracy is underscored by studies of the effects of piracy in countries with budding creative industries, where local content is often the most significant victim of high levels of piracy. For example, a May 2006 study by L.E.K. Consulting shows that in countries with significant local movie industries and high rates of piracy, local creators suffer most. In such countries, losses suffered by the Motion Picture Association (a collection of mostly American motion picture houses) paled in comparison to the total losses from movie piracy.¹³⁹ In China, the revenue losses incurred by MPA members were US\$565 million, but losses to non-MPA members were significantly higher, about US\$2.7 billion. The results were similar in other places with major local motion picture industries, such as India and Hong Kong. In other words, pirates find a far greater market for local content than for imported content, causing far more losses to the local economy than to foreign corporations.¹⁴⁰

Second, copyright enforcement is likely to generate additional local jobs that compensate for any job losses in copying industries. Most important, it stems brain drain, giving talented creative people the opportunity to remain in their homelands rather than fleeing to more hospitable business climates.¹⁴¹ Also, those involved in the copying industries often are able to redeploy their skills to more creative, sophisticated, higher-paying work in legitimate copyright-based industries.¹⁴² In the end, pirates can move from being adversaries of local creators to business partners, thus creating a win-win situation for their home countries.

While Nashville's story is an encouraging anecdote about how creativity and innovation can be long-run drivers of economic growth, one might reasonably ask why today's artists in poor countries are not duplicating this success. The next Section looks for explanations in the challenges facing Africa's popular musicians. The obstacles that face this group are daunting, as many African nations are not blessed with the same robust institutional climate as Nashville enjoyed.

IV. Where are the African Nashvilles? The Great Potential and the Challenging Reality of African Popular Music

high tariffs on foreign books, U.S. publishers profited by selling English novels at a price that greatly undercut American novel prices. Many modern accounts accuse the modern U.S. of hypocrisy, claiming it used copying to acquire foreign know how when it was a developing country. In reality, the benefits of copying may have been largely concentrated in U.S. publishers who copied English novels. Accounts at the time claimed that the U.S. creative industries were hurt most by copying foreign works. Brander Matthews writing in 1888 surveyed the quantities of books published in the U.S. in preceding years and argued that the overwhelming number of inexpensive editions of foreign works were English novels. Brander Matthews, *Cheap Books and Good Books*, in *The Question of Copyright* 418, 423-27 (G.H. Putnam ed., 2d ed. 1896).

¹³⁹ LEK Consulting, (2006), "The Cost of Movie Piracy", available at <http://www.mpa.org/leksummaryMPA%20revised.pdf>

¹⁴⁰ Although copyright sceptics are often fond of scoring rhetorical points by pointing out that the United States took a long time to protect the works of foreign authors, such rhetoric overlooks the fact that the United States effectively enforced domestic copyright from its very inception. The United States changed its laws at the behest of local creators, in part because they wanted their works protected abroad, but also because their market was being undermined by cheap copies of English works.

¹⁴¹ Gervais, D.J., (2005), "Intellectual Property, Trade & Development: The State of Play", *Fordham Law Review*, 74(2), pp.505,520.

¹⁴² Maskus, K.E., (2000), "Intellectual Property Rights and Economic Development", *Case Western Journal of International Law*, 32, pp.471,481.

Africa has a rich musical tradition just as Nashville did in the 1920s. And, as in Nashville, much of Africa has copyright law—at least since African nations passed laws to comply with their obligations under TRIPS (the Agreement on Trade-Related Aspects of Intellectual Property). One might then rightly ask where Africa’s Nashvilles are.

Sadly, however, experience indicates that home-grown talent and formal copyright legislation are likely necessary, but not sufficient, conditions for building creative industries. Artists in Africa suffer from many specific shortcomings in institutional support for a music industry that must be overcome before they are able to take full advantage of their rich heritage. In spite of these many obstacles, there are good reasons to be optimistic about Africans seizing the potential of the many benefits of creative clusters within their own countries.

A. *Abundant Talent, Abundant Potential*

Nashville is hardly the only, and certainly not the greatest, concentration of musical talent on the globe. For example, a popular off-the-beaten-path travel guide touts Bamako, the capital of Mali, as one of the world’s “musical hot-spots.”¹⁴³ “The West African city’s anarchic collection of neighbourhoods sprawls from the Niger river in Mali, filled with single-story dwellings and women cooking in their courtyards on charcoal braziers. The place feels like one big village, with music everywhere.”¹⁴⁴ The guide continues, “none of this should be surprising, given Mali’s 600-year-old musical tradition. And in the last 15 years, artists like singer Salif Keita and singer-guitarist Ali Farka Touré have shot to international fame, making Mali the centre of West African music and Bamako one of the premier places on the planet to hear it live.”¹⁴⁵

Bamako’s rich musical tradition is typical of many African nations. The colours, fragrances and sounds that form such an important part of African life are manifestations of the overwhelming creativity of the people of the world’s poorest continent. As Tyler Cowen has observed, “African nations, from Senegal to Ghana to South Africa, have been hotbeds of musical creativity since at least the Second World War.”¹⁴⁶ So great is the influence of African creativity that many of the world’s most popular forms of music rely heavily on the rhythms, melodies, and musical traditions of Africa.¹⁴⁷ Judging by modern rock ‘n’ roll, hip-hop, rhythm and blues, reggae, and gospel music, the influence is still strong.¹⁴⁸

The potential of Africa’s music industry is widely recognised. As a recent report from the United Nations Conference on Trade and Development (UNCTAD) observed, the creative industries offer some of the best prospects for high growth in least developed countries.¹⁴⁹ In Ghana alone, one researcher estimated that the Ghanaian music industry

¹⁴³ Editors of *Travel and Leisure Magazine*, (2007), “100 Greatest Trips”, American Express Publishing Corporation.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ Cowen, T., (2004), *Creative Destruction*, Princeton University Press.

¹⁴⁷ See Floyd, S.A. Jr., (1995), *The Power Of Black Music: Interpreting Its History From Africa To The United States*, Oxford University Press, and Maultsby, P.K., (2005) “Africanisms in African American Music”, in Holloway, J.E., *Africanisms In American Culture*, (2nd ed.), p.326

¹⁴⁸ See *ibid.*

¹⁴⁹ UNCTAD, (2008), “Background Paper for Secretary-General’s High-Level Panel on the Creative Economy and Industries for Development”, TD(XII)/BP/4, available at http://www.unctad.org/en/docs/tdxiibpd4_en.pdf

could generate US\$53 million a year from just the world music market if local conditions were more amenable to supporting creativity.¹⁵⁰

In a few spots in Africa, this potential is being realised, at least partly. South Africa's music industry is strong and diverse, with internationally-known musicians such as Hugh Masekela, Miriam Makeba, Ladysmith Black Mambazo, Ray Phiri, and the Soweto Gospel Choir. Zambia has begun to revive its music industry after a near-total collapse in the 1990s.

