



## Digitisation and cultural democracy, an (as yet) unfulfilled promise

by Joost Smiers

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## Digitally more active citizens?

We have been surrounded by, and dependent on, digital information and communication technologies for at least two decades and they have now lost their novelty, so this is the right moment to discuss a question that has been burning in our minds for some time: have these new digital information and communication technologies made us more active citizens as far as cultural expression is concerned? Was this not the promise and expectation when we were first confronted with all those endless possibilities that the digital world would offer us? Most of us had become passive consumers of what the entertainment industry and advertising media served up, but it was thought that digitisation would result in a radical change in this laid-back attitude. However, I am not so sure that this actually happened.

However, I must confess, numerous, amateurs, play a musical instrument, alone, in a band, or in an orchestra, they sing in a choir, write poems or short stories, dance, paint, design, act in theatre or musical performances, take photographs, and make films, mostly not helped, or hindered by new digital tools. It is as if they do not find these new inventions useful for the performance and exertion of their creative pleasure. Basically, this is not a problem. Thus, I must correct myself. These cultural amateurs are not passive citizens; it is just the opposite, one may say. They are very active.

This observation sets us thinking. To start with, why do all those millions of people apparently feel that they can manage very well without the attraction of the new challenges? When I consider the diversity of creative opportunities available via the new media, I am amazed that the amateur world has so little appetite to try them out. Is using these new tools either too complicated or still too expensive? Perhaps, but I am not inclined to think that is the real reason, which might in fact be that amateurs generally copy the examples provided by the professional art world. They are also given training and guidance by professional artists. It is significant that, if digital and electronic media have been used by professional artists, the tendency is to refer to their work as experimental. However, an experiment is the exception and not the rule.

Let me reflect a bit more on those cultural amateurs. As mentioned, substantial parts of our population express themselves via creative means. So I wonder, why this seems to be a world apart from the general entertainment and visual environment that surrounds them daily? Think about the background music in the shopping malls, the blockbuster films, the music channels, the huge amount of advertisements. Consider the fact that those amateurs hardly ever, proudly, go out in the public space with their work. It stays inside the walls of their homes or neighbourhood centres. It is as if they refuse to find their work more interesting and more worthwhile than what the large scale commercial media offer.

Isn't it a bit schizophrenic: millions of people create and perform simply for the pleasure it contributes to being themselves, which provides other intensities, feelings of belonging, and aesthetic meanings than what the publicly available and dominant media spread around in the public space, on television, and in the entertainment centres they regularly visit. They are active in their own surroundings, but as citizens they behave, in general, as passive consumers in regard to what the commercial media offers them. Yes, this is schizophrenic; can we explain why this is so? This is what I will try to do in this text. Then, we have to think about the cultural ambiance that surrounds us nearly every moment of the day. This has been, to a great extent, structured and influenced by the ongoing and overwhelming market dominance of a few cultural, entertainment and information conglomerates, that exercise their power by having extensive intellectual property rights, and the control over production facilities,



distribution channels, and marketing. We must discuss those phenomena extensively, and see how they keep us from being culturally active citizens.

### **Sampling miles of footage but no unleashing of digital artistic creativity**

Before attempting to analyse existing market structures, I have to acknowledge that many people use the digital media to distribute content that they have sampled themselves, most of it involving existing music and images amounting to millions of hours and miles of footage. Those expressions of creativity would be expected to make the culture industries' offerings completely redundant. Why should millions of people still be interested in, and open their wallets to pay for, entertainment from the cultural conglomerates that has been produced on an industrial scale in standard formats when they can enjoy creations that are much more fascinating – or, indeed, are not so fascinating? Is it mostly the work of well-meaning individuals – quick and dirty, but no substance? Is there not a lack of reasoned criticism that distinguishes between crass rubbish and works that make sense? If there really were any cultural substance on the YouTubes of this world, I would assume that most of those involved in providing it find the glamorous world of industrial scale entertainment dull and not worth paying any attention to, let alone spending money on.

However, when we look around, the aforementioned entertainment and advertising media are still very much alive and are doing economically better than many other branches of industry today. And, it must be said, the most astonishing fact is that only a few companies currently control the entire distribution of artistic fare on the internet, where market consolidation is even more present than in the old analogue world. Nevertheless, the public are not running away in large numbers. Apparently, having the freedom to be culturally in charge is not what most people are interested in. Digitisation may hold out the promise that a radical change, with very many passive consumers becoming culturally active citizens, can be brought about, but this does not seem to be happening.

As already intimated, most artists do not stray outside those areas from which they derive their experience, and there is no unleashing of professional digital artistic creativity. Nor are artists beginning to take over the creative public mental space hitherto dominated by a handful of cultural conglomerates. Professional artists could do this if they changed their attitudes. They could fascinate individuals from different classes and backgrounds with digital creations if they only wanted to do so and were prepared to educate themselves in the areas concerned. No doubt people would find those creations more attractive and fascinating than those claimed by the culture industry to be great art. Am I exaggerating? I think not. When I have seen this happening, I realised that all the perceived or real barriers keeping many people away from non-industrial arts no longer existed.

At present, however, this is nowhere near becoming a reality. Why not? Is it not the case that such works are currently neglected by the big cultural industries because of the ephemeral aspect characteristic of digitisation of the possibilities offered? Their business model involves products with a fixed form that can be milked for decades rather than the kind of creations that exist for a moment and then disappear from view, perhaps turning up in completely different shapes in unexpected places. This ephemeral, highly interesting and promising aspect of digitisation has no chance in the context of big business. As long as the cultural landscapes in our societies stay under the control of a handful of market dominating conglomerates, I expect the challenging opportunities that digitised artistic expression has to offer to remain underused.



