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# **Fair Copy? A Look at the Anti-Counterfeiting Lobby**

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# Fair Copy? A Look at the Anti-Counterfeiting Lobby

STUART MACDONALD & TIM TURPIN

## Abstract

*Copying is an essential part of the diffusion phase of innovation, a view that was once taken for granted. Now that intellectual property rights have been strengthened and extended to cover the world, it is less acceptable. Rights holders jealously guard their monopolies against piracy and counterfeiting, arguing that strong intellectual property rights (IPR) facilitate not only their own innovation, but also that of the developing world. The pharmaceutical industry is especially strident in advocating an IPR route to innovation, and anxious that those who have trouble regarding information as property see the error of their ways. To this end, it has joined in common purpose with many of the creative industries to lobby governments and the public. The paper investigates their lobbying efforts and finds them curiously clumsy. With such vast resources at its disposal, why does the lobby not do better? Does the lobby aim to obfuscate rather than persuade? The role of copying in innovation will not be better understood without data that only industry can supply. Industry, it would seem, would much rather lobby.*

## Introduction

A major purpose of intellectual property rights - some would say the only purpose - is to prevent the appropriation of intellectual property (IPR) without the consent of its owners. Appropriation takes the form of copying (incorporating, for the sake of simplicity, piracy, passing off and counterfeiting). The argument is straightforward: the incentive to create will be much impaired if others are free to seize what is created. There is also a social cost in that less invention means less innovation and thus a poorer society. In theory at least, the IPR system is particularly suited to encouraging the creativity of small firms, independent inventors, and the developing world. In practice, though, the protection that the IPR system affords the weak is often illusory, and the problems small firms encounter in protecting their

inventions through the patent system are widely acknowledged. Other forms of IPR, including trademarks and copyright, are sometimes assumed to be more appropriate for them. This assumption is not always questioned.

“Without copyright protection, little or no incentive exists for developed countries to transfer new creations to developing countries.” (MacLaughlin, Richards and Kenny, 1988, p.104).

The example of the Indian software industry is often given as proof that IPR protection facilitates the technological development of indigenous industry. The creative industries of Benin and Chad, dutiful signatories to the Berne Convention since 1971, have seen no such development and are not given as examples (Commission on Intellectual Property Rights, 2002, p. 98)

If the IPR system is marginal to the innovation of the meek, it follows that erosion of IPR by copying will have little effect on their creativity. It may be, of course, that the erosion of the IPR of large firms, especially large firms in the developed world, does reduce the creativity of these large firms, though this is not axiomatic. But in as much as large firms are less innovative, or less willing to transfer their new technology to small firms in developing countries, these small firms may be worse off. The assumptions are heroic (Deardorff, 1992; La Croix, 1995), but no less common for that:

“Appropriate intellectual property rights protection will encourage the transfer of technology to, and technological advancements in, the developing world, leading to increased rates of economic development, increased exports, and other economic benefits.” (MacLaughlin, Richards and Kenny, 1988, p.98).

Just how, in practice, does the IPR system assist the transfer of new technology from, say, a large European firm, to, say, a small firm in some remote part of Indonesia? Is the Indonesian firm really to negotiate a licence with the European firm, a licence incorporating an effective technology transfer agreement? And are large European firms genuinely anxious to reach such agreements, and to ensure that technology actually is transferred? Only 8% of all enterprises in twelve Latin American countries are legally registered, leaving 92% unable to enforce legal contracts at all (Albright and de Soto, 2007). And in Egypt, starting even a bakery requires compliance with 315 laws, visits to 29 agencies, and costs the equivalent of 27 times the minimum monthly wage (Albright and de Soto, 2007). Probably the only practical way by which the small firms of the developing world can acquire new technology is by copying.

Copying allows small firms to establish a basic competence on which they can build with their own innovation, something at which they are inherently good. Consider the single example of a small Indonesian firm in the leather goods industry. SMEs in East Java now produce good quality, fashionable leatherware (Macdonald, Turpin, and Ancog, 2005), but at one time the firm simply copied Western designs. Its employees would watch the carousels at the airport, waiting for examples of the latest designs from the most famous designers. The firm made exact imitations, copying the brand name too, until it found that improvements could be made. One adaptation followed another until the firm began to use its own brand name to identify what had effectively become its own product. Copying lowers the barriers to entry for small firms in developing countries to a level at which economic activity is possible. But, for this very reason, the firm that has acquired new technology (by whatever means) must innovate to compete with others entering the industry.

The example is in conflict with the common view of copying. This paper explores this alternative perspective, seeing copying as playing an accepted and respectable role in that part of innovation that requires the transfer of technology. In the past, even the recent past, the importance of this role has been widely acknowledged. But times have changed. A strengthening of the IPR system has accompanied growing determination to value, and guard, information as property. This paper will look at the activities of the lobby that has done so much to advance both this view and its own interests.

### **Diffusion as innovation**

Most innovation comes about through copying; were this not so, the wheel would have to be constantly re-invented. Even so, the diffusion of innovation tends to be neglected nowadays in favour of the translation of invention to innovation. Time was when studies of innovation focused on its diffusion (e.g., Hagerstrand, 1952; Rogers, 1962; Rogers and Shoemaker, 1971). These days, innovation itself is king; in the world of IPR, even invention has given way to innovation.

"When intellectual property rights are protected, *innovators* are able to recover the costs incurred in research, product development and market development. This cost recovery .... is essential for stimulating the future research and development that is necessary to maintain America's competitive edge." [emphasis added] (Silverman, 1990, fn.110)

IPR, at least in the patent form, may – or may not – stimulate creativity, but it does nothing

to encourage diffusion (MacLeod, 1991).

“A patent is a device to prevent the diffusion of new methods before the original inventor has recovered profit adequate to induce the requisite investment. The justification of the patent system is that by slowing down the diffusion of technical progress it ensures that there will be more progress to diffuse.” (Robinson, 1969, p.87)

In terms of economic impact, diffusion is the major part of innovation. Diffusion entails copying, but there is legal copying and there is illegal copying, the latter generally being defined as an infringement of IPR.

Let us take a different perspective and look at copying not simply as an offense against IPR, but rather as an aspect of the diffusion of innovation. Without copying, technology cannot be transferred from those who have innovated to those who would innovate. Technology transfer implies, and requires, the movement of information from those who know to those who need to know. This is a major purpose of the IPR system; a patent specification, for example, is supposed to contain all the information required for reproduction by those ‘skilled in the art’.

"Each patent specification is a detailed disclosure of the invention and it is this aspect of course which is particularly valuable as a rich source of technical information." (Blackman, 1994, p.47).

