

Office of Strategic Use of Intellectual Property for Development

The World Intellectual Property Organisation

**Study on the Economic, Social and Cultural
Impact of Intellectual Property in the Creative
Industries**

Final Report

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1 – Introduction

1 – Introduction

1.1 - Introduction

This study has been prepared by Dr Jaime Stapleton for the Creative Industries Division of the World Intellectual Property Organisation (WIPO). Jaime Stapleton is an Independent Consultant and Associate Research Fellow of the School of Law, Birkbeck College, University of London.

1.2 - Overview

This study examines the potential development of economic, social and cultural impact assessments relating to the principle forms of intellectual property (IP) deployed in the creative industries.

The study is intended to aid WIPO, and WIPO member states, to develop new methods for evaluating the role of intellectual property laws in the development of creative industries and the role of those industries in economic, social and cultural development in general.

It is not intended as a definitive study, but as a critical exploration of ways to supplement and deepen existing studies undertaken in relation to mapping the contribution of the creative industries to national economies. How studies assessing the economic, social and cultural *impacts* of intellectual property may differ from existing ‘measure and evaluation’ procedures will be discussed in the course of this report.

The development of *Economic, Social and Cultural Impact Assessments* (ESCIAAs) will expand and enhance the comprehension of the operation of intellectual property laws. In turn that knowledge will build a greater awareness of the costs and benefits for specific intellectual property instruments, and will thus facilitate greater objectivity in the development of policy in the area of intellectual property and the creative industries.

1.3 – The Demand for Impact Assessments

In recent years, the strategic deployment of intellectual property by national governments, and the development of policies to encourage expansion of creative industries, has had two effects. Firstly, it has led to extensions in the scope and term of major intellectual property forms, and secondly, to the development of *sui generis* forms of intellectual property. At the same time, an intensification of the international intellectual property regime under TRIPs and bi-lateral agreements has created new policy dilemmas for states where intellectual property has, until recently, been relatively marginal in terms of GDP.

Concern about relative costs and benefits of the international IP system have been raised by three groupings in recent years: a) some WIPO member states; b) civil society groups; c) academic analysts.¹ The specific concerns are complex and disparate. At a general level, most concerns have focussed on the *economic costs* incurred in relation to the relative *economic benefits* of certain aspects of the international IP regime. Concerns have also been raised in respect of potential *social and cultural costs* incurred in relation to *economic benefits*.

The need for a firm and transparent evidence base is not doubted. However, current mapping and evaluation of the creative industries provide very limited evidence in respect of the likely trade-offs between the economic, social and cultural realms affected by IP regimes. The intention of this, and future studies, is to point the way towards a more holistic understanding of modern IP regimes, and specifically those that operate in relation to the concept of the creative industries.

1.4 Objectives

The objective of this report is to suggest ways to move beyond the current techniques of ‘measurement and evaluation’, which are primarily used to assess the economic contribution of the creative industries, and towards a more complex assessment of the relative costs and benefits of the principle IP systems utilised within the creative industries.

The development of Economic, Social and Cultural Impact Assessments (ESCIA) will provide policy makers with new tools that provide a more comprehensive understanding of the parts of the IP system most relevant to the creative industries.

A more rounded understanding of the interrelating impacts of the intellectual property system is likely to be of use in shaping future regulation. The deployment of such tools will improve the evidence base for policy-making and induce greater objectivity

¹ To take one examples from each area. a) In February 2006, the Chair of the *Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA)*, listed a number of potential initiatives. Under the general title of *Assessments, Evaluation and Impact Studies*, item 4 reads: “To request WIPO to undertake studies to demonstrate the economic, social and cultural impact of the use of intellectual property systems in Member States.” The summary also suggested the development of an independent *Evaluation and Research Office (WERO)*, responsible for carrying out of “*Development Impact Assessments*”. Paragraph 16 further suggested the establishment of “a mechanism, overseen by Member States, to ensure a continuous objective evaluation of the actual impact and costs of treaties that have been adopted, especially for developing countries.” See *Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA)*, First Session, Geneva, Feb 20 to 24, 2006. *Annex D: Assessments, Evaluation and Impact Studies*. P9. b) Civil society groups, such as *The Adelphi Charter* (2005), have called for impact assessments to be undertaken prior to any new extensions to IP rights. The Charter states that change to intellectual property laws must only be changed if accompanied by wide public consultation and a comprehensive, objective and transparent assessment of public benefits and detriments. See <http://www.adelphicharter.org> c) Individual academics such as Prof James Boyle have suggested that assessments should be undertaken in respect of intellectual property laws along the lines of *environmental impact assessment*. See James Boyle ‘The Second Enclosure Movement and the Construction of the Public Domain’ in *Law and Contemporary Problems*, Vol 66 Winter/Spring 2003, Numbers 1&2, p 33-74