Zambia's experience illustrates how pioneering entrepreneurs can ignite a creative industry, given the right conditions. Very little local music was being created or played in Zambia, even after passage of a copyright law in the mid-'90s.¹⁵¹ In 1999, a new Zambian record label, Mondo Music Records, sparked a revival. Much like Ralph Peer showed the way for Nashville's early country music pioneers, Mondo showed the way for other entrepreneurs.¹⁵² "[T]here has been exponential growth in the amount of Zambian music being produced in the last seven years, and also in the consumption and the appreciation of it. Right now, Zambian music dominates . . . local radio, and [is] also becoming a little bit noticed outside of the country."¹⁵³ Mondo's founder, Chisha Folotiya, recognises the potential value of a creative industry to his country's economy and to creative individuals. He says "we want Zambian music to contribute towards the economic development of our country. On a small level, as individual artists, retailers, producers, choreographers, dancers who are involved in the music itself, and also at the macro economic level, the entire retail sector, and manufacturing sector."¹⁵⁴

Such bright spots in African popular music indicate that a greater effort to capitalise on its potential would be worthwhile. Conditions seem ripe for the creation of "African Nashvilles." The possibilities for creative industries here are easily visible and seemingly endless. Although it would be far too ambitious to expect creative clusters to transform entire African economies, they present the sort of grass-roots opportunity increasingly recommended by development experts.¹⁵⁵ Ordinary Africans ought to be able to employ their considerable talents to create at least a modest industry, which would be capable of supporting many individuals while enriching the cultural and economic lives of African nations.

Unfortunately, these hopeful examples remain isolated. Despite widely acknowledged potential, the music industry remains beleaguered in most African nations.

B. The Reality

In reality, creative industries in Africa fall far short of what they could be. For the most part, they have yet to contribute significantly to national economic development or

¹⁵⁰ GhanaMusic.com, (2007), "BUSAC Support For Ghana's Music Industry", June 23, 2007, <http://www.ghanamusic.com/modules/news/article.php?storyid=1754> (quoting Professor John Collins, a Lecturer at School of Performing Arts of University of Ghana).

¹⁵¹ Hament, Ellyn, (2001), "Zambia: A Melting Pot of Musical Styles", Exploratorium <http://www.exploratorium.edu/eclipse/zambia/music.html>.

¹⁵² Banning, Eyre, (2006), "Interview with Chisha Folotiya", Afropop, <http://www.afropop.org/multi/interview/ID/102/Chisha+Folotiya-2006>.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ See, e.g., Easterly, W., (2006), *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good*, Penguin.

provide a way for creators to make a relatively decent living. There are as of yet no meaningful comparisons in Africa to Nashville after the 1920s.

African creativity remains an underappreciated and underexploited resource: rarely do creative sectors contribute more than 1 per cent of the relatively low GDPs of any African country.¹⁵⁶ Africa's share of trade in cultural goods constitutes less than 3 per cent of the global total.¹⁵⁷ One researcher estimates Africa's share of the world market for sound recordings at a mere 0.4 percent.¹⁵⁸ By comparison, creative industries employ millions and contribute significantly to national economic production in rich countries – over 11 per cent of GDP in the United States, for instance.¹⁵⁹ European creative industries are the fastest growing industries across the continent, and employ over 4.7 million people, according to 2005 figures from UNCTAD.¹⁶⁰

Despite a few celebrated examples on the world music scene such as King Sunny Ade, Ali Farka Toure, and Youssou N'Dour, African music has yet to become a successful export industry. For example, Senegal is justly celebrated for its illustrious artistic history and for relatively well-known stars such as N'Dour who have been able to transform their musical roots to international success in “outside markets.”¹⁶¹ However, the Africa Music Project estimated that in Senegal only “one dozen of the estimated 30,000 artists enjoy international sales and publicity.”¹⁶² Another study attempted to gauge the number of “internationally recognised [music business] celebrities” in other African countries (with “international” connoting success anywhere outside of their home country, rather than global stardom).¹⁶³ The relatively successful South African music business boasted a high of 22 percent, but the next most successful country was the Democratic Republic of Congo with only 8 percent.¹⁶⁴

To the extent that African creators do succeed, their success often fails to produce economic benefits for their home countries. For example, most African music is recorded in either London or Paris—largely depending on where the artist in question originates.¹⁶⁵ Those products are also most often consumed in Western countries as well. The situation is similar for other creative sectors: “Half of a Yellow Sun,” a tale of a bloody civil war in the early 1970s written by Chimamanda Adichie, is one of the most popular African books in the first decade in the 21st century. But it has sold just 5,000 copies in the author's native

¹⁵⁶ UNCTAD press release, “Creative Industries Emerge As Key Driver of Economic Growth With Trade Nearly Doubling in Decade”, January 14, 2008, available at <http://www.unctad.org/Templates/webflyer.asp?docid=9467&intItemID=1528>

¹⁵⁷ *Ibid.*

¹⁵⁸ Tchewwa, M. (2005), *African Music: New Challenges, New Vocations*, UNESCO.

¹⁵⁹ Siwek, S. “Copyright Industries in the US Economy; The 2006 Report”, Economists Incorporated, prepared for the International Intellectual Property Alliance. Available at http://www.iipa.com/pdf/2006_siwek_full.pdf

¹⁶⁰ UNCTAD press release, “Creative Industries Emerge As Key Driver of Economic Growth With Trade Nearly Doubling in Decade”, January 14, 2008, available at <http://www.unctad.org/Templates/webflyer.asp?docid=9467&intItemID=1528>

¹⁶¹ The popularity of Youssou N'Dour is undisputable, but it should be known that what many consider to be his breakthrough album, *The Lion*, released in 1989, featured a popular song he recorded with already hugely popular Englishman Peter Gabriel.

¹⁶² Penna, et al., *supra* note 3.

¹⁶³ Letts, R., (2006), *The Promotion of Musical Diversity*, UNESCO, available at http://www.unesco.org/imc/programmes/imc_diversity_report.pdf

¹⁶⁴ *Ibid.*

¹⁶⁵ Creative industries in Paris tend to support francophone artists, whereas London is more typically suited to Anglophone musicians and filmmakers.

Nigeria, as opposed to at least a quarter of a million in Britain, where Adichie has won critical acclaim.¹⁶⁶

African musicians are often poorer than their fellow countrymen. The Africa Music Project estimated average income for musicians in Senegal was \$600 per year – fifteen per cent lower than the country’s GDP per capita.¹⁶⁷ The study further observed that “eighty per cent of Senegalese musicians are either unemployed or underemployed.”¹⁶⁸

C. *What’s Missing*

The failure of most African nations to produce healthy creative clusters is disappointing. Although African countries face tremendous challenges, creative clusters would seem to be one of the things that African nations could use to begin growth. So where are the “seekers,” the practical, grass-roots entrepreneurs hailed by development economist William Easterly, who could spark the music industry of Africa much as Ralph Peer triggered the appreciation of country music and Nashville’s prosperity in the United States?¹⁶⁹

The seekers exist, but they are hampered by locally-imposed policies and practices that exacerbate local conditions and undermine the institutions that are intended to empower artists. Unfortunately, these obstacles have thus far presented too great of a challenge for all but a lucky few, individual musicians.

Some obstacles to copyright laws providing support to artists and contributing to the stable foundations that are required for creative sectors to flourish in Africa include the following:

- Lack of reliable enforcement against piracy;
- Lack of royalty payments;
- Lack of licensing fees;
- Irrational, burdensome taxation.

i. Lack of Effective Enforcement Against Piracy

Rights-holders and governments in wealthy countries have complained about piracy in less-developed countries for years, perhaps even centuries, but piracy hurts local creators and the development of local creative clusters the most. Piracy most obviously deprives creators and legitimate distributors of sales, but it also creates a number of other deficiencies that impede the development of local creative clusters, including preventing creators from securing capital to finance their work, pushing the surviving recording industry to developed countries, and undermining local trade.

Piracy levels in sub-Saharan Africa are high, even by the low standards of the world’s emerging markets. Pirated versions of creative works represent *at least* 25 per cent of the

¹⁶⁶ *The Economist*, (2007), “Bleak Publishing Houses”, November 22nd 2007.

¹⁶⁷ World Development Indicators, World Bank

¹⁶⁸ Penna, et al., *supra* note 3, p.98.