After all, it is those conglomerates that control the flow of money in the culture industry and persuade us to agree to what they find acceptable and enjoyable. Is this not the reason why there are no genuine artistic developments in the field of electronic arts that reach out to large and diverse audiences and buyers? The market-dominant culture industries influence what we find attractive and occupy our cultural mental space. Seen from this perspective, the tremendous cultural efforts of amateurs, the millions of sampled creations on the internet and the great works of art created and performed by artists who draw on centuries-old experience and styles do not seem to matter. Much less, as noted above, expecting an unleashing of digitised artistic creativity.

Accordingly, the challenge is to construct relationships that no longer involve market domination and a virtual monopoly on taking decisions on what we are to see, hear and read – relationships where there is a much greater chance of a large number of artists not only being able to express their views but also to communicate and resonate with many different audiences and buyers, and where professionals and amateurs no longer hesitate to enjoy the challenge of digitised art. This means a level playing field where many different forms of artistic expression are brought to audiences who feel they have their own choices to make about artistic and cultural matters and are no longer steered in one particular direction by cultural businesses that have so far dominated the market and whose extensive marketing activities have distorted competition.

In order to understand what problem has to be solved to bring about substantial cultural democracy and properly functioning cultural participation – as well as to provide an opportunity for ephemeral digital artistic expression – a substantial proportion of this analysis needs to be about how the giants of the culture industry have managed to establish and, so far, maintain their unearned position of dominance, followed by a discussion of what can be done about it.

In this context, it is impossible to avoid referring to the intellectual property rights that, combined with control over cultural production and distribution as well as extensive marketing facilities, give the few companies that dominate the market a very big say, in fact too big a say, over how we experience our cultural communication and what we make of it (too little from the point of view of democracy). It is also necessary to state why genuine digital opportunities for artistic creation and performance are underused, one reason simply being that the market-dominant culture businesses are afraid that their products (their word for cultural expression) protected by intellectual property rights, such as copyright, will be stolen. Every digital product can easily be “stolen”, changed, or adapted, which is the last thing that these companies, which insist on full control over their “property”, want to see. Unexpected outbursts of digital creativity are accordingly not in their interests, but from the point of view of democracy they should, and could, be in ours.



## The privatisation of our common cultures

Why are intellectual property rights, such as copyright, and, for example, patents a serious problem for what we are trying to achieve, namely cultural democracy and a reasonable income for most artists and their small and medium-sized enterprises instead of only extremely large incomes for a few "stars"? After all, the little research done into artists' copyrights shows that "a very small proportion of artists are able to make a living from their copyrights". (Chiscenco 2009: 134) This makes Ruth Towse conclude that "copyright generates more rhetoric than money for the majority of composers and performers in the music industry". (Towse 2004: 64)

The concept of intellectual property rights hinges on the word property, for which there is some evidence for putting the two together. However, this is less obvious than it appears, for two reasons. Firstly, the concept of property itself is as slippery as an eel. Property is the relation between two or more individuals or institutions with respect to an object or item. The crucial question for defining the concept of property, then, is who may exclude the other from its use. We may agree that since the advent of neoliberalism the right to exclude, and thus also privatise, something that used to be held in common has become a generally accepted substantial right. There is no reason to believe that this is the most reasonable outcome of the continuing social struggle about who is entitled to appropriate the means of production, for example. (Kapczynski 2010: 29)

On the other hand, we are faced with situations in which property relations are virtually unregulated, such as places where there are no land registries, no clear land titles, no provisions for the proper enforcement of long-term contracts and so on. (Heller 2008: 155) Countries in which this is the case will have a hard time developing functioning economies. In short, there may be too many or too few property claims or various situations in between. At the same time, it might be clear that in relation to an item of property no two persons or institutions can claim to be the legitimate owners at the same. This might happen but it could result in considerable conflict.

It is fascinating to note that, basically, such a conflict of interests cannot exist with regard to artistic expression or any kind of knowledge. This is the second reason why using the concept of property, and practice in the context of intellectual creations and inventions is beside the mark. Those expressions of the human mind are non-rivalrous: if person A uses a certain piece of knowledge, or sings a melody, then person B can do so too, and the knowledge and the melody do not become less important and A does not possess less than before. The knowledge and artistic expression stay precisely the same and remain at A's disposal.

During the last two centuries this basic reality has been disregarded, at least in the Western world, for several, perhaps understandable, reasons. Who will invest in the development of a new piece of knowledge or artistic expression if someone else may commercialise it the next day? However, economists, like Adam Smith "have carefully documented the problems of monopoly. Because there are no countervailing market forces, government-enforced monopolies are particularly dangerous. Intellectual property is one type of government-enforced monopoly." (Boldrin 2008, ch. 1, p. 5) Adam Smith, but also Jeremy Bentham, John Stuart Mill, and Edmund Burke, for example, thus opposed it "as unnecessary and damaging to competition and claimed that there were other ways to stimulate creativity and artistic innovation. That view was still being expressed in the 1960s by the few economists writing on this subject." (Towse 2004: 54) Therefore, at the end of this essay proposals will be presented of these other ways to stimulate the development of artistic innovation, especially the active use of digital expression.

## Thinking about intellectual property rights in the digital context

When we think about intellectual property rights, an overwhelming number of arguments and facts make us reflect on why they do not serve the purposes we might have in mind, such as promoting digital creations that are, virtually by definition, ephemeral.

Intellectual property rights can be considered as providing protection for investments, which is understandable. However, there are some disadvantages to be noted too. Carlos M. Correa observes that there are many reasons to believe that intellectual property right protection will benefit large firms the most. "Such firms are the best positioned (technically and financially) to acquire intellectual property rights and to enforce them both domestically and in foreign markets. They account for the majority of patent applications and grants." (Correa 2004: 220,1) As an instrument, they are not very helpful for small and medium-sized enterprises, nor in the cultural sectors, and are certainly not appropriate for the development of digital artistic creations.