and transparency in the policy process, enabling the development of a fairer and more efficient national and international IP regime.

1.5 Methodology

This report has primarily been produced using standard methodology of desk research and literature overview. In major part the report consists of theoretical and synthetic research bringing together perspectives on IP and economic, social and cultural theory and related impact assessment techniques. In the early stages of this research face to-face interviews and email consultations were undertaken with stakeholder representatives from national delegations to the WIPO general assembly, representatives from the WIPO Secretariat, academics from a number of disciplines and representatives from non-governmental ‘civil society’ organisations. The interview process was invaluable in helping to frame the project and formal desk research.

1.6 Limitations of This Report

The subject matter considered in this study is of a cross-disciplinary nature. The difficulties that arise in relation to any cross-disciplinary work, and the ‘competence boundaries’ of every academic discipline, are covered in more detail at various points in the body of the report. At this stage it should be added that this report is the work of a single author. As far as is possible the text has attempted to reflect the necessary complexity of cross-jurisdictional, cross-cultural, cross disciplinary work. However, it should be noted that references and perspectives are likely to reflect the social and cultural context of the author.

1.7 Structure of This Report

The report contains six parts including the current introductory section.

Part 2 – Creative Industries and the Intersection of the Economic, Social and Cultural Realms discusses the principle political and ideological issues that ESCIAs will negotiate. Part 2 begins with an analysis of the origin and development of the concept of the creative industries and their relation to IP. It then moves towards a working definition of the creative industries for the purposes of this study. The analysis then moves to a focus on contemporary theoretical debates detailing the relation of economy and culture and how that debate informs the way economic, social and cultural impacts relating to IP may be conceived and how trade-offs between impacts might be considered. Part 2 concludes with a consideration of what form an ESCIA might take and reviews the opportunities and limitations they present.

Part 3 – Process and Operational Models for ESCIA discusses the principle theoretical and practical issues an ESCIA will negotiate. It begins with a practical outline of the form an ESCIA will take. This section comprises an ESCIA ‘Check-List’ that describes a 10-stage process. A central theoretical issue for ESCIAs will be

which operational model of copyright should be used and in relation to which kind of impact. Part 3 provides an overview of four operational models: the legal-economic (public goods) model; the 'public domain' model; the cultural circulation model; and the knowledge circulation model. The relevance of such models is How such models is illustrated with an analysis of a specific case study. Finally, conclusions are drawn with respect to the future design of practical ESCIAs.

Part 4 - Methodologies and Case Studies discusses the technical issues an ESCIA will negotiate. It provides a summary of the problems of identifying relevant impact areas and selecting relevant impact indicators. A number of impact assessment case studies are outlined. The case studies are drawn from different jurisdictions and cover economic, social and cultural impact assessments. They also represent contrasting approaches used in academic studies, national studies and intergovernmental studies. Part 4 concludes with consideration of what existing approaches (in disciplines outside of the realm of intellectual property) have for the development of ESCIAs.

Part 5 of this report contains the **Executive Summary and Conclusion** to the report and **Part 6** the **Bibliography**.

**Part 2 – Creative Industries and the
Intersection of the Economic, Social and
Cultural Realms**

Part 2 – Creative Industries and the Intersection of the Economic, Social and Cultural Realms

2.1 Introduction

Part 2 of this report addresses three issues. Section Two addresses problems of definition with respect to the creative industries and the concept of impact assessments. Section Three examines the way impacts may fall across the economic, social and cultural realms and which academic disciplines are best placed to examine those impacts. Section Four addresses issues with respect to the form of impact assessments.