This is a fiction, of course. Additional information is required. Often this is tacit information, information gained through experience, contained in an individual’s head, and not easily expressed on paper, not readily codified for the computer, and certainly not neatly encapsulated in a patent specification. Francis de la Rochfoucauld lamented the absence of such information following his visit to a Leicester stocking manufacturer in 1785:

“I’m in no position to decide what I saw, and could only begin to explain it if I had a simple stocking frame in front of me: Yet I examined it for half an hour with the greatest attention.” (quoted in Harris, 1998, pp.531-2)

And so, it is normal practice for those who license patents to insist that someone who knows be sent to show how everything works (Welch, 1983), a practice centuries old (Tann, 1978). Compared with the mobility of skilled mechanics among US railroad companies in the nineteenth century, patents had little influence on technological change (Usselman, 1991). Consider the advice of a Dorset farmer to a farmer in Northumberland anxious to acquire the Dorset water meadow innovation:

“The method I shall submit to you is; to fix upon a healthy, robust Man, who has

been *used to labour* ... it is absolutely necessary for him *to be a Labourer* and to be both willing and able to go through the manual part of the work in all weather, as the Waterman do here.” [emphasis in original] (cited in Macdonald, 1998, p.225)

Copying is not easy; copying demands considerable absorptive capacity of the receiver (Helpman, 1993), appreciated in the nineteenth century explanation for so much innovation in Scottish agriculture:

“To the superior education of the Scotch may, in part, be attributed their successful agriculture; for it cannot be expected that the land will be properly cultivated by an ignorant peasantry.” (Binns, 1851, p.95)

Mansfield, Schwartz and Wagner (1981) estimate imitation costs to be something like 65% of innovation costs, and imitation to take 70% of innovation time. IPR increases the costs of diffusion (Mertz, Kriss, Leonard and Cho, 2002): copying helps to reduce these costs, and is hence a stimulus to innovation.

“Intellectual property appears to be one of those areas where results that seem secure in the context of a static model are overlooked in a dynamic model. Imitation invariably inhibits innovation in a static world; in a dynamic world, imitators can provide benefit to both the original innovator and to society as a whole.” (Bessen and Maskin, 2000, p.20)

It is disingenuous to present IPR theory in terms of the particular benefits the IPR system affords the innovation of the small and the weak. For the large and the strong, IPR can have a strategic value in its own right, quite detached from any part it might play in innovation (Shapiro, 2000). Gone are the days when an invention was patented in the single hope of innovation.

“That’s the key: no exposure.... While we can sue for infringement, we can’t be countersued because we’re not making or selling any products, so there’s no way we could possibly be infringing anyone else’s patents. Our only ‘product’, if you will, is intellectual property.” (Mark Lieberman as quoted in Rivette and Kline, 2000, p.135)

“... it also means looking for other uses for our technology besides in products or just sitting on the shelf. If you only use your patents to protect your products, which is the old paradigm, you’re missing all manner of revenue-generating and other opportunities.” (Jan Jaferian as quoted in Rivette and Kline, 2000, pp.127-8)

## **Copying in innovation**

Copying has long played an important and not dishonourable part in technology transfer. It

was probably the major means by which the innovation of the agricultural and then the industrial revolutions of the eighteenth and nineteenth centuries spread from Britain to Continental Europe (Macdonald, 1993). Patents had little part to play in either of these revolutions in the UK (Griffiths, Hunt and O'Brien, 1992). Then, British innovators often welcomed imitators.

“[John Wilkinson] disliked interruptions for any purpose, and wished to get back as quickly as possible to making iron. His works were open to most foreign visitors, and the Perier brothers, de la Houliere, de Wendel, de Givry and Dulubre, among the most important people in French engineering and iron-making, had ready access ... Wilkinson sent his clerk to guide them and to give them all the information they wanted.” (Harris, 1998, p.504)

British innovators argued both that copying extended the market for British firms, and that their own rate of innovation kept them well ahead of the copyists. Indeed, copying was seen as an essential stimulus to their innovation. The logic is simple enough: copying expanded the market for both novel machinery and the goods the machinery made, but there was inevitably a lag occasioned by the difficulties inherent in copying. The lag allowed the innovator time to develop Mark II while the copyists were still coming to terms with Mark I. In this model, what fuels change is actually change itself, the diffusion of innovation both stimulating the market the innovation requires, and creating the need for yet further innovation. The more radical the innovation, the more familiarisation the market requires. Thus, innovators may even encourage copying to introduce the market to something really different. The system stimulated the furious change of the British industrial revolution every bit as much as it encouraged the frantic innovation of the modern microelectronics industry (Braun and Macdonald, 1982).

New products may well have no market at all until one is created, a process in which copying can be an effective mechanism. The QWERTY keyboard had nothing to recommend it as an innovation; its value lay in its acceptance as standard (David, 1985). Copying is a vital market signal that a new product has made it, that it is a successful innovation (Tang, 1998). At Christie's last year, Grayson Perry, the potter, discovered a Grayson Perry piece he had not made, and was not entirely displeased: “Part of me also sees copying almost as a validation of success” (Brooks, 2007). One study finds that copied software generates something like 80% of software sales (Givon, Mananjan and Muller, 1995), another that software improvements are related to the number of consumers, not to the legitimacy of their purchases (Conner and Rumelt, 1991). That something can be copied may well enhance the value of the original (Novos and Waldman, 1984; Liebowitz, 1985). With fashion products,

where demand tends to be related to demand itself rather than to price, copying may boost sales of both the exclusive and the popular. It has long been observed that those who are persistent copiers of music also tend to be persistent purchasers of the legitimate product (Keon, 1986), and that downloading, despite the claims of the music industry, probably does not erode demand for the industry's albums (Oberholzer and Strumpf, 2007; *cf.* Liebowitz, 2007).

“Based on the evidence to date, the vast majority of music downloads are not directly substituting for purchases of traditional recordings and, rather, represent new consumption units for listeners.” (Romer, 2002, p.215)

The R&D that became institutionalised in the large firms of the developed world in the late nineteenth century was incompatible with the notion that imitation made the fundamental contribution to innovation (Berg, 2002; Church, 1999). In the large organisation, invention emerges from the routine of R&D and innovation follows under management instruction and control. This is very different from what some see as a less-ordered, preceding age, chaotic and yet abundantly creative, in which an imperfect patent system offered imperfect protection and imperfect control of diffusion. And it is very different from the creativity of the small firm and the independent inventor, marked by flexibility, informality and very little routine.

### **Copying in context**

The prevailing view of copying is very much molded by the prevailing attitude to information. Over the last generation, information has come to be accepted both as pivotal in the economy and as private property. The latter has given new prominence to IPR, which itself has probably enhanced the market value of some information. But there is nothing God-given about this situation; it was not ever thus. By modern standards, the luminaries of English literature were shameless plagiarists. Before the second half of the eighteenth century, copying was laudable in Europe; an individual would not have had the temerity to consider his work to be his own, and certainly not his own property. It was obviously a development, in the Merton (1988) sense of standing on the shoulders of giants, of what many others had created (Rotstein, 1993).

“Human beings do not create in that way. Just as new scientific discovery manifests something that was already latent in the order of nature, and at the same time is logically related to the total structure of the existing science, so the new poem manifests something that was already latent in the order of words ... Poetry can only be made out of other poems; novels out of other novels.” (Rotstein, 1993, p.14)

And creation was not seen as the fundamental step in innovation; that place was reserved for presentation to an audience, for diffusion.

“The text is a speech event involving interaction among a producer (the ‘author’), a textual artifact (book, movie, song, computer program), and a recipient (reader, viewer, listener). Texts occur only upon the dynamic interaction of all three.” (Rotstein, 1993, p.6)

That copyright protects the expression of the idea rather than the idea itself would seem to affirm that there is little original to protect.

When the intangible is treated as tangible, which is the logic of IPR, it becomes much easier to see copying as theft (Rotstein, 1993). In societies where there is no strong tradition of individuals owning property, the notion of claiming the intangible as a personal possession can be difficult to grasp (Carter, 1996). To copy things of quality is no more than good manners in Chinese society, demonstrating a sense of propriety (Long, 1991; Carter, 1996).