This means that big companies have established very considerable protection for their investments and accordingly can and will invest very large amounts, for instance to launch stars, bestsellers and blockbusters. By doing this, they push the smaller, cultural, enterprises aside and consign them to the margins of the markets. These are the companies that act as guarantors for the development of diverse artistic expression and ultimately ensure that digitisation can really come into its own. At the same time, these big companies dominate markets in terms of production, distribution and, certainly, marketing on such scales that distort competition. In his analysis, Ronald Bettig says that "copyright and patent laws, most often enacted and enforced by the state, legitimized the concentration of ownership of inventions, art, and literature in the hands of the expanding capitalist class." (Bettig 1996: 17)

If this were the kind of society we aspire to, that would be no problem. If real competition between companies and a broad diversity of producers and content were the purpose, then the system of intellectual property rights fails. It supports massive investments in the production of a few global music stars and blockbuster drugs but limits the chance that most other artists will be heard, seen and read. I will come back to the fact that these huge conglomerates actually freeze our cultures, which is the opposite of what we must have for the development of unexpected and ephemeral digital creations.

Why should decision-making on investments in knowledge and artistic creativity be in private hands and why should intellectual property rights be protected at all, Amy Kapczynski wonders: "But why is private property superior, say, to community-negotiated rules . . . ?" (Kapczynski 2010: 29) Moreover, what should we think, for example, about the productions of Disney, which is itself the greatest champion of intellectual monopoly and has taken everything from the public domain. "The economic argument that these great productions would not have been produced without intellectual monopoly is greatly weakened by the fact that they were." (Boldrin 2008, ch. 2, p. 17)

Disney freely used themes that came from everywhere. However, we are not supposed to use the material from a Disney film and change its message. When it comes to Disney, and other intellectual property rights holders, we allow our cultures to become *frozen*. They are the only ones who may decide how material will be used, or changed, and in what contexts. Is this democratic? Rosemary Coombe provides an impressive analysis of what is at stake: "Culture is not embedded in abstract concepts that we internalize, but in the materiality of signs and texts over which we struggle and the imprint of those struggles in consciousness. This ongoing



negotiation and struggle over meaning is the essence of dialogic practice. Many interpretations of intellectual property laws quash dialogue by affirming the power of corporate actors to monologically control meaning by appealing to an abstract concept of property. Laws of intellectual property privilege monologic forms against dialogic practice and create significant power differentials between social actors engaged in hegemonic struggle." (Coombe 1998: 86)

Actually, digitisation embodies all the possibilities what Rosemary Coombe so beautifully calls "dialogic practice". However, the market-dominant culture industries are imprisoning us in frozen cultures. Do not touch our "products", these industries say: we decide how they will work and we decide that they will stay the same as they are forever. This is at odds with the fluidity held out as a promise by widespread digitisation.

We all know that James Watt improved the steam engine, but what most of us do not know is that in his partnership with Boulton he vigorously enforced his patent against infringers and improvers. This held up new developments for around two decades and it was only with the expiry of his patent in 1799 that the flood of pent-up innovation was released. The evidence suggests that Watt's efforts to use the legal system to inhibit competition set back the industrial revolution by a decade or two. (Pollock 2006: 5; Boldrin 2008, ch. 1, p. 3) With this and many other examples in mind, James Boyle concludes that "an author-centered regime is frequently economically irrational. It does not even serve the goals it is supposed to. An author-centered-regime can actually *slow down* scientific progress, *diminish* the opportunities for creativity, and *curtail* the availability of new products". (Boyle 1996: 119) This is in fact what we may observe with regard to the development of electronic artistic expression and the active citizen participation it promises.

In order to justify exclusive claims to knowledge and artistic expression, something like the function of an author had to be constructed. This is supposed to be the person who invents and creates and is mainly driven by his or her own ability to be original. However, is it really the case that someone can be so original that it is justifiable to give him or her the exclusive right to the use of a work and everything that looks like it and to do so for many decades? A court recently ruled that even an unrecognisable one-and-a-half-second sound clip was copyright-protected and permission was required before the clip could be sampled. (Heller 2008: 14) Of course, this is an aberration. However, the daily reality is that the public domain is inadequately considered and rarely conceptually developed in juridical contexts. No one represents the public domain or acts as its guardian. (Coombe 1998: 97,8)

At the same time, we may be aware that the creator of innovation also always borrows ideas and information from others. (Drahos 2002: 2) The intellectual property system, and its author function, can pretend to have a measure of legitimacy as long as we are blind to the importance of the commons for the development of new knowledge and creativity and deny that there are substantial sources from predecessors that contribute to the creation and invention. One person always creates on the shoulders of others.

This should make the drafters of intellectual property laws less inflexible, but the opposite is the case. Amy Kapczynski again: "In countries such as the United States, for example, intellectual property rights have become broader (covering more kinds of information), deeper (giving right holders greater powers), and more punitive (imposing greater penalties on infringers). Supplemental measures have also been introduced to increase the technological control of rights holders and to counter the way digital technologies facilitate copying." She calls this shift a second enclosure movement. (Kapczynski 2010: 24)



The headline of an article in the International Herald Tribune (18 August 2011) indicates quite shockingly what is actually happening: *Patent deals are the rage, but innovation might be a victim*. The article states that Google was willing to pay \$12.5 billion for Motorola Mobility in no small part because of its stockpile of 17,000 patents. In June 2011, Apple and Microsoft teamed up with four other companies to pay \$4.5 billion for the 6,000 patents held by the bankrupt Canadian telecommunications maker Nortel Networks. "This patent gold rush has a darker side", the analysis goes. "It is diverting money for innovation from industries crucial to the economic future of the United States. So the very innovation patents were intended to encourage suffers in patent wars. The result is that it now pays to sue over patents as a routine business practice."