2.2 Definitions

2.2.1 Creative Industries, Cultural Industries, and the Cultural Sector

Currently, there is considerable confusion over the precise definitions of the terms the ‘Creative Industries’, the ‘Cultural Industries’, and the ‘Cultural Sector’. Different meanings are attached to these terms at local, national and international levels. It is common to find some of terms used interchangeably. It is therefore necessary to clarify the term, the ‘creative industries’ as it is used in the context of this study.

It is now obligatory to begin any discussion of the concept of culture by quoting Raymond Williams’ declaration that “culture is one of the two or three most complicated words in the English Language”.² The problem defining the concept of culture extends to concepts that have developed in relation to it, such as that of the creative industries.³

Within the context of this study, two distinct meanings of culture will be examined. The first is culture as it is used to denote a significant social grouping. That is the term as it is used within anthropological and sociological discourse. Within this study, the term ‘culture A’ will be used in reference to this definition.

The second usage is culture as it is applied in the context of the ‘cultural sector’ of national economies. That is, the aspect of national life that generally falls under the Ministry for Culture within governmental structures. Within this study, the term ‘culture B’ will be used in reference to this definition.

Within national economies, discussion of culture B is usually focussed on ‘the cultural sector’, ‘the culture industries’, the ‘cultural industries’ and the ‘creative industries’. Further clarification of these terms is required.

² Raymond Williams, *Keywords: A Vocabulary of Culture and Society*, Fontana, London, 1976.

³ For a more detailed analysis, see William H. Sewell Jr. ‘The Concepts of Culture’, in *Beyond the Cultural Turn*, Victoria Bonnell and Lynn Hunt (eds); University of California Press, London, 1999.

The definition of the ‘cultural sector’ is contingent on historical factors: for example, the existence of traditions of literature, theatre, music, visual arts, film etc. It is further contingent on governmental structures, such as how particular ministries and civil bodies are currently organised.

The term ‘cultural industries’ has come into use in the last 30 years. It denotes an economic approach to what is now generically termed the ‘cultural sector’. The term ‘culture industry’ was originally developed in the Marxist-orientated criticism of the ‘Frankfurt School’ during the 1930s to describe mass consumption industries such as film and recorded music.⁴

The term ‘creative industries’ first came into use in the late 1990s. The term, and its associated conceptualisation of a group of ‘industries’, was the product of political developments in the UK. As such, the term and original concept emerged as a “political construct” of the British Labour Party in the late 1990s, becoming a major plank of policy when the party formed a government in 1997.⁵

More specifically, the concept of ‘creative industries’ developed in relation to a reorganisation of ministerial departments as the new government came to power. The concept was an attempt to bring the ‘cultural sector’ of the UK in to line with the new political thinking of the time. The party itself was moving politically from its traditional power base in unionised labour employed in heavy industry that had largely disappeared in the UK over the preceding 30 years. The new ‘third way’ politics also sought to close the gap between ‘left’ and ‘right’. In the process, the party itself was re-branded as ‘New Labour’. Critical to these changes was the political engagement with the developing concept of knowledge economics.

The original concept of creative industries thus emerged in relation to specific political, economic and theoretical considerations. However, it has quickly become a term that is utilised internationally. The definition has subsequently undergone a number of revisions in relation to differing international contexts. Even within the UK, the definition, and its relation to the concept of cultural industries has similarly undergone a number of strategic re-definitions.

The Concept of Creative Industries in Relation to Knowledge Economics

From the early 1980s onwards, economic and social theorists had suggested that the development of western economies could be divided into three distinct historical phases. In the first, political economy was centred on the control of land. In the second, the locus of power shifted towards the control of resources necessary for industrial production. In the third, the locus of power moved to control over the concept of production.⁶ Phase one is said to foreground the relative importance of

⁴ Theodore Adorno *The Culture Industry: Selected Essays On Mass Culture*, ed., JM Bernstein, Routledge, London, 1991; Adorno & Horkheimer, *Dialectic of Enlightenment*, Stanford University Press, London, 2002.