“I have transmitted what was taught to me without making up anything of my own. I have been faithful to and loved the Ancients” (Confucius as quoted in Alford, 1993, p.29)

“Copyright and other protective legislation goes firmly against the grain of Asian culture, which supports the concept of sharing, not protecting, individual creative work. One should not expect Asians to quickly support copyright legislation, not to immediately embrace it in their attitudes or behavior.” (Swinyard, Rinne and Kau, 1990, p.662)

Copying was discouraged in China not when it infringed any rights of a creator, but when it threatened imperial power (Alford, 1993). IPR has often served to support authority rather than to stimulate creativity.

IPR is nicely compatible with a model of innovation which insists that more R&D means more innovation, and more IPR means more R&D (Abbott, 1990). Yet, even in large organisations, such a notion may be fanciful. Innovation is much more likely to be a function of selling the old in new markets than of creating what is altogether new (Church, 1999). Wedgwood copied shamelessly in order to sell to those desperate to emulate their betters; his real innovation was in just how he sold to this new market (Young, 1995). The innovation characterised by the IPR system is a rush to capture first-mover advantages as in the archetypal patent race. In reality, innovation is dominated by second-mover imitation (Church, 1999). To discourage this imitation is to discourage innovation (Boldrin and

Levine, 2002).

Many firms do not look to an IPR monopoly to benefit from their innovation. It is an option reserved for the rich and powerful, generally the large firms of the developed world. Most firms look to other means, both technical and non-technical, to reap rewards from their innovation – operating in niche markets, speed to market and so on (Tang, 1998; Brouwer and Kleinknecht, 1999). For example, compared with time to market, piracy has little impact on profits in electronic publishing (Tang, 1998). Indeed, in the real world, technology is often much easier to protect than the patent taken out to protect it (Macdonald, 2004). Obtaining and defending his patents cost Edison much more than he ever received from owning them (Noble, 1979).

The irony is that many of the countries now so strident in defending the IPR of their own companies, and in attacking infringement by foreign firms, were once themselves guilty of allowing their own firms to copy and to infringe the IPR of others. Many countries in what is now the developed world permitted their nationals to disregard foreign IPR throughout most of the nineteenth century, and often allowed their citizens to claim foreign IPR as their own (Chang, 2002). Britain was protectionist while trying to catch up with Holland, Germany protectionist while trying to catch up with Britain, the US protectionist while catching up with Britain and Germany, Japan protectionist until the 1970s, Taiwan and South Korea until the 1990s (Kim, 2002; Wade, 2005). An unattributed document of 1983 from the government of Taiwan, an unscrupulous copier in the 1980s, makes clear the importance of copying in national development:

“The ROC government has viewed imitation as a necessary process in the evolution of human civilization and believed that commercial counterfeiting is an inevitable phenomenon in most developing countries.” (cited in Wade, 1990, p.268)

As long as technology elsewhere was more advanced, it seemed sensible to focus on its acquisition. IPR was seen as an obstacle, not an aid, to this diffusion. Only once these countries had acquired a technological infrastructure, in part through illicit copying, did they become interested in exploiting IPR to deter copying by others. It was pressure from the more developed countries that resulted in the Paris Convention of 1883 on patents and the Berne Convention of 1886 on copyright, both declaring that signatories must provide the same IPR as they offered their own citizens. It is important to appreciate how new is this switch in policy; the United States did not join the Berne Convention until 1989 (Deng,

Townsend, Robert and Quesnel, 1995). Pharmaceutical firms may insist that patents are essential to their survival, but many developed countries did not allow the patenting of pharmaceutical inventions until very recently: France in 1960, Ireland in 1964, Germany in 1968, Japan in 1976, Switzerland in 1977, Italy and Sweden in 1987, and Spain in 1992 (Dutfield and Suthersanen, 2005).

When the US gave no protection to foreign copyright holders (Corrigan and Rogers, 2005), did European authors object to the absence of American royalties? Of course they did. Dickens, for instance, was not best pleased that *A Christmas Carol* sold for the equivalent of \$2.50 in the UK and the version pirated in the US for just 6 cents (Alford, 1993). He made his objections loud and clear on every promotional tour of the United States. Copying only enhanced an author's reputation in the US (and thus elsewhere too), leading to a larger market for the author's works and enhanced returns from his creativity. He was able to play off one American publisher against another for fees for first access to his works, and to exploit the complementary market. His reading tour of 1876 comprised 76 appearances and made \$228,000 (Khan, 2005). Dickens did very nicely out of the system he castigated. The Chinese fifteenth century poet, Shen Zhou, may have had similar promotional value in mind:

“... if my poems and paintings, which are only small efforts to me, should prove to be of some aid to the forgers, what is there for me to grudge about?” (Shen Zhou (1427-1509) as quoted in Alford, 1993, p.34)

And thus it was with foreign patents, denied to US inventors throughout most of the nineteenth century unless they manufactured in the US. Did foreign inventors protest? Of course they did. And at the same time, they sent their machinery to the US and their skilled men to ensure the machinery worked, profiting from a market made vast and vibrant by copying. There is no trace in the nineteenth century of the argument that the US, as a developing country, would lose out on technological development if it did not provide foreign inventors with protection against copying.

“... the developing countries will appreciate the great value a good local IP law can have on further investment in the country: both local and foreign investors will be more encouraged to fund local developments if their investments are protected, in effect are insured against local piracy.” (Jackson, 1996, p.72)

This technology transfer argument, made with po-faced seriousness now, would have been risible in nineteenth century America. What has changed?

## **The rise and rise of IPR**

The legislative logic behind IPR is less than perfect (Primo Braga, 1989a). It is a product of need rather than Nature, cobbled together in the hope that information can be made to pass as a normal sort of good. Because the characteristics of information are very odd indeed, the results are inevitably imperfect (Macdonald, 1998). Such imperfection offers opportunities to those able to justify change in terms of improvement.

In 1980, the US Supreme Court determined in the *Diamond v. Chakrabarty* case that living organisms produced by human intervention could be patented (Washburn, 2005). An instrument once applied chiefly to mechanical invention was becoming applicable, at least in the United States, to almost anything. Business methods, for example, became patentable in the US, though not in Europe (Meyer and Tang, 2007), and by 1988 Harvard University had patented a mouse (Slaughter and Leslie, 1997). 1980 was also the inaugural year of the Court of Appeals for the Federal Circuit (CAFC), a specialist patent court in the United States that proved receptive to maintaining the interests of patentees. In making patents easier to defend, the CAFC made them more valuable and thus increased the attraction of patenting. Those with vested interests in the patent system protected their interests with new vigour. Those with a grasp of the intricacies of IPR achieved greater returns from their lobbying to shape the system to their own advantage. In the UK, Thatcher had just begun to implement a programme that would transform many public goods into private goods. In this new conservative world, there was little patience with the scientific ethos that sees information as a public good. Information was valuable, and should therefore be a private good (Primo Braga, 1989a). And 1980 was the year of President Reagan's inauguration, heralding an era of policy favourable towards the most powerful lobbyists, led by the big pharmaceutical companies (Angell, 2004b).