¹⁶⁹ Easterly contrasts “seekers,” the promoters of entrepreneurial, grass-roots, local-based development solutions with “planners,” the promoters of vast, ambitious, but often futile, projects. See Easterly, W., (2006), *The White Man’s Burden: Why the West’s Efforts to Aid the Rest Have Done So Much Ill and So Little Good*, Penguin.

entire marketplace across Africa.¹⁷⁰ That figure is as high as 90 percent in some West African countries.¹⁷¹

Throughout sub-Saharan Africa, “there are ineffective enforcement regimes even though the copyright laws are of a strong disposition.”¹⁷² One analysis describes the cause of piracy as a systemic failure of both the public and private institutions that should be combating piracy: “Inadequate funding of enforcement agencies; lack of trained and properly motivated staff [of copyright offices]; stakeholder apathy in the enforcement of their rights; a weak institutional base; poorly trained and paid enforcement (police, customs, and specialised institutions) agents; a cumbersome and tardy judicial systems; and unorganised stakeholders are at the heart of the ineffective regimes in sub Saharan Africa.”¹⁷³

In essence, the pirates are better organised and more successful than either their victims or those tasked with combating them. In Senegal, the Africa Music project observed that “pirates have more means at their disposal than those responsible for policing them.” They further observed that “criminals guilty of wide scale commercial piracy are often pardoned because of well-placed connections within local government.”¹⁷⁴

In places where life is already hard enough, such conditions are not merely unfair—they have tragic consequences. Alhaji Sidiku Buari, President of the Musicians Union of Ghana, has described how all of these unfortunate realities conspire against creators in Ghana: “A musician will do his music and somebody else reframes it and gets all the money in his pocket. . . . Our musicians have no social security, no insurance, no pension scheme and most of them die as paupers.”¹⁷⁵ Creators’ hard work and talent is betrayed by a poor institutional climate. As Orrack Chabaagu, Director of EMI South Africa has observed, “It is unfortunate that after one has gone through thick and thin to produce his music, he does not live to enjoy its results because of piracy.”¹⁷⁶

Piracy also hampers individual musicians from securing capital to finance their creative work or other ventures. Their primary potential assets—their copyrights and the revenue streams that should result from them—are effectively worthless. As a result, musicians are unable to obtain loans from local financial institutions, thus forcing them to pay for instruments, recording time and other business expenses up front and out of their own pockets.¹⁷⁷

The problem is the same one recognised by Hernando De Soto in his acclaimed work on real property in the developing world: without clear, enforceable property rights, the poor

¹⁷⁰ Penna, et al., *supra* note 3.

¹⁷¹ *Ibid.*

¹⁷² Nwauche, E.S., (2003), “Intellectual Property Rights, Copyright and Development Policy in a Developing Country: Options For Sub Saharan African Countries”, Copyright Workshop at Zimbabwe international Book Fair, presented June 30th, 2003.

¹⁷³ Nwauche, E.S., (2003), “Intellectual Property Rights, Copyright and Development Policy in a Developing Country: Options For Sub Saharan African Countries”, Copyright Workshop at Zimbabwe international Book Fair, presented June 30th, 2003.

¹⁷⁴ Penna, et al., *supra* note 3.

¹⁷⁵ Ghana Billboard, Interview with Alhaji Sidiku Buari, Ghanamusic.com, http://ghanamusic.com/artman/publish/article_1309.shtml (December 4, 2004).

¹⁷⁶ Government Urged to Enact Tough Laws to Address Piracy in Music Industry, Ghanamusic.com, http://ghanamusic.com/artman/publish/article_1809.shtml (April 28, 2005).

¹⁷⁷ *Ibid.*

have no assets with which to secure loans and other capital. They are thus prevented from climbing the economic ladder, as such capital is typically necessary to ascend to more secure status.¹⁷⁸ The experience of African musicians shows that De Soto's insight regarding physical property applies to IPRs as well.

Ineffective enforcement of copyright has led to a host of other unintended and self-defeating consequences, including pushing the production of African music out of Africa. For example, the late 1980s in Ghana saw most legitimate music businesses, such as production houses and factories, shut down due to competition from piracy. Because of piracy, "Ghanaian musicians fled to other countries, thereby creating a vacuum in the industry."¹⁷⁹ Zambia's experience was the same, where a once "massive music industry" faded to almost nothing in the early '90s, as local record production shut down because of competition from pirate cassette tapes and lack of foreign exchange.¹⁸⁰

There are many factors that might weigh towards local production, including lower labour costs, local knowledge and familiarity with local tastes, the existence of some production infrastructure, and convenience. Yet in spite of all of these potential advantages, recording and production in the UK or France is often still the wiser choice, which exacts a further opportunity cost to local economies in lost jobs, lost local income, and lost spending on related goods and services.¹⁸¹

The tolerance of rampant piracy also thwarts the development of regional markets for music. Piracy not only deters non-African companies from investing in the development of the African marketplace, but also acts as a barrier to intra-Africa trade as well.¹⁸² Kenyan copyright experts estimate that of all the content emanating from creators across the border in Tanzania, material from just two artists is legitimately sold in Kenya, despite both countries sharing at least two common languages, English and Swahili.¹⁸³ The forgone investments represent an important loss for two creative cultures that could potentially feed off each other in order to develop new, techniques, styles, and markets. The missed opportunity suppresses the creation of jobs and wealth in desperately impoverished East Africa.

ii. Lack of Royalty Payments

A well-functioning music industry looks at least partly to the long-term. One-hit-wonders and fads are common phenomena, but in a healthy environment most of the players hope and strive for more stability. Artists and record labels are motivated to produce, aggressively market, and widely distribute well-crafted recordings that will sell for years to come. One of the hallmarks of such a well-functioning system is the opportunity for

¹⁷⁸ De Soto, H., (2000), *The Mystery of Capital*, Basic Books.

¹⁷⁹ Norley, N., (2007), "Musicians Bemoan Fall of Industry", *Ghanaian Chronicle*, Feb 7th, 2007, available at <http://allafrica.com/stories/printable/200702070880.html>

¹⁸⁰ *Interview with Chisha Folitya*, Afropop <http://www.afropop.org/multi/interview/ID/102/Chisha+Folitya-2006> (2006). As discussed earlier, the Zambian industry revived at the turn of the century after the efforts of pioneering entrepreneurs and passage of a copyright law.

¹⁸¹ It should also be noted, however, that large expatriate communities, originating from the same countries where many African creators come from, now reside in the UK and France. These communities constitute a growing market demanding "home-grown" music.

¹⁸² The Africa Music Project notes that non-African copyright owners are still largely unwilling to license their property to the African marketplace. Penna, et al., *supra* note 3.

¹⁸³ Wabala, D., "Kenya: Illegal Trade in Pirated Music Gets Bloody As Dealers Scramble for Control" *The Nation*, 25/03/2007 <http://allafrica.com/stories/200703260049.html>, accessed 28 March 2007.

musicians to earn royalties on the sale of recordings. Although not every record makes enough to pay significant—or any—royalties, the opportunity to receive royalties encourages a focus on long term sales.