⁵ For further discussion see Andy Pratt, ‘Cultural Industries and Public Policy: An Oxymoron?’ *International Journal of Cultural Policy*, 11.1 April 2005. p 31-44. As Pratt notes, creative, culture, or cultural industries suffer from same problem: “which industry or activity cannot be described as having a cultural dimension?”

⁶ See Seth Schulman *Owning The Future*, Houghton Mifflin, New York, 1999. Schulman cites Alvin Tofler as the immediate origin of the periodisation. Christopher May (*The Information Society*, Polity Press, London, 2002) concurs, suggesting that Tofler was drawing on both Schumpeter and

‘real estate’, or land. Phase two is said to foreground ‘movable property’, or commodities. Phase three is said to foreground ‘intellectual properties’ and the control of concepts of production.⁷

In the late 1990s, policy makers in many developed states focussed on the idea that economic competitiveness must be based on the production of ideas, as opposed to the manufacture of material commodities. This is frequently characterised as a need to compete on the basis of innovation rather than price.⁸ It has also been expressed as an epochal shift from ‘old’ to ‘new competition’.⁹

The narrative of the knowledge economy helped to orientate key policies of the New Labour government. On its election, the *Department of Culture Media and Sport* (DCMS) was formed to oversee the ‘cultural sector’. One of its first jobs was to set up the *Creative Industries Task Force* (CITF). The Task Force reflected the new economic and trade-focussed view of cultural policy. CITF identified six key areas for policy intervention: *export production; skills and education; access to finance; taxation and regulation; intellectual property rights; regional issues*.¹⁰

In 1998, the department published its first *Creative Industries Mapping Document* (CIMD). The mapping document provided the first concrete definition of the Creative Industries, which were defined as:

“those activities which have their origin in individual creativity, skill and talent and which have potential for wealth and job creation through the generation and exploitation of intellectual property. These have been taken to include the following key sectors: advertising, architecture, the art and antiques market, crafts, design, designer fashion, film, interactive leisure software, music, the performing arts, publishing, software and television and radio.”¹¹

Kondrietiev.) Luis Suarez-Villa (*Invention and the Rise of Technocapitalism*, Rowman and Littlefield, Oxford, 2000) presents this process as the replacing “the reproduction of capital as the most important social and economic function, with the reproduction of inventive creativity.”

⁷ Two structure drives are usually cited. Since the early 1970s, changes to international capital flows have led to structural changes in the manufacturing base and labour markets of developed states. Secondly, technological change, in particular, the development of the computing/software and biotechnology sector, have foregrounded the importance of intellectual property and associated management systems. For a more nuanced account, see Thomas A Stewart, *Intellectual Capital: The New Wealth of Organisations*, Nicholas Brealey Publishing, London, 1998. P 3-5. Stewart’s analysis parodies Adam Smith’s analysis of the division of labour in Book One of *The Wealth of Nations* (1776).

⁸ The innovation v price competition was first described by Joseph Schumpeter in *Capitalism, Socialism and Democracy*, Routledge, London, 2000 (first published 1943).

⁹ In the 1980s, debates about ‘Fordism’ and ‘post-Fordism’, often linked to concept of post modern theory, periodised modes of competition into ‘old’ and ‘new’. The notion that Fordist/Taylorist model of mass production and labour organisation was being eroded by new technology and more flexible labour market regulation was analysed by Piore, M and Sable, C *The Second Industrial Divide*, Basic Books, New York, 1984.

¹⁰ In 1998, the department also set up the Creative Industries Export Promotion Advisory Group (CIEPAG). In 2002 its work was passed to four groups: Design Partners; Creative Exports; Cultural Heritage and Tourism; Performing Arts International Development. In 2000 CITF was replaced by the Ministerial Creative Industries Strategy Group (MCISG).

¹¹ *The Creative Industries Mapping Document*, DCMS, 1998. See Part 6 – Bibliography of this report for a full web citation.