The US government proved particularly receptive to this lobbying in the early 1980s. Concern about diminishing national competitiveness encouraged desperate resort to technology, the higher the better. The prevailing philosophy was that the smokestack and the rustbelt were the detritus of yesterday's industry: the modern economy would be built on information, not manufacturing. In information, the US could be competitive. Commercial strength was reckoned every bit as important to national security as military strength, and

both depended on the same technological information (Inman and Burton, 1990). To prevent the loss of this information to competitors, export controls on information were introduced from the early 1980s (Macdonald, 1990). The rationale of patenting complemented the export control ideology perfectly: for both, information was valuable only if others could be prevented from using it (Almeida, 1995). To lose control of information was to diminish the value of information. So embedded in US strategy did patents become that, at the General Agreement on Tariffs and Trade (GATT) meeting in 1986, pressure was mounting to supplement the international patent administration of the quaint, esoteric and generally benign World Intellectual Property Organisation (WIPO) with the enforcement mechanisms of the powerful World Trade Organisation (WTO) (Drahos and Braithwaite, 2002). The way was clear for the gradual introduction by 2006 of a harmonised international IPR system (though uniformity is still a way off), with compliance the responsibility of national governments and deviance punished by trade sanctions under the Trade-related Aspects of Intellectual Property Rights agreement (TRIPS). IPR had entered the major league.

TRIPS establishes a common set of international standards and procedures for the protection of IPR, and recognises a need for effective enforcement of trade-related IPR. Under TRIPS, each member country can determine the method by which obligations are implemented within its own legal system and practice. In recognition of the problems facing the least developed countries, a transitional period was provided to allow these countries time to bring their laws and practices into line with TRIPS (Blakeney, 1996; Innes and Turpin, 1999). Irrespective of these conditions, the national economic benefit from becoming a signatory to TRIPS was always going to be far greater for industrialised countries. But the theory promised economic benefit for all, and it was this promise that helped entice the smaller and weaker countries into the fold. It is the threat of punishment that keeps them there. While many other countries have had to make major change to their IPR legislation, the US has not (Primo Braga, 1989b; Kent, 1993). International harmonisation seems to have been to an American standard, the more odd considering the peculiarities of American IPR regulations. As Gerald Mossinghoff, spokesman for the Pharmaceutical Manufacturers' Association, proclaimed:

“By putting an improved system into place, we will legitimize internationally the objectives which the United States has had to fight for bilaterally and multilaterally.” (Mossinghoff, 1991, p.77)

## **The pharmaceutical industry and creativity**

Gerald Mossinghoff, Commissioner of the US Patents and Trademarks Office in 1984, and President of the Pharmaceutical Manufacturers Association by 1985 (Sell, 2003), has argued that brand-name drugs are “alternatives to more expensive and painful surgeries and hospitalizations (Mossinghoff, 1989), and that IPR was critical in the innovation that made America great in the nineteenth century, neglecting all the while to mention that the US gave no protection to foreign IPR (Mossinghoff and Oman, 1997). In only a very few industries, most obviously the pharmaceutical, is patenting central to innovation (Levin, 1986; Harabi, 1995). In the pharmaceutical industry, patents matter (Lanjouw, 1998). But the industry’s research is a peculiar sort, involving much testing of molecule combinations, followed by extensive clinical trials. It is the outstanding example of the classic linear model of R&D, the model beloved by managers everywhere for the control it permits over research, and found in its pure form almost nowhere except in the pharmaceutical industry (*cf.* Hara, 2003). Pharmaceutical innovation is further controlled by regulation and legislation. Yet, it is assumed – not least by the pharmaceutical industry – that what suits the pharmaceutical industry’s innovation suits all other innovation, that there is a direct link between more IPR protection, more R&D, and more innovation.

“Profitability of an R&D project is directly related to the degree of intellectual property protection ... the probability that a firm will produce any innovation is directly related to the resources that the firm allocates to R&D.” (Rozek, 1990, pp.36-7).

While only 19% of UK patent applications are granted, pharmaceutical applications progress regularly and routinely to an almost inevitable patent – 98% are granted (Nolan, Oppenheim and Withers, 1980). The industry’s strategy is to play the odds, on the grounds that one or two blockbuster drugs will make more than enough profit to cover the costs of all the others (Bosworth and Mahdian, 1999; Kingston, 2000). Blockbusters have been elusive of late and the industry has become increasingly desperate, seeking inspiration from skunkwork (Augsdorfer, 1996), from small biotechnology firms (Dodgson, 1991), and from academics (Angell, 2004b). Concerns are being raised that the sheer routine of pharmaceutical innovation is inimical to creativity (Angell, 2004a).

The pharmaceutical industry is also desperate to improve a public image that reflects not an industry improving health, but an industry quite unscrupulous in its search for profit. An industry so dependent on public regulation and legislation needs to bear in mind that its

customers are also voters.

“To encourage innovators to continue bearing the risks and making investments in pharmaceutical and biomedical R&D, public policy in the USA must continue to preserve the intellectual property system. It is this system that allows an innovator to actively manage a pharmaceutical product’s life cycle, which is integral to preserving the incentives for the innovator to invest in R&D.” (Radel, Lowe and Rozek, 2007, p.137)

To threaten the IPR of the pharmaceutical industry is to rip apart the very fabric of civilisation.

“The disrespect for or disregard of one type of IP has a knock-on effect and must by necessity lead to disrespect for and disregard of other types of IP. ... Fake drugs do not only impact on IP rights; they also impact, more widely, on basic human rights.” (Harms, 2007, pp.2, 4)

The similarities between the pharmaceutical and the creative industries are not immediately obvious (Hirsch, 1975). Yet, both are strategically dependent on blockbuster innovation. Revenue is highly skewed towards a very few products (Oberholzer and Strumpf, 2007) and the wonder artist is as keenly sought as the wonder drug. Copyright in general gives vast incomes to a few superstars and virtually nothing to the majority of creators (Corrigan and Rogers, 2005). James Enyart (1990) of Monsanto provides a disingenuous account of how “unlikely allies” in the high fashion and luxury goods industries were recruited to help the lobbying effort, first in the US and then overseas:

“What I have described to you is absolutely unprecedented in GATT. Industry has identified a major problem in international trade. It crafted a solution, reduced it to a concrete proposal and sold it to our own and other governments.” (Enyart, 1990, p.56)

Less attractive industries have been anxious to present the creative industries as the real victims of counterfeiting. So, according to Philip Morris International (2003a), 70% of counterfeit victims in the 1980s were European luxury goods manufacturers. Just as the pharmaceutical industry takes pains to show how creative it is, the creative industries try to hide the reality that they are often big business first and creative very much second. The artists and repertoire scouts of the music industry serve to separate the musician from the cold reality of big business (Albini, 1993). The recording industry of the 1970s looked enviously at the profits of the pharmaceutical industry, and its exploitation of IPR. It also noted the pharmaceutical industry’s skill in lobbying (Hirsch, 1975).

## **The rhetoric of the lobby**

Gone are the days when industry had to depend on civil courts to protect its IPR; industry now expects governments to protect its interests as part of their responsibility for international trade, and governments expect industry to participate in the fight against piracy. This means that they lobby. The stakes are huge, and lobbying efforts commensurate.

### *Level 1: the evil of copying*

Just as the pharmaceutical industry was influential in the foundation of the TRIPS arrangements (Sell, 1995; *Economist*, 1994), so the software, music, movie, sportswear, perfume, spare machine parts, luxury and fashion industries - as well as the pharmaceutical, of course - have set the agenda for discussions of copying, and have organised themselves into powerful pressure groups, such as the International AntiCounterfeiting Coalition (IACC), the Business Software Alliance, the International Federation of the Phonographic Industry and the Motion Picture Association of America. At one level, these groups argue simply that copying is theft, and that stealing is just plain wrong. Those who question this moral orthodoxy are to be roundly castigated.