The inhospitable environment created by piracy for the music industry in under-developed countries tends to lead to instability and a short-term, limited focus.¹⁸⁴ Outside of South Africa, there are few substantial, financially stable record labels.¹⁸⁵ The recording industry tends to be a fragmented, fly-by-night business with irregular distribution. For example, industry observers in Ghana complain that the local record industry employs a “peculiar and unique” distribution system where many retail outlets sell the work of only one particular record label, making it frustratingly difficult for fans to find recordings.¹⁸⁶

The lack of stability makes royalties impracticable as a business strategy, which in turn harms quality and leads to further short term thinking and strategic behaviour. Recording artists try to collect as much revenue as possible in the short-term, exchanging their future (and largely theoretical) royalties for one-off payments from record companies.¹⁸⁷ They then offer very similar work to other recording companies in exchange for further one-off payments. Record companies in turn anticipate that duplicative output and competition with piracy will lead to a brief sales cycle, and thus tend to underpay artists for their work, which further perpetuates the supply of largely unimaginative material. While this vicious cycle of deteriorating quality may seem to be against the interests of all those involved, the environment makes it hard to escape.

Even when royalties are part of the bargain, the promise often goes unfulfilled. For example, in Senegal, royalties are supposed to be collected by the Bureau Sénégalais du Droits d’Auteurs (BSDA), but it rarely succeeds in rewarding artists appropriately, as royalty payments are inconsistent at best.¹⁸⁸ Artists also accuse the BSDA of over-charging for its services.¹⁸⁹ In other sub-Saharan countries like Kenya and Ghana, the recording industry has also been accused of utterly failing to account for royalties.¹⁹⁰

iii. Lack of Licensing Income and Problems with Collecting Societies

A well-functioning, robust music industry creates many creative and financial opportunities for creators besides selling recordings and earning royalties from sales. Many of these opportunities are facilitated by licensing. Composers and musicians license their work for broadcast on radio and television, for cover versions of songs, for inclusion in movies, television, and advertising, and increasingly, for derivative uses, like the creation of re-mixes and ring-tones. All of this activity expands creative clusters, making them even more significant and beneficial to creators and the local economy.

Unfortunately, most African musicians are not enjoying the benefits of licensing their music. Some of this failure results from shortcomings in the legal system, but the real

¹⁸⁴ Penna, et al., *supra* note 3.

¹⁸⁵ Tchebwa, M., (2005), *African Music: New Challenges, New Vocations*, UNESCO, 2005. pp.52-53. .

¹⁸⁶ *The Ghanaian Chronicle*, (2007), “Carlos Sakyi Slams Ghana’s Music Distribution System”, July 6th, 2007, available at <http://news.thinkghana.com/entertainment/200707/6540.asp>

¹⁸⁷ Penna, et al., *supra* note 3.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ See, e.g., GhanaMusic.com, (2008), “Carlos Sakyi returns Sidiku’s fire”, Jan 12th, 2008, available at <http://www.ghanamusic.com/2008/01/12/carlos-sakyi-returns-sidikus-fire/>

problem regarding licensing is the lack of effective, dependable collective rights organisations (CROs). CROs are the mechanism employed in much of the developed world to secure payment for artists for various small uses of their works. The small size of each potential transaction makes transactions costs far too high for individual parties to pursue agreements or to enforce their rights. CROs remedy this problem by granting blanket licenses in exchange for aggregate subscription fees, which are then allocated to copyright owners in proportion to the use of their works.

Unfortunately, it appears that many CROs are not doing their jobs well in Africa. There are widespread complaints that the amounts bear no relation to the actual frequency of play by radio stations or other public venues.¹⁹¹ Radio stations and other music distributors in Senegal withhold sales information from the BDSA, making it impossible to determine how to allocate royalties.¹⁹² There have been particularly bitter complaints in Ghana, where musicians have claimed that officials of the Copyright Society of Ghana and the government copyright office have corruptly diverted the royalties they do collect.¹⁹³ CROs in Senegal and Ghana, as in many other less-developed countries, have no effective system for monitoring how much a work gets played, which would determine the basis of fair distribution of royalties.¹⁹⁴

Another problem is that many CROs are managed by the local government or are government-sanctioned monopolies. Such arrangements undermine the effectiveness of CROs by making them less accountable to their members. Such is the case in Senegal, as the Ministry of Culture controls the BDSA and in Kenya, where the “Music Copyright Society of Kenya” is the only collecting house in the country, as sanctioned by the Kenya Copyright Board.¹⁹⁵ CROs in Nigeria can only operate with the explicit approval from the government-controlled Nigeria Copyright Commission.¹⁹⁶ Restricting competition provides little incentive for collecting agencies to respond to artists’ concern. According to the Africa Music Project, “distribution [of royalties], when it takes place, is a political process rather than an objective one.”¹⁹⁷

Government involvement with CROs can also threaten the independence of musicians. In fact, artists in Ghana have accused the Chairman of the Ministry of Culture-controlled Copyrights Office of withholding payments from artists in an attempt to influence the content of their music.¹⁹⁸

¹⁹¹ “Ghanaian musicians are worried!”, <http://www.myjoyonline.com/tools/print/printnews.asp?contentid=1407>. Accessed Mar 20th, 2007.

¹⁹² Afrik.com, (2001), “Les radios sénégalaises ne paient pas leurs artistes”, July 10th 2001, available at <http://www.afrik.com/article3021.html>

¹⁹³ The charges are hotly disputed, as Alhaji Buari who is Acting Board Chairman of Copyright Society of Ghana has filed a libel suit against a newspaper that repeated the charges. Ghanamusic.com, (2007), “Alhaji Sidiku Buari Sues Weekly Fylla”, April 4th, 2007, available at <http://www.ghanamusic.com/modules/news/article.php?storyid=1368>

¹⁹⁴ GhanaBase.com, (2007), “Respect the Rights of Ghanaian Musicians – Carlos Sakyi”, April 20th, 2007, available at <http://ghanabase.com/archives/news/2007/1018.asp>

¹⁹⁵ <http://www.mcsk.or.ke/>

¹⁹⁶ For a complete description of the Nigerian Copyright Commission’s responsibilities, see: <http://www.nigeriafirst.org/cgi-bin/artman/exec/view.cgi?archive=1&num=6616&printer=1>

¹⁹⁷ Penna, et al., *supra* note 3.

¹⁹⁸ The Chairman of the Copyright Office of Ghana, Alhaji Sidiku Buari, is allegedly withholding more than US\$6 million that is owed to musicians. He is accused not paying artists and attempting to exert influence over their content. Personal communication on March 3rd, 2008 with Franklin Cudjoe, Executive Director, IMANI, Accra, Ghana

As the ongoing controversy in Ghana demonstrates, when government controls a creative person's livelihood, there is a temptation to use that control as a lever to influence political discourse. For example, a station manager for a radio station in Dakar has said government stipends earmarked for local radio stations tend to arrive "only during election time."¹⁹⁹ It is not hard to imagine similar leverage being used against provocative creators. While freedom of speech is an important liberty across the world, it is especially precious in Africa, where few media outlets are truly independent. According to the most recent Freedom House rankings, the vast majority of African countries are either "not free" or "mostly free". Just eight countries are viewed as "free".²⁰⁰

iv. Burdensome Taxes

Counterproductive taxation specifically aimed at the music industry also impedes its growth as a creative cluster. Governments impose taxes specifically targeted to musical instruments and other aspects of the music industry.²⁰¹ These taxes make a tough business that much tougher.

One particularly troubling target of taxation is live performance. Given the other difficulties the music business in Africa presents, musicians often try to scrape a living together through live performances. Unfortunately, live performances are centrally organised and well publicised, which leads tax collectors to concentrate on this activity. Thus this business is often impeded by unclear and pernicious levels of taxation.