This conceptualisation of creative industries has been influential internationally. It ascribes a clear economic focus and instrumental purpose to cultural activity. Most significantly, it makes an explicit link between the cultural sector and the production and marketisation of intellectual property.¹²

2.2.2 The Creative Industries Definition Problem

Despite the general influence of this model, considerable operational differences in the definition of ‘creative industries’ remain at local (regional), national and international level. Problems relating to definition and associated problems relating to scope, and the availability and reliability of data, have been widely discussed.¹³ Currently, there is no agreement over a standard international definition.

The creative industries concept is a political construct. The original UK definition reflected specific ideological beliefs and strategic-economic objectives. The concept of creative industries continues to be deployed strategically. The objectives that policy makers wish to pursue differ. Therefore, the definition is liable to jurisdictional variation and to changes over time within jurisdictions.

The definition is further determined and modulated by its use within specific contexts. For example, in ‘mapping and evaluation exercises’, the definition will be subject to decisions made by commission bodies about what to measure.¹⁴ Variations may be due to choices made by national governments as to what it is desirable to prove or disprove. Alternatively, variations may occur at the technical level, where statistical offices have to make decisions about what it is possible to measure, given the available resources and data. All variations may further depend upon (often unacknowledged) ideological and cultural perspectives of commissioning bodies and surveying organisations. At a practical level, differences in the cultural practices, market structures and associated political priorities also give rise to variations in the definition.¹⁵

For the purposes of this study it is necessary to provide clear and limited definitions of the creative industries. Most industrial sectors can be described as, in some measure, creative or innovative. Many industries use elements of intellectual property protection. The issue of definition is therefore paramount. Clearly, a definition of creative industries that encompassed *any* industrial sector or business model that employs IP in *any* way would be too broad. Copyrights, patents, trademarks, design rights, database rights, traditional cultural expressions, geographical indicators etc.,

¹² It should be noted that the UK has recently updated its conceptualisation of creative and cultural industries. The new conceptualisation is closer to the models employed by international organisations, such as WIPO. In June 2007, UK government’s ‘Creative Economy Programme’ of the Department of Cultural Media and Sport published a report it commissioned from the Work Foundation. The report, *Staying Ahead: The Economic Performance of the UK Creative Industries*, can be downloaded from the creative economy web site at: <http://www.cep.culture.gov.uk/index> See Part 6 – Bibliography of this report for a full web citation.

¹³ It should also be noted that, in many jurisdictions, there has also been hostility to the economic and property focus of the concept from professionals within the cultural sector. The arguments are complex, and beyond the scope of the current paper.

¹⁴ Such as CIMD 1998

¹⁵ The concept reflects cultural practices that have a specific history within the north European cultural nexus. Applications of the broad concept to jurisdictions with very different cultural experiences and practices can lead to fundamental variations in definition. This is particularly the case where cultural forms have traditionally developed in the absence of intellectual property forms.

are different legal entities. They have developed in relation to different kinds of market, and function differently with respect to those markets. They are also viewed differently depending on the jurisdiction, its legal traditions and its particular form of economic organisation. It is therefore unlikely that a single analytical framework would suffice to account for the complex range of impacts that arise under such diverse conditions.

2.2.3 Creative Industries Definition in this Study

Given that the definition of creative industries can be regarded as both contested and problematic, it is necessary to provide a clear definition for the purposes of this study. The original UK definition has been widely assumed to refer to the copyright-based industries.¹⁶ Currently, the copyright-based industries is the closest to an internationally agreed definition of the creative industries.

In 2003, WIPO published its own *Guide on Surveying the Economic Contribution of the Copyright-Based Industries*.¹⁷ ‘Section 4.2.3 Definition and Breakdown of the Core Copyright Industries’, Paragraph 115 provides the following definition:

115. The core copyright industries are industries that are wholly engaged in creation, production and manufacturing, performance, broadcast, communication and exhibition, or distribution and sales of works and other protected subject matter.

This definition gives the development and exploitation of copyright resources as the necessary definitional characteristic of the cultural/industrial sector under consideration. The definition used in the WIPO Guide is the base definition referred to in this study.

This should not be taken to mean that cultural practices and industries gathered under that term have no relation to other forms of intellectual property. Trademarks, design rights, TCEs and data base rights may form part of the economic base within this sector. However, currently the most workable and recognisable *definition* of the creative industries is that of the copyright-based industries.