“The argument actually has been put forth in certain circles that protecting IP is a bad deal for the poor and developing nations. It’s hard to figure the economic logic behind such assertions. Do the proponents actually believe that the best way to build an economy and lift people out of poverty is through an economy allowing theft, rather than one that establishes strong, clear property rights?” (Keating, 2006, p.3)

According to a report from the Institute of Policy Innovation, one of the many consultancy, university and think tank units funded by the lobby, counterfeiting is nothing less than communism:

“This new anti-intellectual property movement goes by several names: the free culture movement, public knowledge, access to knowledge, the free software movement. But whatever you call it, this movement is nothing more than communism for intellectual property. They believe that ownership of intellectual property is harmful to the public. They make exactly the same arguments and have the very same philosophy that the communists had about tangible property.” (Giovanetti, 2006)

In as much as the lobby is at all inclined towards theory, it is theory of the most basic sort. From its survey of the economic literature, the International Intellectual Property Alliance (IIPA) concludes simply that “the many economists who have studied these issues have all generally agreed, strong copyright protection enhances economic growth ...” (IIPA, 2005, p.10). Such comprehensive conclusions are not only unrealistic, but also just a mite misleading: “Mansfield’s findings indicate that the existence of the patent system is thought to be crucial for innovation in both the chemical and drug industries” (IIPA, 2005, p.5).

Mansfield certainly did reach this conclusion (Mansfield, 1986) – and that the patent system was of no importance at all in the innovation of any other industry. The Mansfield claim is oft repeated; for example, by the Small Business and Entrepreneurship Council (Keating, 2006), which shares a Washington address with the Property Rights Alliance. The same authors, the same organisations and the same assertions crop up again and again, suggesting an orchestration from which there is little deviation.

### *Level 2. the costs of copying*

At another, deeper, level, the lobby is much concerned with the costs of copying, and is the source of most of the statistics figuring in discussions of copying: “Trade groups estimate that bootlegging in China cost almost \$870 million in lost sales in 1994” (Borrus, 1995). The lobby’s estimates do not usually allow for price elasticity (MacLaughlin, Richards and Kenny, 1988); they assume that a fake Gucci handbag sold in a Bangkok backstreet has actually replaced the genuine article at the price it would have fetched at Harrods in London. The consequence is rather generous estimations.

“The BSA’s [Business Software Alliance] research, conducted independently by the International Data Corporation (IDC), claims that cutting the current global piracy rate of 35 percent by 10 percentage points over four years could globally create 2.4 million new jobs, \$400 billion in economic growth and \$67 billion in new tax revenues.” (Mark, 2005)

Multiplying product price in the legitimate market by the estimated number of copies made (CEBR, 2002, Salmon, 2005) has served the lobby well in the past. The assertion in 1986 that US industry was losing between \$43 billion and \$61 billion to foreign copyists helped justify the changes to the international IPR system that resulted in TRIPS (Verma, 1996). The lobby has a general interest in ensuring that no costs of counterfeiting are overlooked. The greater the costs, the greater the problem and the more seriously the argument is to be taken.

“... the more serious the counterfeiting problem is perceived to be, the more the dealer expects not only itself, but also the manufacturer and government to bear greater obligation for correcting the situation.” (Olsen and Granzin, 1992, p.105)

From a mere \$5.5 billion in 1982, losses from copying jumped to \$60 billion in 1988, \$200 billion in 1996 (IACC, 2005), and an estimated \$1.2 trillion by 2009 (Schine, 2007).

The Organisation for Economic Co-operation and Development (OECD) in Paris, a respectable group to which the developed world looks for comparative economic statistics, has been especially helpful to the lobbyists. The OECD hired a consultant in 1998 to produce

a report on the economic impact of counterfeiting (OECD, 1998). The consultant was also working for the Counterfeiting Intelligence Bureau of the International Chamber of Commerce (ICC), which gave her access to much material for the OECD report. So, the OECD's figure for that part of world trade that is counterfeit is actually the Counterfeiting Intelligence Bureau's figure.

“One estimate that has become very well known is that published by the Counterfeiting Intelligence Bureau of the International Chamber of Commerce in 1997 that indicated that the overall cost of counterfeiting in the world was about 5-7 per cent of world trade. This found its way into the 1998 OECD report and ever since we have been, unfortunately, faced with this so-called ‘OECD’ figure.” (Dryden, 2007, p.5)

The Counterfeiting Intelligence Bureau was then able to tell the European Commission that the OECD had declared that counterfeiting accounted for between 5% and 7% of world trade, which figure the Commission used in its Green Paper (European Commission, 1998). Asked to comment on the Commission's Green Paper, the ICC took the opportunity to up its own data from between 5% and 7% to between 8% and 10% of legitimate world trade (ICC, 1999).

“The [Commission's] Green Paper starts conventionally, reminding readers that counterfeiting is a widespread phenomenon with a global impact. Various shock-horror statistics are cited, showing the loss through counterfeiting to be almost so large as to be beyond our comprehension. It is easier to take counterfeiting seriously than the figures attached to it, some of which may be as phoney as the practices they purport to relate to.” (Phillips, 1999, p.275)

The OECD has now reduced the cost of copying from between 5% and 7% of world trade to about 2% (Dryden, 2007; Williamson, 2007), a readjustment in line with other calculations (Feinberg and Rousslang, 1990), but one that seems to have had no effect on the lobby's determination to use the larger figure (e.g., Schine, 2007).

A lobbyist alternative to one-for-one calculations of the cost of piracy is the multiplier approach. Huge though one-for-one calculations make losses to be, they are only part of the total cost of copying. There are also indirect costs borne by the economy at large because industries can no longer spend what the pirates have stolen (Siwek, 2007b). Then, of course, those who would have been paid cannot themselves spend, and so it goes on. The multipliers are stupendous. Once again, the Institute of Policy Innovation excels itself:

“Most studies of the impact of copyright piracy focus narrowly on the impact of piracy on the producers of legitimate works. These estimates generally measure the additional sales that would have been made if pirated products had been unavailable. However, in my study these "direct" losses make-up only one component of the overall costs of piracy to the US economy. My study also considers lost sales among US retailers of legitimate products and lost production by the ‘upstream’ industries

that supply inputs to the legitimate producers of copyrighted works ... In fact, this domino-like process is modeled across all U.S. industries using ‘multipliers’ developed by the U.S. Bureau of Economic Analysis. The multipliers also permit me to assess the costs of piracy in terms of lost output, jobs and employee earnings. In this way, I estimate the ‘true’ economy-wide costs of copyright piracy.” (Siwek, 2007a)

When the multipliers do their stuff, it is apparent that the true cost of copying borne by US copyright industries alone is something like \$58 billion a year, to say nothing of 373,375 lost jobs (Siwek, 2007b).

### *Level 3. implications of copying*

Beyond the costs of copying, the lobby operates at a third level, relating its statistics to something likely to be meaningful to the public; tax losses and consequent inability to pay for hospitals and schools do nicely (McCary, 2007). So, some \$23 billion is said to have been spent on counterfeit goods during 2003 in New York City alone, a tax loss to the city of \$1 billion (Thompson, 2004). For good measure, the financial loss is customarily converted to jobs lost to make it perfectly clear that counterfeiters are stealing bread from the tables of honest folk.