One example of this burdensome taxation comes from Ghana, which has a confusing tax on tickets sold for live performances. In Ghana, officials have shifted what used to be a 25 per cent surcharge on ticket sales on to an indeterminate Value Added Tax.²⁰² The situation is similar elsewhere: a hefty 25 per cent duty and an additional 16 per cent Value Added Tax is levied on live performances in Kenya.²⁰³ The result may not be difficult to predict: as described by "Dou Dou" Sow, a well known musician in Senegal interviewed by the Africa Music Project who lives in deplorable conditions in Dakar, "there are less live performances today than in the old days because there isn't enough money [to perform]."²⁰⁴ Anecdotal evidence from the Africa Music Project illustrated how complicated tariffs were levied on imported musical instruments, pushing the cost of putting on live performances out of reach for artists struggling to make it from one show to the next.

Counter-productive barriers imposed through poor public policies prevent small-scale entrepreneurs with few resources – the epitome of the African artist – from engaging in productive economic activity. Long waiting times and overly complicated requirements put what should be simple tasks, like registering property and trading with foreigners, out of reach for poor, struggling artists. These frustrating realities are quantified by Doing Business, a World Bank project that measures the difficulty of engaging in entrepreneurial activities. It estimates that it takes an *average* of 33 procedures and 780 days to enforce a

¹⁹⁹ Penna, et al., *supra* note 3..

²⁰⁰ Freedom House Map of Freedom in the World, available at <http://www.freedomhouse.org/template.cfm?page=363&year=2007>

²⁰¹ Penna, et al., *supra* note 3.

²⁰² *Ibid.*

²⁰³ Personal correspondence with Michael Andrews, Managing Director, Kenya Association of Producers & Videograms.

²⁰⁴ Penna, et al., *supra* note 3.

contract in Senegal. It takes a further 6 procedures and 114 days just to register a property.²⁰⁵ Clearly these issues are of concern across the entire economy. However, these barriers to engaging in entrepreneurial activities pose particularly significant obstacles to artists who already scrape by with fewer resources than the average citizen.

V. What to do? Policy Recommendations

The challenge facing creative industries in Africa demonstrates that the passage of a copyright law alone is unlikely to benefit creators or stimulate the development of creative clusters. While this fact is disappointing, it is hardly surprising. As we discussed earlier,²⁰⁶ experience and research have shown that IPRs are necessary, but not sufficient, for realising the full benefits of local creativity and innovation.

Africa's experience with copyright law thus far is yet further proof of Nobel laureate Douglass North's mantra that "institutions matter."²⁰⁷ The Nashville success story includes some elements that only become truly visible when we contrast it with the struggles of the African music industry. A creative cluster cannot be based merely on talent and nominal laws. Unless they are implemented effectively and enforced, copyright laws provide little support to artists, anywhere. Moreover, related institutions, such as effective collecting societies and distribution channels suited to the local economy, are also essential.

The failure of African development aid has illustrated that there are no silver-bullet solutions to development. Top-down, projects directed by technocrats have often proven to be ineffectual at best and sometimes do more harm than good. When such development projects fail to account for the many obstacles to individual initiative in poor countries, they are unlikely to achieve their goals. That unfortunate reality has undermined the benefits of projects ranging from building hydro-electric power plants to the enactment of new laws. To make matters more difficult, initiatives that focus on empowering individuals and private sector institutions, such as liberalising markets, property rights legislation, and efforts like micro-loans have proven more promising, but also often fail in isolation.

Developing solutions to improving the lot of the poor is more challenging and complex than any would wish and some are willing to acknowledge, but progress is not impossible. Perhaps the only obvious suggestion is that governments should not feel compelled to deliver the "everything to everyone" solution. People need to have the worst obstacles removed from their paths. Once unleashed, the energy and genius of individuals will do most of the work.

While the specific barriers that significantly burden creative industries in poor countries might appear to be overwhelming, we contend that a concentrated focus by creators, private industry, civil society, and policymakers on a limited number of areas could energise local creators and local economies.

Improvements in the following areas would remove many of the obstacles to building local creative clusters:

²⁰⁵ Doing Business Database, World Bank, available at

<http://www.doingbusiness.org/ExploreEconomies/?economyid=164>

²⁰⁶ See supra notes 32-44 and accompanying text.

²⁰⁷ See Douglass C. North, *STRUCTURE AND CHANGE IN ECONOMIC HISTORY* 201 (W.W. Norton & Co. 1981).

- Prioritise creative clusters;
- Foster private capabilities;
- Enact copyright laws that benefit local creators;
- Implement and enforce intellectual property laws effectively;
- Privatisise and enhance royalty collection;
- Reduce taxes and regulatory burdens on the music industry.

A. *Prioritise Creative Clusters.*

The creative industries are an important opportunity for less-developed countries, as they present a key opportunity to grow sooner rather than later. A recent UNCTAD report recognised this potential, concluding that the “creative industries ... seem to be a feasible strategic option to diversify the economies of developing countries ... including least developed countries, by offering new venues for those countries to leapfrog into value added high-growth sectors of the emerging creative economy.”²⁰⁸ Certain creative industries that are already able to tap into existing local talent and skills, like music industries in Africa, hold particular advantages for poor countries because they represent “low-hanging fruit.” While thriving music industries clearly require considerable individual skill and training, they do not rely on extensive formal education or require the development of sophisticated physical infrastructure. A focus on creative clusters as we suggest here thus requires far less patience, technology transfer, and outside funding than many other industries.

Prioritising creative clusters requires political will and legal and institutional reform. What is required is the right legal environment—no simple task, but one that is more manageable when focused on empowering specific industries. While governments sometimes devote extra resources to enforcement in order to mollify trading partners, we advocate a greater, sustained effort to ensure that the copyright system is supportive of *local* creators.²⁰⁹ In the case of creative clusters, like African music industries, we believe that the relatively modest specific investment is warranted by the likely economic and social payoff.

Devoting specific resources to the creative industries can provide a strong foundation for spill-over growth in other sectors by providing quick growth and demonstrating that local industry can thrive in under-developed countries without government or donor subsidy. As the aforementioned UNCTAD report observes, creative industries are among the fastest-growing economic sectors in *both* developed and some developing countries.²¹⁰ Not only will the early growth of creative industries benefit creators and the local economy, it can

²⁰⁸ UNCTAD, (2008), “Background Paper for Secretary-General’s High-Level Panel on the Creative Economy and Industries for Development”, TD(XII)/BP/4, available at http://www.unctad.org/en/docs/tdxiibpd4_en.pdf ..

²⁰⁹ TRIPS compliance merely sets minimum standards, largely focused on treatment of foreign IP owners. It does not require a special effort with respect to IPRs—as Article 41(5) of TRIPS makes clear, countries are not required to prioritise IPR enforcement when allocating judicial and enforcement resources.

Article 41(5) states:

It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.

TRIPS, Article 41, available at http://www.wto.org/english/tratop_e/trips_e/t_agm4_e.htm

²¹⁰ *Ibid*

provide a moral victory, showing that home-grown industries and home-grown culture can compete and thrive.²¹¹ Such proof of the benefits of markets is essential.

We do note, however, that creative industries are unlikely to prosper in the long run if the rest of the economy is not liberalised. Ultimately, the creative sector alone cannot drive the economy, nor can it flourish without financially healthy local customers and investors. Many of the policies we suggest here—e.g., greater enforcement of property rights, more effective courts, and regulatory and tax reform—would benefit the economy if applied generally across all sectors. And they should be.

B. Foster Private Capabilities.

The efforts of private actors are the most important to the development of a creative cluster. Governments play a necessary, but limited and discrete role in such development by building the legal and administrative infrastructure of healthy IP systems. Beyond this clearly defined role, governments are poorly positioned to take on greater responsibilities, such as promoting or financing particular artists or art forms. For poor countries, encouraging private creativity by emphasising the rule of law is also the most economically feasible policy.