It should not be surprising that, where intellectual property rights represent considerable value, piracy and counterfeiting are rife. What industries ask the state to do is defend their private interests and enforce their intellectual property rights. "Property rights that cannot be enforced are worth little. Enforcement requires the participation of civil courts and specialist tribunals. Increasingly, criminal law enforcement agencies have begun to play a much greater role in enforcement as states have moved down the path of criminalizing infringement of IPRs." (Drahos 2010: 201) Actually, the states with large numbers of intellectual property claims are preparing the so-called Anti-Counterfeiting Trade Agreement (ACTA), the purpose of which is to introduce a global enforcement agenda.

Moisés Naím is not optimistic that enforcement of intellectual property rights will have a great chance of succeeding and that the fight against piracy and counterfeiting (as well against soft and hard drugs) can be won, on either an industrial or an individual scale. Not because of a lack of motivation on the part of the intellectual property owners but because the illegal producers, traders, forgers and exchangers of artistic material and medical drugs are many times more motivated. Digitisation therefore helps them enormously. He states quite plainly that we do not have the resources to fight all supposed and real evils and have to prioritise the deployment of our tracing mechanisms and legal and penal systems. He therefore sets out two principles as guidelines. First of all, the economic value of illegal trading has to be drastically reduced: "Drive out the value from an economic activity, and its prevalence will diminish accordingly." The second principle is to reduce social harm.

When setting priorities, it is clear that the criminal traffic in women, children and human organs has to be combated, as does corruption, illicit earnings and illegal arms trading. These activities tear into the fabric and culture of a society. He concludes that the fight against piracy and counterfeiting (as well against soft and hard drugs) will clearly have to be given up at the same time as the instrument of intellectual property rights. However, when there is no value to be reaped, illegal activities no longer make sense. He advises developing different structures and relations in markets where intellectual property rights are no longer necessary. (Naím 2005: 252)

Perhaps the most delicate question to discuss is whether artists, and other inventors, deserve a moral right in their work. It was only late in the nineteenth and subsequently in the twentieth century that the (romantic) idea developed in continental Europe that artists should be the only people to decide on the use of their work and that the integrity of the work – and their personhood as authors – should be respected.

One might be sceptical about placing artists upon such a pedestal. "It is entirely possible that in a given society very elevated ideas can be entertained concerning art even though that art is conceived as an art of imitation in which technical virtuosity, indeed erudition, constitutes the preponderant element, and not as an expression of the authorial personality." (Saunders





1992: 98) Here, Saunders seems to be saying how digital arts develop. It should also be noted that even the concept of copyright, not to mention moral right(s), are not mentioned in the 1948 United Nations Universal Declaration of Human Rights. Article 27.2 provides: "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author" but does not state how this should be done.

When we start to consider how out of date the concept of moral right is – according to the wishes of the artist and, especially, the culture industry, a work should not be touched and should stay frozen – we realise that digitisation puts an end to it and helps us to take the last step in leaving behind the idea that a work is sacred and should stay in its original form forever. According to Chris Anderson, "(t)he traditional line between producers and consumers has blurred. Consumers are also producers. Some create from scratch; others modify the works of others, literally or figuratively remixing it. In the blog world, we talk about 'the former audience' – readers who have shifted from passive consumers to active producers, commenting and blogging right back at the mainstream media." (Anderson 2006: 83)

In our book *Imagine there's no copyright and no cultural conglomerates too ...*, Marieke van Schijndel and I brought up an issue that occupies the minds of many artists: If we decide that moral rights – in addition to exploitation rights – are unjustifiable, then we are still left with one question: should artists have to stand by and watch their work being adapted or changed without having any say in it? In fact, there is no choice, and this will naturally be an extreme culture shock for some people, although it will not be felt as such in most cultures where copyright, and therefore moral rights too, have never taken root. Incidentally, we have no reason to suppose that large numbers of people will start grabbing hold of artistic works and treating them inappropriately.

It is not unthinkable that an artist might see his or her work emerge in a context that only evokes revulsion, which can never have been the intention. In such a case, the work is being used for a purpose that he or she passionately rejects or loathes, for example. Copyright offered protection from unpleasant situations like that. No permission had been requested, so it was easy for a court to conclude that the copyright had been infringed. But what can be done now that, in our opinion, copyright is no longer viable? There are a number of instruments in the legal toolkit that we feel are even more appropriate for meeting the artist's legitimate demand not to be dragged through the dirt. Here, we are referring to defamation of character and, in particular, wrongful and unlawful acts. More important, and effective, than going to court is the public debate on what adaptations are acceptable and what changes damage the integrity of a work.

## **Market domination prevents active citizen participation**

The arguments for why the system of intellectual property rights is not appropriate in the digital twenty-first century are overwhelming – I doubt that it was actually fair and fit for the purpose of previous centuries. This is a topic for economic historians but it has regrettably been rarely on their research agendas up to now. However, intellectual property rights have contributed considerably to the construction of global markets, as we know them at present, and the power relations in those markets. It is not an inevitable outcome of some global processes that this system with major deficiencies has come into being.

To understand this better, we should bear in mind that there is a second mechanism that enables unequal power relations to continue to exist, a lack of diversity of producers on global



markets and the resulting digital blindness. In the context of the field of music – but this is also true for other areas of artistic expression – Oxana Chiscenco summarises what actually happens in global markets: “Higher consolidation and the resulting market clout affords major record companies to acquire more copyrights, which in turn gives them more market power to buy even more copyrights, and the circle continues.” (Chiscenco 2009: 127)

We accordingly refer to market domination by a handful of companies with a stronghold on the exploitation of extensive intellectual property rights in the cultural, information, medical and agricultural sectors of our societies. What problem lies in having so few companies whose size means they really matter? What issues should be discussed?

These entertainment companies exert an enormous influence on the choices we make that reflect our cultural preferences, but let us also not forget the news we are given – or indeed are not given – on the drugs that our doctors and we ourselves think are beneficial for our health and on the kind of food we buy. It is the selections made by the culture and other market-dominant industries and sustained by extensive market campaigns that we are offered. Influence is clearly always exerted but it makes a huge difference if there are a large number of companies that produce, distribute and promote cultural expression, news, drugs or food because this substantially limits that influence as one firm is just one among many others. Furthermore, at the receiving end we change from being mostly passive consumers who have to wait and see what is on offer into more active citizens who really have to do some conscious work in making choices.