“Counterfeit automobile parts, such as brake pads, cost the auto industry over \$12 billion in lost sales. If these losses were eliminated the industry could employ an additional 200,000 workers.” (IACC, 2005, p.5)

The US Chamber of Commerce also provides a public service by circulating news clips offering a myriad of details and examples of counterfeiting, far too many to check carefully. Interest groups can be very effective purveyors of news – more than half of what appears in the print and broadcast media in the UK is straight from their press releases, mostly unchecked (Lewis *et al.*, 2008; see also MacLean, 2007). The idea is to make a point as graphically as possible, not to fret about accuracy. Stories tend to be revived and rehashed, which means that accuracy suffers further. For example, a story about the dangers that bootleg vodka poses to Scotland that appeared in the *Scotsman on Sunday* on 22 April 2007 (Elias, 2007), was appropriated by various other newspapers and eventually by United Press International, from which the US Chamber of Commerce took its story. By this time, Edinburgh had been relocated in England, the two Scottish distilleries closed down were in Wales and Britain, and the whole Scottish nation was in panic over the death of a Musselburgh woman from alcohol poisoning (US Chamber of Commerce, 2007). The woman had actually expired four years earlier. In covering her death at the time, the BBC quoted the policeman in charge of the investigation: “We suspect there may be several more

bottles unaccounted for”, he said (BBC, 2003).

The IACC provides a similar public service by amassing hundreds of instances of copying reported in the popular media (IACC, 2005). By 2005, the IACC had accumulated something like 850 articles on counterfeiting. While the lobby is active in re-circulating press stories (e.g., Property Rights Alliance, 2007), it does not like to be seen to feed the press directly. Thus, the IACC reports the level of software piracy in Missouri as revealed by the *Grand Rapids Business Journal*, not as revealed by IPR, the consultant hired by the Business Software Alliance, or as revealed in the press release the Business Software Alliance sent to the *Grand Rapids Business Journal* (IACC, nd).

Crime is important to the lobbyists, at one level as a measure of the extent of counterfeiting.

“Bank robberies, by contrast, generally involve less than \$70 million a year, but seem to garner more public attention and law enforcement resources.” (IACC, 2005, p.4)

But the very association of counterfeiting with crime is also important in driving home that counterfeiting is a criminal offence.

“To dissuade these consumers, a campaign should emphasize the pernicious consequences of counterfeiting, such as the loss of American jobs, damage to the American economy, or contributions to organized crime” (Nill and Shultz, 1996, p.40).

In the UK, the Federation Against Copyright Theft (FACT) emphasises this criminality, associating illicit copying of films with benefit fraud, offensive weapons and the exploitation of children. One of the many case studies FACT presents is entitled ‘Convicted sex offender receives 15 month jail sentence for film piracy’ (FACT, 2006). The tactic is an interesting one, demonstrating how the activities of the hardened criminal affect the ordinary citizen, but also how counterfeiting can turn the ordinary citizen into a hardened criminal (Fels and Brenchley, 2006). The illegal downloader gets what he deserves in the form of spyware and viruses, and being taken for a paedophile (International Federation of the Phonographic Industry, 2006).

But the argument goes further, much further: because copying is a high-profit, low-risk offence requiring organisation rather than skill, it attracts organised crime. Those who copy are the very villains who traffic in drugs. Devoid of all scruples, these criminals copy drugs, and parts for cars and aeroplanes (Bush, Bloch and Dawson, 1989; Chaudhry and Walsh, 1996). Thousands die. Even the tobacco industry demands protection on the grounds that

counterfeit cigarettes may damage the health of smokers (Philip Morris International, 2003a; Lovell, 2005). The media industry has been quick to exploit the fear: according to a recent BBC programme, fake video cameras and printer cartridges “have the potential to kill” (Harcourt-Webster, 2008). The US Chamber of Commerce runs a counterfeiting ‘Outrage of the Month’, which gathers stories that vie with each other in their efforts to shock and awe:

“... much of that money is ending up directly in the hands of terrorists like al-Qaeda, Hezbollah, and Hamas. ... The first attack on the World Trade Center in 1993 was financed by proceeds from the sale of counterfeit goods, as reported by *U.S. News and World Report*. And recently captured Al-Quaeda training manuals recommend operatives sell fake goods in order to raise money.” (US Chamber of Commerce, 2006a)

*US News and World Report* seems to have made no such claims, but the BBC did (Clark, 2001), attributing the revelation to anonymous “experts”, and initiating years of expert speculation on the links between counterfeiting and the destruction of the twin towers.

“... the September 11 attacks cost only \$500,000 – a little more than \$26,000 per terrorist – certainly not a large or unattainable amount of money. Based on the aforementioned figures, one successful large scale intellectual property crime could potentially fund multiple terrorists attacks.” (IACC, 2005, p.25)

“According to the private investigator conducting the research, a raid of a souvenir shop in mid-town Manhattan led to the seizure of a suitcase full of counterfeit watches and the discovery of flight manuals for Boeing 767s, some containing handwritten notes in Arabic.” (IACC, 2005, p.27)

It is apparently only a matter of time before the terrorists take the logical step and use copying itself to spread terror, perhaps by pasting copies of innocent labels onto bottles that really contain deadly chemicals (IACC, 2005).

The lobby can present information in the reasonably sure knowledge that no one is going to challenge its assertions. This may be why its stories are sometimes less than sound. Take the report released on 29 January 2007 by Business Action to Stop Counterfeiting and Piracy (BASCAP), a group formed by the International Chamber of Commerce (ICC) (BASCAP, 2007). The survey has academic investigators from Cass Business School in London, and the Business School at the University of Newcastle. Some 48 firms complain that they are much troubled by counterfeiting. The report does not reveal that they are all members of BASCAP, presumably joining the organisation precisely because they were much troubled by counterfeiting. The technique of using academics to report a sponsor’s opinions as research results was being exploited by the IACC twenty years ago (Bush, Bloch and Dawson, 1989). But much more important is the coverage of the report organized by the ICC and FBC Media, its media and communications strategist. Two days of ICC events, at which the report

was the centrepiece, generated more than 100 news reports in 23 countries. By the end of the first week in February, the story had been shown on 13 world television networks (including Al Jazeera), 10 national television channels, in three documentaries, and even in flight on seven airlines. The story, according to a delighted ICC Communications Director (Kelly, nd), is estimated to have reached 350 million households.