Private actors, like musicians and record labels, do most of the work in building successful creative clusters through both healthy competition and co-operation. Healthy competition largely results from individuals working to better their own lives. With a proper enabling environment (as discussed in the rest of the recommendations below), people will endeavour to build careers and businesses on their own behalf provided they see the prospect of a reward. So long as the government does not tilt the playing field, a healthy competitive environment will result.

In addition, however, recent work on using economic clusters to encourage development shows that certain forms of cooperation among competing entities are essential.²¹² Clusters tend to form and prosper where the members of an industry build formal and informal institutions that support the industry.²¹³ Trade associations, business organisations, and informal social networks are needed to accomplish goals of mutual concern and, most important, to share knowledge and facilitate business transactions. In the case of a music industry, these kinds of institutions can engage in collective enforcement of rights, promote artists, and encourage collaboration and information sharing.

One example of such cooperation that would particularly benefit industries in poor countries is the effort among creative industries in wealthy countries to combat piracy. Business rivals pool their efforts to combat the collective problem of piracy through a number of trade associations such as the International Federation of Phonographic Industries (IFPI), International Publishers Association, Recording Industry Association of America (RIAA), Motion Picture Association, Business Software Alliance, and the Industry Trust for IP Awareness. Pirates typically do not specialise in the works of any one business, so it is more effective to pool private resources in order to combat them collectively. Moreover, these

²¹¹ Penna, et al., *supra* note 3, p.97.

²¹² See Porter, M.E., (1998), *The Competitive Advantage of Nations*, Free Press.

²¹³ See Porter, M.E., (1998), "Clusters and the New Economics of Competition", *Harvard Business Review*, 76(6).

organisations develop specialised knowledge and skills in combating piracy that is best housed and shared in one place, rather than scattered among many players.

Creative industries in Africa would greatly benefit from following such examples by forming their own trade organisations to combat piracy. Indeed, there are already examples of such laudable efforts, including the Professional Musician Association of Ghana. Governments are not well suited to creating such organisations because they have inadequate incentives to represent the interests of artists and to respond to their concerns objectively and effectively. Moreover, the leadership and demand has to come from within the organisation. Instead of taking the initiative themselves, governments could play a more appropriate role by fully cooperating with and supporting such organisations in their enforcement efforts.

Businesses the world over have also long supported promotional and morale-boosting efforts like chambers of commerce, industry marketing campaigns, and annual awards for excellence. There are reasons such institutions endure: they promote a certain positive self consciousness among industry participants, promote the region as a good place for this sort of business, and make the public aware of the virtues of the industry's products. Creative industries in many countries, including some lesser-developed countries, embrace such efforts, particularly with annual, national awards recognising the best recordings in various industries.²¹⁴ Such efforts would likely do much good to underscore the importance of local creativity to the cultures and economies of their homes.

All these cooperative efforts also serve as a platform for all-important informal social networks. Economic clusters thrive on the cross-pollination that occurs from business collaboration, shared expertise, and employees switching jobs. In the music business, this kind of networking results in creative innovation, technical refinements in recording, and innovations in financing and marketing. These advantages serve as perhaps the greatest reason for participants of the creative industries in poor countries to come together in cooperative efforts to build and promote their industry.

The area of private capabilities is one where developed world donors, civil society organisations, and specialised agencies like the World Intellectual Property Organisation can provide helpful technical assistance. Each country has its own unique circumstances, but there is much to learn from the experience of successful business models, technical issues like recording, standard form contracts, marketing, combating piracy and other business issues.

This kind of grass-roots, demand-driven assistance is exactly what is called for by the mandates of various international organisations. For example, article 67 of TRIPS calls upon wealthy countries to provide assistance in implementing the agreement.²¹⁵ The general consensus resulting from the Development Agenda talks was that WIPO should increase and

²¹⁴ For example, an annual Ghana Music Awards has existed since 2000. See <http://www.ghanamusicawards.com/>

²¹⁵ Article 67 states:

In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel. TRIPS, Article 67, available at http://www.wto.org/english/docs_e/legal_e/27-trips_08_e.htm#art67

improve its technical assistance to less-developed countries. While some of these activities may be profitably focused on government officials—for example sharing best legal practices—private sector actors like creative businesses and individual artists should receive much of the attention.

However, the most productive assistance is likely to result from helping successful businesspeople to share their knowledge and expertise with their counterparts in the less-developed world. There are a number of salutary examples of such programmes. One project used experienced world music industry marketing professionals to train a group of African musical professionals before sending them to pursue opportunities at MIDEM, a large international trade fair for music.²¹⁶ Another project assisted the organisers of the “Festival in the Desert” music festival in Mali by bringing in successful festival professionals to “twin” with the local staff members who hold equivalent jobs.²¹⁷

C. *Enact copyright laws that benefit local creators.*

IP strategies in under-developed countries should strive to support and promote local inventors and creators. Simply honouring international obligations is not enough, as greater “fine tuning” is likely needed to maximise local benefit.²¹⁸ To benefit local creators, a country’s IPR laws ought to include the following features beyond the minimum that TRIPS requires.²¹⁹ In keeping with this paper’s positive focus on creative clusters, particularly the music industry, the following recommendations regarding the contents of local IP laws are focused on copyright and related rights for that potentially-lucrative sector:

- Provide for effective injunctive remedies against infringement;
- Create and employ monetary remedies sufficient to deter infringement;
- Ensure that trade associations can bring enforcement actions on behalf of members;
- Institute reasonable criminal penalties for copyright piracy;
- Make rights and transfers of rights easy to record and track.

i. Provide for effective injunctive remedies against infringement.

Given its crippling impact on recording industries in most less-developed countries, laws need to provide for swift action against piracy of sound recordings. Although Article 44 of TRIPS already requires the availability of injunctive relief, it is essential to provide swift, affordable remedies that immediately halt the distribution of infringing works. If IP owners are required to fight to the conclusion of a case before receiving relief, pirates have the upper hand as they are making money while the IP owner suffers lost sales and the cost of litigation. For particularly egregious infringement, therefore, swift, emergency relief ought to be available, even before the identity of the infringer is ascertained. Outside of such emergency situations, preliminary relief pending trial also is necessary. For these remedies to be effective, even in civil cases, copyright owners need the cooperation of law enforcement to seize and impound the infringing products.

²¹⁶ http://portal.unesco.org/culture/en/ev.php-URL_ID=28581&URL_DO=DO_TOPIC&URL_SECTION=201.html

²¹⁷ http://portal.unesco.org/culture/en/ev.php-URL_ID=23272&URL_DO=DO_TOPIC&URL_SECTION=201.html

²¹⁸ See supra notes 14-20 and accompanying text for a discussion of how framing IPRs as a trade issue detracts from understanding how they could benefit local people and businesses.

²¹⁹ See supra notes 32-44 and accompanying text for a discussion of the limitations of relying solely on TRIPS-level protection to secure local benefits from implementing IP laws.

ii. Create and employ monetary remedies sufficient to deter infringement.

Predictable financial remedies large enough to deter infringement are particularly important, as they make piracy a less attractive business. Article 45 of TRIPS requires only compensatory damages and the availability of expenses. It also permits, but does not require, attorney fees and payment of pre-established damages. Several African countries give courts discretion to award “additional damages . . . as the court may consider appropriate in the circumstances” where the infringement is flagrant.²²⁰ While this approach is helpful, its utility is limited because it is confined to special cases at the court’s discretion.