\* Many years ago we might have dreamed that the forthcoming digitisation would radically change market conditions in favour of the much greater diversity of companies that can play the game without being pushed aside by a few big players, but the opposite is the case. For instance, in the field of music, “the independents’ market share has actually dropped in the *digital* age. The lack of growth in this market share, which affords very cheap technology for making and selling music, alerts one to wonder whether independents can provide an effective competition to majors in the promising digital age”. (Chiscenco 2009: 87) In fact, they cannot.

The structure of the music market has changed significantly. Control of the production of cultural expression – records in the case of music – used to be crucial, whereas in the digital age control of its distribution is the decisive factor. Here, we find only three or four very big companies that dominate the digital arena. In the end, an American Senator, Richard Blumenthal, a Democrat representing Connecticut and a member of the antitrust subcommittee, started to feel that there was something alarming happening before our eyes: speaking about one of the few giants that dominate the digital field, he said: ‘Google is a great American success story, but its size, position and power in the marketplace have raised concerns about its business practices and raised the question of what responsibilities come with that power.’ (*In Google antitrust inquiry, echoes of Microsoft*, International Herald Tribune, 19 September 2011)

One would expect that competition authorities, supported by strict competition law, would have intervened. In the United States – more than in Europe, I believe – this happened from time to time in just a few cases until Ronald Reagan became president. “Key antitrust enforcement positions were filled by individuals directly identified with, or openly sympathetic to, the Chicago school view that, within broad bounds, high market concentration has few negative consequences and that mergers tend in the vast majority of cases to be efficiency increasing and seldom competition reducing.” (Scherer 1989: 90) This example was followed without hesitation in Europe.



With regard to news and information, Frank Blethen and Ryan Blethen, for example, conclude that we have paid a high price for this sunny optimism. In enabling concentrated control over the United States information system, “the U.S. government has abandoned its obligation – a responsibility that is embedded in the Constitution and was intended by the nation’s founders – to protect free speech, a rich variety of voices and to ensure broad access to independently gathered and vetted news and information.” (Blethen 2011: 198) In Europe, it is not much different.

I now come to an aspect that has amazed me for many years. Apparently, we have in our societies a desire for markets to be open enough for newcomers and at the same time for no company to dominate the scene with regard to prices or quality, for example. This has been implemented through competition policy and US antitrust legislation. The aim is to establish level playing fields. In different countries this aspiration has been covered by separate legislation (the difference between competition policies and antitrust policies is not just the words used), but in general the same elements can be found everywhere: a company should not gain market dominance by overt collusion, and predatory behaviour should not be tolerated. Moreover, mergers should be considered from the point of view of whether they will result in a new market-dominant entity. In most cases, the panoply of legal instruments is available to intervene in order to (re)establish competitive market relations. Whether they will be used, depends on the political will and situation: are competition authorities and policies lax or does the conviction exist that establishing level playing fields is a crucial social task?

Now the aspect that has amazed me the most: it might happen that a company becomes market dominant but does not collude with others, does not behave badly and does not merge with another. We may praise the owners of such a company because they seem to be good entrepreneurs, but this is just one side of the story. The other is that we, as members of society, could find it unacceptable for any company to dominate markets, especially in such sensitive fields as culture, news, drugs and agricultural produce, and it does not matter how it became so strong.

The simple fact that they can set standards on markets, influence consumers (the citizens) and make business life more difficult for many other, smaller companies is an issue ignored in most studies on competition or antitrust policy, let alone practical policy guidelines. As if it is a confession of faith, many authors claim that market power as such is not the problem and does not lead to anti-competitive behaviour. They do not intend “bashing big business”. (Chiscenco 2009: 13) In my opinion, this is beside the point. I may admire good entrepreneurs, and I really do, but there are other factors to be taken into account too. M. A. Utton seems to be aware of the problem: he points out that “skill, foresight and industry” may result in market dominance but ultimately concludes that “(i)t would be foolish to use antitrust to punish the efficient and innovative”. (Utton 2003: 43)

Crucial in his analysis is the word “punish”. However, if society were to find it in its interests for no companies to be market dominant and made it crystal clear where the borderline is, then nobody would be punished. Can taxation be said to be a punishment? The answer is yes, since it influences the possibility for a company to be profitable and do all it wants to do. However, taxation is not unexpected and is, hopefully, accepted as a fact of life and of doing business. Limiting the size of companies for the greater goal of achieving really effective and functioning level playing fields should not come unexpected for any company as such are the rules of the game. Being an entrepreneur does not involve operating in a vacuum but is a useful activity that takes place in social contexts where citizens also have their own interests and, consequently, demands.



As we are no longer used to readily accepting that we as members of society may have a big say in how to structure markets, we pretend that we do not know how to have that say and seem afraid to try to do so. To increase our awareness, I will make extensive reference to Joseph Stiglitz' recent statement about banks, in which many of my reflections can be recognised. It is an example that can easily be transposed to the avoidance of market-dominant positions in the cultural field. Stiglitz observes that there is an unhealthy dynamic taking place: "the big banks have a competitive advantage over others, not based on real economic strength but because of distortions that arise from the implicit government guarantee". His analysis is that those banks "are not responsible for whatever dynamism there is in the U.S. economy. The much-vaunted synergies of bringing together various parts of the financial industry have been a phantasm; more apparent are the managerial failures and the conflicts of interest. In short, there is little to lose, and much to gain, by breaking up these behemoths. Their commingled activities – insurance companies, investment banking, anything that is not absolutely essential to the core function of commercial banking – need to be spun off."