The US Chamber of Commerce enumerates its activities as indicators of performance and is surprising disingenuous in its listing:

“Provided ABC’s Good Morning America with content for the piece it aired in October on the consumer threats of counterfeiting and piracy ... Secured a seat on the Russian State Duma IPR Working Committee to enable input from the business sector to IP legislative developments ... Our education efforts continue with a campaign in Brazil to target college students ....” (US Chamber of Commerce, 2006b)

In 2005, the Motion Picture Association of America published a report on movie piracy, written by the Texas consultancy, LEK. It declared that 44% of film piracy in the US was attributable to downloading by students (MPAA/LEK, 2005, p.12). Persecution ensued (Webb, 2007; MacAskill and Clarke, 2007). Two years and quite a few prosecutions later, LEK admitted to a miscalculation; a more accurate figure was 15%:

“The 2005 study had incorrectly concluded that 44 percent of the motion picture industry’s domestic losses were attributable to piracy by college students. The 2007 study will report that number to be approximately 15 percent ... We take this error very seriously and have taken strong and immediate action ...” (MPAA, 2008)

Perhaps it is because there is no one to bring the lobby to book that its assertions are sometimes extreme. Perhaps it is because its information, and especially its statistics, are used in many different contexts, and then adapted and used again. Perhaps it is because so much lobby copy is filtered (through universities, think tanks, consultancies, Congressional hearings, government inquiries and international agencies), gaining respectability as it loses meaning. Whatever the reason, the claims can be bizarre:

“There are thousands, if not millions, of people in China devoted to counterfeiting, including entire towns.” (Peter Lowe quoted in Benjamin, 2003)

“Yet another example of the targeting of perishables is the discovery of over one and a half million teabag labels. We need no more proof that counterfeiting is all around us.” (Pulford and Zimmerman, 2000, p.8)

“A kilo of cannabis leaf will fetch 2000 euros in Europe, while a kilo of counterfeit

or pirated CDs will fetch 3000 euros.” (Pulford and Zimmerman, 2000, p.6)

“One estimate is that the profits from counterfeiting are similar to drugs trafficking; there is a return of 10 euros for each 1 euro invested; other estimates are that counterfeiting is more profitable than drugs trafficking, one kilo of pirated discs is worth more than one kilo of cannabis resin.” (Industry Trust for IP Awareness, 2004)

“In 1999, an International Chamber of Commerce official reported the IRA was financing its operations by selling pirated videos, including a copy of ‘the Lion King’.” (Millar, 2002)

So loud and insistent is the argument of the lobbyists that any alternative is hardly heard. Time was when the lobby directed its fire at only the big fish (Phillips, 1999). Now that TRIPS looks to governments to stop copying, and expects complaints to be brought by the private sector, lobbying has become political, and the target small fry. Co-ordinated international campaigns identify the humblest and prosecute unlucky examples *pour discourager les autres* (Economist, 2003). Perhaps predictably, the Pharmaceutical Manufacturers Association was among the first to apply this pressure (Sell, 2003), arguing that private industry should be allowed to bring complaints against foreign governments for violating trade agreements (Liu, 1994). As early as 1987, public awareness was being advocated as the primary solution to the counterfeiting problem (Harvey, 1987). By 1988, it had been accepted that the participation of the private sector would be critical to US ambition for an international IPR regime (Gadbaw and Gwynn, 1988). The private sector is now expected not only to complain to national authorities, but also to help them in the prosecution of counterfeiters – pirates pursued by privateers:

“... customs cannot achieve significant results in the fight against counterfeiting and piracy without the help of the right-holders themselves. This co-operation is the most effective weapon and as such must be strengthened. The industries covered by intellectual property law can fend off repeated attacks by counterfeiters through lodging applications for action.” (Europa, 2008)

The US Chamber of Commerce, which launched its “multi-million dollar global initiative” against counterfeiting in 2004, has extended its activities from educational and briefing to training overseas police forces (US Chamber of Commerce, 2007; McCary, 2007). Having instructed the Chinese government on how to deal with copying, the US Chamber of Commerce has expanded its remit:

“We have designed and are now implementing strategies to get other countries, such as Brazil, India, Russia and Korea, to strengthen their legal systems, prosecute counterfeiters and pirates, and to comply with their international treaty obligations.”

(Huther, 2005, p.6)

“The record industry can help governments train judges and provide the background on the private sector involvement in the enforcement of rights.” (International Federation of the Phonographic Industry, 2006, p.19).

The UK film industry has had its own anti-piracy body since 1983, FACT, which now briefs the Metropolitan Police Film Piracy Unit, set up in 2006. It claims police powers:

“FACT has been accepted as a prosecution authority and engages in criminal prosecutions in its own right.” (FACT, 2007)

### **The logic of lobbying**

On one level, it is clear that customers do not confuse the copy with the genuine article, and therefore that the market for the legitimate product is not eroded by non-deceptive copying (Besen, 1986). At another level, something else is happening. Bear in mind that many of the goods copied are fashion items. What is being purchased is less the good itself than an entitlement to appreciation. The rich pay very much more than the poor for this entitlement. To be spotted with a fake would be devastating for the rich, but of no moment for the poor. Nor do the rich consider the genuine article devalued by the poor purchasing the fake article (Nia and Zaichkowsky, 2000). The poor emulate the rich; they do not pass themselves off as rich. Their emulation has long been a major stimulus to innovation in the translation of luxury goods to mass market items (Weatherill, 1988). The same emulation of the rich has been noticed in eighteenth century France; the poor purchased cheaper versions of luxury goods procured outside a stultifying guild system that did its best to stamp out innovation (Fairchild, 1993). The analogy with the modern lobby is striking.

Though the lobby commonly uses the price of the original to calculate the cost of counterfeiting, it does not usually claim that the copy is as good as the genuine article. It argues both that the copy is a woefully inadequate imitation of the real thing, and also that the customer will not be able to tell the difference (e.g., Balfour, 2005).

“Without trademark protection, pirated versions of products can enter the market without incurring any promotional expense because consumers will be unable to differentiate between various producers’ products.” (MacLaughlin, Richards and Kenny, 1988, p.102).

In fact, consumers seem to have no trouble distinguishing between original and counterfeit (Prendergast, Leung and Phau, 2002) and, unlike the owners of the IPR, do not think the value of originals is eroded by counterfeits (Nia and Zaichkowsky, 2000). Copies can

sometimes be high quality, not really surprising when they are often over-runs surplus to the requirements of the trademark owner and come from the very factories that produce the genuine article (OECD, 1998; Lai and Zaichkowsky, 1999), the result of companies outsourcing manufacture and requiring excess capacity and even production as a strategic precaution in markets where demand is fickle and volatile (Hendricks, 2007). The world's 1,033 optical disc plants apparently have the capacity to produce 58 billion discs annually; demand for legitimate discs was 28 billion in 2006 (Finn, 2007). One reason why individual firms are not more prominent in their objections to copying, preferring to act through the lobby, is that rights holders often licensed indiscriminately in the 1980s (Shultz and Saporito, 1996). Many individual companies would find it hard to argue that counterfeiting devalued the brand when their own strategy has been doing just that for years. Sometimes, it is the counterfeiters who restore value to faded brands. In Thailand, companies making counterfeit products have been so good at the job that they have been bought out and re-commissioned by the rights holders (Shultz and Saporito, 1996), a process not unlike file-sharing companies becoming part of the legitimate music industry (Edgecliffe-Johnson and Chaffin, 2006; Clark and Johnson, 2006).

“In one situation, a German manufacturer sued the Turkish company for pirating its washer and dryers. The German company won the case but decided to merge with the Turkish company because the imitations were of high quality and were much cheaper than the company could produce in its existing facilities.” (Jacobs, Samli and Jedlik, 2001, p.505)

Hard though it is to believe, it is not so very long since the United States seized imported counterfeit goods and then allowed them to be re-labelled, or given to charity, or auctioned off, anything as long as they did not undermine the market for the legitimate good (Kaikat and LaGarce, 1980). Rwanda seems to have been one destination to which seized fashion goods were sent (Stipp, 1996). Now rights holders demand total destruction of seized counterfeit goods (e.g., Philip Morris International, 2003b). What has changed? Well, markets are now global and targeting only rich folk in the developed world is no longer sensible strategy (Rodrik, 2001).