Pirates are more likely to be deterred by the availability of sufficiently large pre-established damages, at the defendants’ option, in ordinary cases. If damages – or even an accounting of profits – are the only available remedies, then the pirate’s potential financial risk mostly consists of being forced to disgorge his profits *if* he is caught and held liable. In such situations, damages are merely a business expense rather than an effective deterrent. Attorneys’ fees and pre-established damages predictably raise the pirates’ financial risk, reducing the incentive to engage in pirating activity.

iii. Ensure that trade associations can bring enforcement actions on behalf of members.

As discussed earlier, members of creative industries should be able to cooperate in order to combat piracy. The law should facilitate such action by permitting trade associations to bring infringement suits on behalf of (and with the permission of) their members. In some countries, only registered collecting societies can bring such suits on behalf of members,²²¹ while in others only the copyright owner can bring suit.²²² These restrictions make it more difficult to tackle piracy. More liberal standing rules would greatly facilitate cooperative efforts. The law should also provide for the cooperation of law enforcement to impound pirated goods and execute judgements against pirates.

iv. Institute reasonable criminal penalties for copyright piracy.

Criminal penalties are important, as they add an additional level of deterrence against the most egregious, but financially lucrative acts of piracy. Indeed, Article 61 of TRIPS requires that countries establish criminal laws to deter copyright piracy, as well as trademark infringement.

Nevertheless, more is not always better where criminal penalties are concerned. Some countries enact and occasionally enforce harsh criminal penalties, sometimes in response to pressure from trading partners. For example, the Chinese head of the Food and Drug Administration was recently executed on grounds of the continued prevalence of counterfeit medicines in China – and under pressure from the flow of sub-standard goods into

²²⁰ Kenya, South Africa, Zimbabwe, and Nigeria all employ this language in their copyright acts in nearly identical provisions. The Kenyan copyright act is available at http://www.wipo.int/clea/docs_new/en/ke/ke012en.html#P186_22134 ; the South African at http://www.wipo.int/clea/docs_new/en/za/za002en.html ; the Zimbabwean act at http://www.wipo.int/clea/docs_new/en/zw/zw001en.html ; and the Nigerian act at http://www.wipo.int/clea/docs_new/en/ng/ng001en.html#P203_18719 .

²²¹ See, e.g., Copyright Law of Nigeria, Sections 15, 15A, available at http://www.wipo.int/clea/docs_new/en/ng/ng001en.html#P203_18719

²²² See, e.g., Copyright Law of Mozambique, Section 59, available at http://www.wipo.int/clea/docs_new/en/mz/mz002en.html#P386_36415

the United States.²²³ While such actions create a strong impression, they likely are counterproductive. If penalties seem excessive to local sensibilities, then local law enforcement and courts are less likely to apply them, thus making the laws less of a deterrent in reality.²²⁴

To create an effective deterrent, criminal laws should make sound recording piracy unprofitable and risky and the penalties should be reasonable enough that authorities are willing to apply them routinely.

v. Make rights and transfers of rights easy to record and track.

Property rights are far more effective when people can establish ownership easily and potential licensees and buyers can locate owners quickly and at low cost.²²⁵ Creators ought to be able to register their copyrights easily and cheaply. In addition, it would be helpful to develop a system for recording assignments, licenses, and other transfers. Many wealthy countries have complicated and inefficient systems for tracking ownership, but are able to overcome them.²²⁶ People in less-developed countries are less likely to be able to afford the transaction costs associated with deploying similar systems of ownership tracking, but can easily avoid them in starting new, more efficient systems from scratch that simplify registration and clearly define rights-ownership.

D. Effective implementation and enforcement of intellectual property laws.

Regardless of the content of IP laws, they are unlikely to do much on their own without effective implementation and enforcement. As Robert Sherwood says in his aptly titled paper, “Some Things Cannot Be Legislated,” “until judicial systems in developing and transition countries are upgraded, it will matter little what IPR laws and treaties provide.”²²⁷ Even the best designed law means little if government is unwilling to play its part in enforcement efforts and courts lack the expertise, resources or tools to implement it. While ineffectual enforcement and poorly functioning courts are symptoms of a lax IPR regime, they provide insufficient grounds for trade sanctions – an available but little explored option for trading partners under the TRIPS agreement.²²⁸

Outside of adhering to the rule of law, two aspects of IP law implementation and enforcement are important to healthy creative clusters. First, both government and creative industries must focus on reducing levels of piracy if the creative industries are to have any

²²³ *Associated Press*, (2007), “China executes former FDA chief amid product safety crisis”, July 10th, 2007, available at <http://www.cbc.ca/world/story/2007/07/10/china-tainted-products.html>

²²⁴ See Mark F. Schultz, (2007), “Copynorms: Copyright Law and Social Norms”, in Yu, P.K. (ed) *Intellectual Property And Information Wealth vol.1*.

²²⁵ De Soto, H., (2000), “The Mystery of Capital”, Basic Books.

²²⁶ Thus the discussion in the United States about the “orphan works” problem, where users and potential licensees find it impossible to track down owners of many older works.

²²⁷ Sherwood, R.M., (2002), “Some Things Cannot Be Legislated”, *Cardozo Journal of International and Comparative Law*, 10, p.42.

²²⁸ As Peter Yu observes, developing countries like China have enforcement failures in many areas and it is thus hard to claim that foreign IP is being specially disadvantaged. Yu at 215 (noting that “Article 41(5) of the TRIPS Agreement state[s] . . . that a WTO member state is not required to devote more resources to intellectual property enforcement than to other areas of law enforcement”). Robert Sherwood also notes that trade representatives are unwilling to pursue sanctions based on poor judicial treatment of IP rights, as the problem is hard to distinguish from poor judicial performance generally. *Ibid*, p.42.

meaningful foothold. Second, judges need sufficient training and tools to adjudicate the claims of creators effectively.

Governments must devote resources to combating piracy. Anti-piracy efforts are one of the key ways in which the political will to prioritise creative clusters becomes manifest in action. Governments should designate law enforcement personnel and resources to fighting piracy.

Anti-piracy campaigns should be highly visible and well-publicised to magnify their effectiveness and change public perceptions of piracy. One of the foundations of any deterrence strategy is convincing offenders they are likely to be caught.²²⁹ Visible enforcement efforts have an important educational element, informing potential pirates of the law and conveying a new commitment to enforce it. By contrast, in most poor countries, non-existent or minimal enforcement conveys the message to pirates that their actions are not considered serious offences. Moreover, pirates currently have every reason to believe that they are unlikely to be sued or prosecuted. Enforcement campaigns could also change public perceptions of the morality of piracy, changing buying habits and making the business of piracy less socially acceptable.

Realistically, however, the people with the most at stake—the creative industries—must take the lead in combating piracy. While governments must take a visible role in combating the most egregious pirates, their resources are limited and constrained by other priorities. Musicians and producers of recordings will need to combine efforts on their own behalf. In many wealthy countries, private parties also play a significant role in combating piracy. As we discussed earlier, trade associations investigate piracy and bring enforcement actions on behalf of their members. Individuals also secure cooperation of law enforcement authorities or bring civil actions. These sorts of cooperative activities are a potentially successful strategy for poor countries, as local trade associations could pursue pirates on behalf of their members. Such enforcement efforts can even be largely self-financing where damages are available. Government can be a partner in supporting these efforts by providing cooperation and providing law enforcement help to seize pirated recordings. A pre-condition for effective private sector enforcement, however, is being able to count on the court system to enforce rights.

Courts need the proper training and tools to combat piracy. One way to improve the efficiency of courts may be to allow judges in courts of general jurisdiction to volunteer to take IP cases. This proposal is currently being considered in the United States²³⁰ and has also been advocated for courts in poor countries.²³¹ The advantage of this proposal is that scarce training resources and experience can be focused on a smaller number of judges.