What should be done? In his opinion, "a three-pronged attack is needed: breaking up the too-big-to-fail institutions, strongly restricting the activities in which remaining large institutions can be engaged, and calibrating deposit insurance and capital adequacy restrictions to 'level the playing field'" The restrictions on their activities may result in low returns for the big banks – but that is as it should be. "The high returns that they earned in the past were the result of risk-taking at the expense of American taxpayers." (Stiglitz 2010: 166,7) The discussion will clearly be about what size banks may be in his philosophy without distorting the achievement of level playing fields, and therefore in our case how big cultural businesses may be or, better, how relatively small or medium-sized.

More important here is that Joseph Stiglitz counters the argument that the Federal Reserve and the Secretary of the Treasury did not have the legal authority to intervene in, for example, the failure of Lehman Brothers: "they had ample opportunity to go to Congress and ask for it". (Stiglitz 2010: 167) For our situation of market-dominant culture industries, it is relevant to note that Articles 81, 82 and 83 of the European Constitutional Treaty already provide for the possibility of breaking up market-dominant companies into many pieces that have done no wrong or merged but simply grown too big. What matters is that awareness of this potential measure should be refreshed.

If we had achieved level playing fields – where there is no system of intellectual property rights and no company has in any way a dominant position – what would be the consequence for employment, for example? In the first place, we have to remember that the current huge cultural conglomerates are not in business to create employment but to please stock markets and therefore have to capture the largest market share possible and create intellectual property portfolios with which they can establish strong market positions. (Schurman 2010: 40; Finkelstein 2010: 59) However, it is realistic to expect that small and medium-sized enterprises, at any rate in cultural fields, will create many jobs, including at the local level.

It is not to be expected that marketing will play the same role under the new circumstances that it does in the contemporary world. After all, there will no longer be any companies with the financial clout, and intellectual property protection, to spend huge amounts of money on advertising. Their relatively smaller size, will lead them to serve more focused markets. This also makes it less necessary to have a massive presence in the public domain with costly advertising campaigns.

## A bright, digital, future

Having analysed why we should abolish the system of intellectual property rights and why we should revitalise competition and antitrust policies (in order to establish level playing fields), it is time to try to predict what market relations in cultural sectors would look like if we implemented these considerable paradigm shifts, although it should not be forgotten that in any case digitisation changes market structures. The analysis that I present here has been based on my work *Imagine there's no copyright and no cultural conglomerates too ....*, written with Marieke van Schijndel.

No one will in fact be surprised that completely new cultural relations will emerge with the proposed changes in culture markets. Several very important results of those interventions can be counted:

The *first* effect one might expect from the proposed radical restructuring of culture markets is that, under these new conditions – investments are no longer protected by copyright –, the rationale for cultural conglomerates to make substantial investments in blockbusters, bestsellers, and stars is lost (actually, it is unlikely that this kind of cultural giant will continue to exist after the introduction of the market regulations we have proposed). After all, by making creative adaptation and transformation respectable again – these are unique challenges for digital active citizen participation –, and by abolishing the present system of copyright, the economic incentives to produce on the present scale will diminish. If we were to commit ourselves to the abolition of copyright and the employment of a truly consistently implemented cultural competition policy, we would bring about an earthquake in culture markets in favour of the diversity of cultural creations and performances, with many more expressed using digital tools than at present.

Very big corporations would never again reach such an inordinate size and achieve the market domination they have today, so the effect would be that no single company would be able to significantly manipulate the cultural playing field. At the same time, cultural conglomerates would, through the abolition of copyright, lose their grip on the range of cultural products with which they determine the outlook of our cultural lives to an ever-increasing extent. They would have to give up their control over huge sections of the culture markets.

This has far-reaching consequences for the way different publics relate to cultural productions. This is the *second* effect we might expect. Up to now, the public's guide to making choices has been what the cultural conglomerates' marketing efforts have mainly offered them to ensure they do not miss a blockbuster film, a star, or a best-selling book. However, these conglomerates – and their major marketing strategies – will no longer exist in the situation we propose and public attention will cease to be steered in only one direction as a result.

This is a cultural gain, and one much bigger than we can ever imagine. The public will redevelop their curiosity, which will be their main guide once the marketing of cultural giants no longer exists to influence their tastes. Curiosity is an extremely valuable characteristic of human beings and makes reflective citizens capable of thinking for themselves. Moreover, it will become more and more self-evident that amateurs and professionals will interactively react to each other's creations and performances, using the most unpredictable digital tools of creation and communication.

When copyright is abolished and the present cultural conglomerates are substantially smaller in size – that is, when they are normal-sized companies –, a level playing field will be established in which a great deal of artistic expression can find its way to buyers, readers,



users and audiences. This is the *third* effect of our proposals. There will once again be a scope in culture markets for a variety of entrepreneurs, who will consequently no longer be ousted from public attention by blockbuster films, bestseller books and music, visual arts or design stars. Actively responding and participating, a host of artists will be able to find audiences for their creations and performances in a normal market.

If copyright were no longer to exist, works would belong to the public domain from the moment of their creation or performance. However, this does not mean that creators, performers and other cultural entrepreneurs would be unable to make a living from their work and make it profitable. In order to understand this process, we must bear in mind that market relations would also change fundamentally.

What would these new markets look like and, more specifically, how will many more than a few cultural entrepreneurs make their money? We should be aware that the term cultural entrepreneur includes artists, producers and people who commission work – in short, everyone prepared to bear the risks involved in a cultural enterprise or activity.

This brings us to the *fourth* result, namely what might be expected from the complete reorganisation of culture markets that we propose. The quintessence of our argument can be summarised in the following questions: *is it likely* that the work of an artist and his or her producer or client will be used by others without payment or proper recognition? Is it likely that another cultural entrepreneur will immediately use a work once it has come on the market? Without copyright this would in principle be possible, but we should also realise that there will no longer be any one single company with a market-dominant position, and there will no longer be even *one* "other" company that might think a recently published and well-received work could easily be "stolen" (NB: if there is no copyright, then no stealing takes place either) or used for free-riding purposes. Rather, there are likely to be thirty, forty or fifty other companies that all think alike. If this reality is recognised, it becomes less likely, or even unlikely, that another company will make the effort and invest money to launch an already published work on the market.