In 2001, the World Trade Organisation and the World Health Organisation in 2001 reached an understanding approving the pharmaceutical industry's price discrimination strategy on the grounds that higher prices for drugs in the developed world would permit the industry to recoup its R&D costs, and also allow lower prices in the developing world (Forero-Pineda, 2006). This market segmentation encourages the industry to extend its definition of piracy

from the illegal to the merely unauthorised. Much like the tobacco industry (Olson, 2007), the pharmaceutical industry regards products of its own manufacture transferred from a low price market to a high price market as counterfeit. This means in the case of the UK that 80% of what the pharmaceutical industry refers to as counterfeit drugs have actually been legally manufactured, though for a different market (*Scrip*, 1994). Fewer than half of new pharmaceutical molecules marketed worldwide are sold in any one country, and even then it may be years after they have been sold in other markets (Lanjouw, 2005).

Whether national anti-piracy agencies should be employed to prevent parallel imports in support of the marketing strategy of the pharmaceutical industry is a matter for debate (WHO/WTO, 2001) – debate in which the pharmaceutical industry is anxious to sway opinion. Crucial to this effort is the presentation of the pharmaceutical industry as research-driven and research-intensive. In reality, the industry is market-driven and market-intensive. Patents may give the industry the assurance it requires to invest in research, but they also give it the assurance to launch complex global marketing strategies. While the stock market valued R&D expenditure ten times more highly than advertising expenditure in the 1970s, the two had drawn even by the late 1980s (Hall, 1993). By 1990, large pharmaceutical companies were spending something like a third of sales revenue on ‘marketing and administration’ and little more than 10% on R&D (Angell, 2004a). Indeed, it was noted in the 1980s that the more lavish the promotion of brands, the more they attracted counterfeiting (Harvey and Ronkainen, 1985). Philip Morris International (2003b) may also be the architect of its own misfortune. In pleading ruin from the trade in counterfeit cigarettes, it actually cites the anti-smoking lobby on the evils of smuggling (Joossens *et al.*, 2000). This work concludes not only that smuggling benefits the tobacco industry by expanding its market, but also that the industry itself is a participant in the smuggling. Lobbying has helped secure longer and longer copyright monopoly, though this extra stimulus to creativity has been secured by the companies who employ performers rather than the performers themselves (Gow, 2008). The lobbying of the companies is at the expense of the performers (Gayer and Shy, 2006), who look to the copyists – not the recording companies – to generate sufficient demand for their work to earn a living.

“A lot of bands see tapes made by fans as free advertising. I know I discovered a lot of bands this way.” (copier quoted in Marshall, 2004, p.174)

“In Dylan’s case the bootleggers [copiers] are the best PR going. Sony doesn’t put any PR into Dylan anyway and I’m sure Dylan’s office would be disappointed if bootlegging stopped because I can’t see how else word gets around to sell some of the concerts if it wasn’t for the underground.” (copier quoted in Marshall, 2004,

p.174)

Consider, for example, Macaulay's nice observation on the relevance of copyright monopoly to another performer, Dr Johnson:

"Would it have stimulated his exertions? Would it have once drawn him out of his bed before noon? Would it have once cheered him under a fit of the spleen? Would it have induced him to give us one more allegory, one more life of a poet, one more imitation of Juvenal?" ('Macaulay on copyright', 1978, back cover)

An obvious strategy to counter piracy would be to reduce prices, a course the music industry is constantly encouraged to take. The problem for the lobby is that such a strategy conflicts with other, more entrenched, strategy – in the automobile industry, for instance, to price replacement parts far above original parts, and in the aircraft industry to charge differential insurance rates based on how determined airlines are to keep their planes flying (Monteiro and Macdonald, 1996). Consequently, price hardly figures in the lobby argument (McDonald and Roberts, 1994), which is odd considering that price is the primary advantage of the counterfeiter. According to the Coordinator for International Intellectual Property Enforcement of the US Department of Commerce, the low price of copies is neither here nor there; what is important is that copying deters creativity and innovation, and promotes criminal activity (US Embassy, Moscow, 2006).

There is mounting evidence to support the experience of past centuries that the costs of copying can be small and the benefits large. In the music industry, for example, copied music does not seem to compete with the legitimate product, and may actually expand the total market (Marshall, 2004; see also *Economist*, 2003). Where copying does impose a cost on firms – and it certainly does on pharmaceutical firms – it is hard to believe that this comes as a total surprise. Does the publisher really think that no one will ever make an unauthorised photocopy of a journal paper? The author's reputation absolutely depends on this happening. In the same way, is a manufacturer of fashion goods really surprised when someone copies a product? In both cases, copying is expected - even welcomed in the reassurance it brings – and its costs already discounted in the price of the original good.

“After all, the many images now reproduced – whether paintings, photographs, drawings, maps, or engravings – far from diminishing the impact of the originals, encourage people to go see them in museums; their affective power can only be enhanced by their having been previously studied.” (Jeanneney, 2007, p.22)

## **Concluding thoughts**

The lobby has been active for many years now, seeking to convert public opinion and to convince governments of the damage done by copying. Did the lobby really need to convert and convince? Perhaps it did, but two decades have passed and much has changed. In particular, TRIPS has delivered all the lobby could have wished, and industry's now role in detecting and prosecuting counterfeiters gives the lobby more power than it could even have imagined in the early 1980s. Perhaps all that drives the efforts of the lobby these days is a vague feeling that it would be as well to maintain a public presence. That would explain why it is that the lobby offers the media what is really just entertainment. Assertions are made that are unfounded, statistics are provided that have no factual basis, and all the while stories are circulated and re-cycled so that no one knows whence the story came, or even what it once was. There seems to be little orchestration of this campaign, and no grand conspiracy; simply massive resources applied to keep the lobby's view of counterfeiting in the public mind (Drahos and Braithwaite, 2002). The lobby seems content for its view to permeate rather than persuade.

For decades now, the absence of empirical evidence has limited understanding of the IPR system in practice (Breyer, 1970). Greater understanding can come only through the contribution to the debate of empirical evidence (Helpman, 1993; Lanjouw, 1998; Corrigan and Rogers, 2005). This, of course, is where the industries most involved with IPR can make an invaluable contribution. Often, they alone have the data. Their contribution has generally been unhelpful, redolent with self-interest and short-termism. They pay lip service to the need for innovation, but defend IPR as monopolists, resolutely opposed to new entrants, and as protectionists, resolutely opposed to innovation.

“We might at least entertain the notion that piracy is in fact a reaction, one that implies that all is not well with the prevailing practices of genuine article manufacturers and it is these, and the role of legislation, as much as the activities of pirates that need to be re-examined.” (McDonald and Roberts, 1994, p.64)

It is, of course, possible that new factors have emerged. The lobby now has strategic interests associated with the global market. In particular, it fears interference with the market segmentation that is fundamental to modern global strategy. This may be why copying is not countered with price reductions. When strategy tailors prices to individual markets, there is no leeway for using price to respond to copying. There is another strategic issue of much importance to many of the firms that lobby, and especially those in the creative industries. These are big businesses, anxious to remain big, even at the expense of creativity. Much fuss about copying the product of their creativity serves to mask the reality that there is perhaps

not much creativity to copy.

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