Finally, all participants in the system—law enforcement, private parties, and judges—need to be educated regarding IP. They need proper technical training regarding the content and implementation of the law, and could very well benefit from technical assistance that

²²⁹ Mark F. Schultz, (2007), “Copynorms: Copyright Law and Social Norms”, in Yu, P.K. (ed) *Intellectual Property And Information Wealth vol.1*, pp.201, 217.

²³⁰ See “An Act to establish a pilot programme in certain United States district courts to encourage enhancement of expertise in patent cases among district judges”, H.R. 34, 110th Congress, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h34>

²³¹ Sherwood, R.M., (2002), “Some Things Cannot Be Legislated”, *Cardozo Journal of International and Comparative Law*, 10, p.42.

conveys the experience of their counterparts in more developed countries. But they also need to be educated regarding the significance of the creative industries to their countries and the impact of their enforcement efforts.

In addition, the other parts of the legal system need to function fairly well. Much of the effective use of IP is based on contracts, so a well-functioning IP system depends on enforceable contracts. Courts also must be guaranteed independence from political forces, who are subjected to intense lobbying from vested interests. Political immunity grants the courts and the justice system the sole tasks of administering the rule of law, which sets important precedents for society to observe, and provides the basis for long-term investments that are essential to the development of knowledge-based industries.

E. Privatising and enhance royalty collection.

A healthy music industry pursues opportunities and partnerships with many other industries by licensing its music for performances, radio, and use in ring-tones and films. The licensing market is either not working well or not working at all in many poor countries. Much of this activity would be facilitated by other suggestions we make, but there are a few, specific challenges to healthy licensing markets as a result of counter-productive policies that many countries could and should remove.

In many instances, licensing is administered by collective rights organisations (CROs) rather than through individual transactions between copyright owners and licensees. These transactions particularly make sense where the uses are high volume but of a low individual value, such as for radio broadcasting, jukebox play, or performances in dancehalls, cafes or other venues. In these cases, individual negotiations would impose a high transactions cost. A common solution to this challenge is to create a CRO, which issues a blanket license to a licensee in exchange for a periodic fee. In many, but not all, countries, CROs are government organisations or government-chartered monopolies.

Creators in less-developed countries would likely benefit greatly from independently audited, private CROs that compete with one another.²³² The experience of some countries shows that the music industry is quite willing and capable of creating its own CROs.²³³ Private entities are particularly desirable in less-developed countries, as they relieve resource-starved governments from chores like rate-setting and royalty collection and place the responsibility on the beneficiaries, who have the greatest incentive to expend resources efficiently to get the job done right. Private CROs are also more likely to remedy many of the complaints of African musicians regarding the ineffectiveness and improper influence of government-run or government-sanctioned CROs.

One problem that many African artists have complained about is poor, over-priced service from publicly controlled CROs.²³⁴ If CROs were privately controlled and competed – or at least contended with the possibility of competition – for members, they would have stronger incentives to serve their clients responsibly. Also, as observed earlier, privatising

²³² We also think that private, competitive CROs would work best in developed countries as well, but that is a discussion for another day.

²³³ For example, in the United States, composers' rights are administered by three competing, private organisations: The American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.

²³⁴ See Section IV(C)(iii).

royalty collection frees up scarce public resources and places the burden of collection on those with the greatest reason to do so effectively and efficiently.

Another problem of which African artists complained is that CROs are politically influenced to play favourites in collecting and paying out royalties.²³⁵ Whatever the validity of this perception—doubtless true in many cases—the existence of the perception alone is damaging. Creators who invest their time and those who invest in producing and distributing their work need a credible commitment that any success they have will actually benefit them. Privately operated CROs would be less inclined to engage in the corrupt activities that plague existing state monopolies and would greatly increase confidence in the system.

A welcome development would be the emergence of private, pan-African collecting societies in competition with one another. Such organisations could take advantage of economies of scale and talent across different countries, offering a range of artists the possibility to market their work throughout the continent and beyond.

F. Reduce taxes and regulatory burdens on the music industry.

Governments in poor countries sometimes impose excessive and regressive taxes and regulations on creative and innovative activities. While they are hardly alone among the governments in the world in pursuing such policies, they can particularly ill-afford to burden such poor populations with such costs. Artists report high taxes on musical equipment and public performance.²³⁶ If a country chooses to prioritise creative clusters, as we contend they should, then such burdens should be reduced or scrapped altogether.

Lower taxes on these activities directly related to the arts incentivise more artists to create and to promote their work directly to the public. Since innovation and creative work have such tremendous positive ripple effects, it is important not to burden their creation, lest one lose the many downstream benefits.

Generally speaking, reducing the overall burden of taxation will be a significant boon for creators, but it is important to note that a more favourable business environment across Africa will reap massive dividends for the world's most regulated region. In terms of cultural output, a glance at the top of the World Bank's Doing Business rankings identifies all the countries that are currently thought of as cultural hotspots. From vibrant London in the 18th century London to Hollywood today, freer economies with credible, stable, and decentralised institutions foster creativity and tend to attract bright talent, regardless of its original location.²³⁷ With brain drain a growing concern, African economies would do much to stop their loss if talented local creators and innovators were able to secure more benefit from their work at home.

Conclusion

Nashville's unlikely emergence as a multi-billion dollar hub for country music provides important lessons for establishing and supporting the potential growth of African creative industries. Without the likes of risk-takers like Ralph Peer and seminal moments

²³⁵ Ibid.

²³⁶ See Section IV(C)(iv).

²³⁷ See Cowen, T., (1998), *In Praise of Commercial Culture*, Harvard University Press.

such as the “Bristol Sessions”, “Music City U.S.A.” might never have been what it is today. Without the conditions that gave Ralph Peer and the artists that contributed to the “Bristol Sessions” the opportunity to earn a return on their bet that country music could be a popular music genre, “Music City U.S.A.” certainly would not be what it is today.

Africa's experience with intellectual property rights is yet further confirmation of the fact that institutions—the laws, customs and norms within which people act and interact in any society—matter. The right institutions allow knowledge industries to prosper. They empower creators through an enabling environment that allows them both to compete with one another and to co-operate to undertake mutually beneficial activities. The wrong institutions can cause creativity to wither. The trying experience of African musicians is a testament to this fact.

Yet their experience need not be so painful. Creativity is mankind's potentially most abundant resource but it does not represent a free lunch. Protecting property rights is an essential component to developing knowledge-intensive industries, regardless of where they are based, but they are only one component. No matter how much production and distribution costs may fall, creators still need to make a living.

Creative industries, particularly popular music, are "low-hanging fruit" that could greatly benefit African economies if the right circumstances are achieved. Their development requires less investment and government-led oversight than many think, and certainly far less than heavy industries or more technologically advanced businesses. Given slightly better conditions, creative individuals can do most of the hard work of building a prosperous industry. The reforms suggested here would help countries to take the essential next step beyond stronger IP laws to building institutions that competently employ the intellectual property Africans already create to fostering creativity, innovation and economic growth.

Although a thriving popular music industry would hardly help all Africans lift themselves from poverty, its success would be an important moral, economic and cultural victory for African entrepreneurs. Moreover, the reforms that stimulate its success would also generate stable conditions for other entrepreneurial efforts based on local talents and tastes to follow. Additional benefits would likely have a strong exemplary effect, leading to increased support and demand for the rule of law throughout society. For the protection of IP in poor countries to achieve any of its significant potential, a plausible way for locals to benefit from this protection needs to be demonstrated. Reforms in just a few key areas would provide all the impetus that is needed.