This definition has several advantages. It is immediately clear which form of IP is under consideration. The adoption of copyright laws is a condition of membership of the WTO. Subsequently there is the possibility that, in the future, international comparisons of impact could be attempted.

2.2.4 Contextual Qualification

This definition requires a contextual qualification. Any chosen definition of the creative industries can be viewed through two dominant interpretative frameworks. The creative industries are different depending on whether the analyst views the

¹⁶ However, in practice the definition is far more problematic.

¹⁷ *Guide on Surveying the Economic Contribution of the Copyright-Based Industries*, World Intellectual Property Organisation, Geneva, 2003. See Part 6 – Bibliography of this report for a full web citation. For additional definitions see: *Understanding Creative Industries: Cultural statistics for public policy making* UNESCO/Global Alliance for Cultural Diversity, February 2006. See Part 6 – Bibliography of this report for a full web citation.

sector as primarily ‘*industrial*’ in character, or primarily ‘*cultural*’.¹⁸ The creative industries can be viewed through an industrial, trade-orientated framework. They can also be viewed through the cultural framework that pertains within the cultural sector.

For example, in the UK the creative industries have been mapped under both the *Creative Industries Economic Estimates* (CIEE), and under the *Data Evidence Toolkit* (DET 2005). The former provides yearly updates based on the logic of the original *Creative Industries Mapping Document*.¹⁹ The DET uses a matrix system to map production cycle data from the cultural sector. The matrix encompasses privately owned cultural industries, publicly funded cultural programmes, and institutions and projects that combine elements of private and public sector financing. The elements that are held to comprise the creative industries in UK definition are spread out across the matrix.

The logic of the DET is based on the mapping and evaluation of a cultural sector. The structure that defines that sector is based on deep, historically located, cultural assumptions.²⁰ The CIEE reports are based on the mapping and evaluation of an economic and trade sector. The structure that defines that sector is based on a comparatively recent set of politically and ideologically located assumptions.²¹

The creative industries, however they are defined, are rooted in dominant norms within particular jurisdictions. Those norms are both economic and cultural in character. Therefore it is important to recognise that the conceptual framework through which the creative industries are *received* is as important as the critical as the framework through which they are *conceived*.

To state this more clearly, the creative industries may be given a specific conceptual identity through an act of policy in a particular jurisdiction. The specific identity given will reflect the situation – economic, social and cultural – within that jurisdiction and the priorities of the policy maker or institution that gives the definition. The identity given to the creative industries within any jurisdiction may also be subject to harmonisation with definitions that predominate in other jurisdictions, or definitions that have become dominant in international organisations, such as WIPO or UNESCO.

However, when considering the impacts of the creative industries, it is important to remember that the character of the jurisdiction is again critical. However the creative industries are defined, their reception, and whether a given impact is regarded as ‘positive’ or ‘negative’ will depend on a number of jurisdictional variables. Those variables may include dominant legal norms within any given jurisdiction, together with norms of economic, social and cultural behaviour and the policy objectives of the government of that jurisdiction. In short, how impacts are conceived is highly dependent on *context*.

¹⁸ Copyright can also be viewed through such frameworks.

¹⁹ CIMD 1998, as discussed above.

²⁰ Within the ‘western tradition’, the line of logic that leads to the cultural and artistic forms in question has been in development for several thousand years.

²¹ The logic here is based on an interpretation of the cultural sector, related to the precepts of knowledge economics and the role of IP, comparative economic advantage and global competition.

2.2.5 Defining Economic, Social and Cultural Impact Assessments (ESCIA)

‘Impact assessments’ are likely to be substantially different in character and scope from the ‘mapping and evaluations’ that are currently carried out at national level.