Is there any reason to fear that someone other than the original creator and risk-bearer could run off with items of artistic expression that now belong to the public domain? As indicated above, we believe it will not come to that. Investments might hopelessly fail when a number of parties try to take a gamble, and all parties are exposed to similar hazards. The prospect that many others will almost simultaneously be willing to re-offer a published work to a range of different audiences will in most cases be enough of a disincentive to remarket a work first marketed by someone else. In this case, it is conceivable that the first marketer – the first initiator and risk-bearer – will remain the only party (or one of the few parties) that can continue to exploit the work, even if it belongs to the public domain, without being "hindered" by competitors.

The only real risk is that another company might occupy such a strong position in the culture market that it can easily distribute and promote the work without being hindered in the slightest by the original exploiter or creator of the work or other market players. Such a monopolist, or oligopolist, can reach and seduce audiences with great ease without any competition from other equally strong market players. It is therefore essential, as has been said before, that culture markets are regulated in such a way that *there is no single party that dominates the market to the extent that it can obtain works from everywhere undisturbed and turn them into profit without restriction.*



Michele Boldrin and David K. Levine describe, rather amusingly, how the Record Industry Association of America (RIAA) constantly reminds us on its anti-piracy website that “(t)he thieves ... go straight to the top and steal the gold”, which would mean economic ruin for the record company. However, this argument makes no business sense. “Picking only winners means waiting until it is clear who is a winner. Well, try it: try getting somewhere by imitating the leaders only after you are certain they are the leaders. Try ruining the poor pop star by pirating her tunes only once you are certain they are big hits! Excuse us, we thought that ‘being a hit’ meant ‘having sold millions of copies’. Try competing in a real industry by imitating winners only when they have already won and you have left them plenty of time to make huge profits, establish and consolidate their position – and probably not leaving much of the market for you – the sleek imitator.” (Boldrin 2008, ch. 2, p. 15)

The substantial gains to be made after we have implemented our proposals concerning the abolition of copyright and the establishment of a level playing field reside in the fact that the public domain of artistic creativity and knowledge will be restored, which is the *fifth* effect of the changes we propose for culture market relations. It will no longer be possible to privately appropriate works that in actuality derive from the public domain. We may highly appreciate a new work, however it should remain accessible for further creations, appropriations, participation, and for critique, and also for changes and amendments. Public debate, and thus active citizenship, will then determine whether alterations are respectful and whether the original work commands this respect. If public debate does not materialise, it is a loss for democracy.

## Overcoming the digital and many other divides

There are six divides that might put at risk the realisation of democratic debate and confrontation, including in the digital field. I call them the digital, the punitive, the democratic, the information, the society-related and the critical divide.

The *digital* divide concerns the indisputable fact that many people are excluded from the use of digital tools, mostly because they are poor – and more poor people are now emerging – or feel uncomfortable with this technology. Using the internet is no longer a luxury that we can take or leave. Rather, access to it is essential for human communication and for obtaining information. The solution will not be to let people who cannot afford them have computers and internet connections free of charge as that would not increase the incentive to use them effectively. Under certain conditions, tax reductions for poor people might be more helpful. A better solution could be to make computers and internet access available at neighbourhood centres or, for instance, in retirement homes. What is even more important is that those places provide the opportunity for people to be given training in using the internet, both as recipients of information and as active participants. Experience teaches us that when people have cleared the first hurdles there is no stopping them.

People can be excluded in another way as well from the use of internet. This is what I call the *punitive* divide. In more and more countries of the world, industries are trying to convince the authorities that people and organisations that “violate” copyright and trademark legislation should be punished by cutting their internet connections. At the beginning of December 2011, the US Congress is discussing a bill that would give the US administration the power to censor the world wide web. Comparable “three strikes and you’re out” legislation has been passed in France and other countries. However, both the European Parliament and the French Constitutional Court have declared that a person’s internet connection may only be cut



following a court ruling. It has been proclaimed that internet access is a fundamental human right and should not be simply restricted by means of an administrative measure.

The *democratic* divide prevents people from fully participating in democratic decision-making and all the steps related to it. It is shocking to observe that there are many situations in which the internet is still not used in ways that could foster public debate. In its October 2011 issue, the French monthly *Le Monde Diplomatique* contained a four-page supplement reporting on the challenges of, and experiences with, participatory democracy. It is remarkable that not a single word was devoted to what the use of digital tools could contribute to widespread and effective participation in democratic processes. The democratic divide can also come about when so-called net neutrality is abandoned. There is currently a strong tendency for people and companies that are well-off or have more influence than others to obtain faster connections, to the disadvantage of the majority of citizens, who are not in such a privileged position.

The *information* divide came about through WikiLeaks and was like a bolt from the blue in the social consciousness. There are now more and more people who feel they should blow the whistle on abuses about which they have inside knowledge and which would otherwise never become public and, therefore, not be discussed, brought, before the courts and/or stopped. There are currently many facts and data on developments that should be laid open for debate but are nevertheless kept quiet or under the table. Whistleblowers cannot tolerate this and take the risk of bringing matters into the open.

WikiLeaks – whatever one may think about how it operates – has made it clear that societies need such courageous people. It teaches us that digitisation can help to facilitate the efforts of whistleblowers to a hitherto unthinkable degree. At the same, however, it raises awareness of the fact that these individuals deserve protection and safe accommodation, and we are only at the start of establishing what the criteria for providing such protection should be. Who would be, worldwide, the competent authorities to judge this and be able to ensure such safety? How can it be guaranteed that the identity of whistleblowers will be kept secret? The United Nations should be the forum where all these questions are put on the agenda. However, it is unlikely that this will lead to any progress in the foreseeable future, so it is crucial for the Council of Europe to be the platform where these issues are given serious attention.

The *society-related* divide is about past and present tensions, misunderstandings and even violent acts that prevent people from neighbouring societies from living together in virtual harmony. Digitisation can, for instance, enable stereotypes to be reduced but it may also result in their becoming very strong. These processes may be disorganised but they may also be intentionally very well organised and structured. An example of such confusing phenomena has been studied by the Korean anthropologist Hyojin Kim in the context of how young generations from China, Japan and Korea use internet sites to communicate their prejudices openly about each other, expressing their thoughts on any subject without them being filtered. Translation machines help to speed up the time taken for hate texts and songs, for instance, to cross borders and contribute to the production of further tensions between countries, including at official levels. To make matters more confusing, for many young people the production of such hate messages and prejudices “kills time” and constitutes fun and enjoyment but nothing serious. Hyojin Kim calls this “pop-nationalism”.

But, moods can suddenly change. She describes an event that took place in Korea on September 27, 2011, during a soccer match between Korea and Japan. A Korean supporter held up a banner on which was written: “We welcome the big earthquake in Japan”. If this was the outcome of all the hate mails and songs .... it worked as a shock and produced shame and official apologies from the Korean site. The majority of comments and replies from Korean





“netizens” were strongly critical of the Korean supporter’s behaviour. ‘In actuality, many Korean and Chinese nationals expressed sympathy for the suffering Japanese following the Japanese earthquake . . .’ Hyojin Kim concludes that communications on the internet are endowed with a certain element of diversion. However, ‘the moment of self-purification, which emerges within the sphere filled with all kinds of parody and diversion and where racial and national prejudices can more easily be expressed than in any other space, or what we can refer to as the movement of sympathy for others’ suffering, can be regarded as the untapped potential of the internet.’ (in the Proceedings of the 1<sup>st</sup> World Humanities Forum, Busan, Korea, 24 – 26 November 2011, pp. 521 – 532).

This analysis leads us to the last divide, what I call the *critical* divide. With this Korean example it becomes clear how important it is to have feedback from observers who critically describe and evaluate what happens on the internet. At least one may say that most of the communication circulating is confusing and sometimes rather contradictory. How to make sense of it? And even more importantly, how to help people to understand what is happening and to take a critical stance? This is an enormous challenge for the next decade. We must **avoid** that substantial parts of our population do not benefit from the results of critical studies and observations and therefore do not learn to deal responsibly in their communication methods on the internet. Otherwise, a critical divide made up of many people that do not understand the consequences of their actions on the internet may result.

Concerning artistic expression on the internet, independent and well-informed critics must once again play an important role here. It is only by testing and analyzing the work of artists that we can get a real sense of value versus mediocrity. Actually, cultural conglomerates lose a monopoly over broad cultural areas since artist’s images, etc. are available to all, and there are no limitations on the creative adaptation of art.

### **Amazement: do we tolerate democratic digital stagnation?**

I can imagine that some people still feel ill at ease with my suggestions on the policy of competition –proposing that market domination of cultural enterprises should be cut up into many pieces– and the abolition of the system of intellectual property rights. Indeed, it is not difficult to imagine that markets without dominating forces can exist. However, decades of neoliberalism have had an effect. Indeed, it might be hard to believe that it is not necessary that cultural expressions should be mainly produced and owned by a few huge enterprises. Perhaps fear of an uncertain economic and cultural future is the underlying reason.

What is amazing however, is that many people do not grasp the fact that digitization has completely changed our current reality. The cost to society due to forces keeping the cultural digital field frozen, owned and controlled by a few companies that are not at all interested in the creation and performance of diverse artistic expressions, is enormous. The loss of active citizen participation alone, when it is more than ever possible is highly regrettable. The only worry of these major companies is how stock markets will react to their activities and events and how the rumours about stars and their behaviour will affect the market. Let’s remember how James Watt postponed the development of the industrial revolution for a couple of decades: having patents on his inventions hindered others from creating new inventions.

The conclusion might well be: do we tolerate the fact that such stagnation will happen again, now in the cultural field where the possibilities for diversity, for active citizen participation, and for interactive communication are abundant, supported by the not so new digital information and communication technologies?

## Recommendations

1. An explosion of digitized communications and artistic expressions, this is what one finds on the internet, more often than not using works of well known stars. Regrettably, one seldom finds expressions of truly original creativity. One may wonder, are we aware of the character of the expressions that circulate in the digital arenas, do we have the capacity to sort out what does and doesn't makes sense? Why are the expressions that we sometimes confront so confusing? Are we able to distinguish the deeper layers that carry the meaning? In order to find our way in this bewildering and joyful digital environment we, as citizens and as a society as a whole, desperately need critical support to help us categorize, understand in a more profound way what we see, hear and read, to judge for ourselves, and to make our own choices.

From a democratic perspective, it is strongly recommended that relevant university departments, media journals, newspapers, and NGO's give their academics, journalists, students and activists ample room for research and investigation journalism concerning what happens in this fluid, volatile, and many times also orchestrated digital arena.

2. We do not know the future. What we know for sure, however, is that through digitisation cultural communications will differ considerably from what we experience at present. In order to make this communication more democratic, in its many aspects, and for many artists more profitable, I have outlined that we should implement a couple of paradigm shifts – using competition and anti-trust policies to make market domination of cultural conglomerates substantially smaller, and finish the system of intellectual property rights.

In this text, and more in detail in my *Imagine there's no copyright and no cultural conglomerates too ....* , written together with Marieke van Schijndel, I have described according to our analysis, what market relations will look like after the implementation of such considerable paradigm shifts. However, it is highly recommended that University economic departments, law departments regarding sections on competition or anti-trust policy, and policy think tanks, take up the challenging task to predict, also quantitatively and more precisely, how market relations will react as a consequence of the proposed changes. Indeed, we cannot predict the future, but we can prepare ourselves, intellectually and practically, for more democratic cultural relations.

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