Since the late 1990s, the latter have gained widespread international acceptance – particularly with respect to the mapping and evaluation of copyright-based industries.²² For example, the *WIPO Guide* has provided a set of standards and procedures, together with practical aid through capacity building assistance, that have enabled the spread of a set of common standards that holds across a number of jurisdictions.²³

These estimates, when used in conjunction with international comparators, provide national governments with a valuable guide to strengths and weaknesses within this sector of their economies. Typically, studies register the relative size and levels of activity in the sector expressed in relation to GDP, GVA, employment, quantity and size of businesses. Such measurements however fall well short of the requirements of impact analysis.²⁴

An impact assessment must, by definition, establish a *causal* relationship between a particular stimulus and a particular reaction. The picture it builds of that stimulus must provide an overview of both positive and negative impacts. ESCIAs are therefore likely to be far more complex in character than current mapping and evaluation exercises.²⁵

Such assessments should aim to provide policy makers with a rounded set of choices. This may entail consideration of trade-offs between one kind of economic impact and another, or between a cultural or social impact and an economic impact.

It should be noted that while an objective, evidence base for policy is desirable in principle that evidence may not always be accepted and adhered to. The context in which an impact analysis is received is as important as the context in which it is conceived. Governments are often required to make decisions that reflect their own political necessity, rather than decisions that reflect ostensibly ‘objective’ evidence based on empirical research. Decisions also often reflect ideological affiliations and beliefs. The interpretation of evidence is never purely objective.

²² It should be noted that in some jurisdictions these industries are referred to as the creative industries.

²³ The wide acceptance of this methodology is reflected in the Development Agenda. Annex D of the PCDA, First Session Summary, Paragraph 16 suggests: Measuring the contribution of national creative and innovative industries: Expand the successful WIPO Guide for Surveying the Economic Contribution of the Copyright-based Industries to include the patent-based innovative industries.

²⁴ Question marks also remain over the quality of such measurements. In the UK, CIEE reports are produced for the government by The Office of National Statistics, which is an independent body. However, CIEE are deemed too unreliable to be classed as official national statistics.

²⁵ However, it is likely that ESCIAs will build in some way on experiences and data used in mapping and evaluation exercises.

2.3 Envisioning Impacts

2.3.1 Relative Impacts and Likely Trade-Offs

In order to imagine how ESCIAs may operate, it is necessary to develop an understanding of three issues. Firstly one must have a broad conception of how the economic, social and cultural realms operate with respect to each other. Secondly, some appreciation of the how copyright operates in respect of those realms. And, finally, some appreciation of how copyright impacts upon those realms.

This is by no means simple. Impact analyses that can account for the full range of economic, social and cultural effects will have to map out a very complex range of potential trade-offs. This may entail trade-offs between different areas of policy, which may in turn be spread across different government ministries. Currently, it is routine for policy makers to trade off one *economic impact* against another. It is also common to have to balance broad *economic impacts* against *social impacts*. The balancing of *economic impacts* against *cultural impacts* is more rare. However, comprehension of how the economic, social and cultural realms operate in concert with each other is currently limited.²⁶

Developing a better understanding of how the economic, social and cultural realms interact with each other will be an essential part of the development of ESCIAs. For example, we would expect that changes in the economic realm will have an impact within the economic realm. However, changes in the economic realm also produce follow-on impacts in the social and cultural realms. Similarly, changes in the social realm create impacts that are felt in the social realm. But, they also produce impacts in the economic and cultural realms. To complete this circle, cultural changes produce impacts that are experienced within the cultural realm. But they also produce impacts that are experienced in the social and economic realms.

In sum, a pattern of causation may begin in one realm, but the impacts may not be confined to that realm. In economic theory it is common to think of such spin-off impacts in terms of ‘externalities’. These are usually conceived in terms of financial cost. However, in ESCIAs, such externalities must also be conceived as *social* and *cultural* in character.²⁷

It is important to recognise that, within IP law, attempts to balance economic, social and cultural factors against each other is not unusual. IP laws make a number of implicit and explicit assumptions with respect to the potential impact of the law. These trade-offs are generally expressed in terms of the *balances* that a given law must strike.

For example, copyright regimes must balance the exclusive rights of the owner against the access rights of the users. The balance is between a right that is primarily *economic* in character, and one that is essentially *social* in character.²⁸ The balance between the rights of authors and readers, viewers and listeners can also be viewed as

²⁶ This is true both in theoretical modelling and at the level of policy.

²⁷ For example, in *Environmental Impact Analysis* (EIA) externalities of economic activity, such as mining or logging are examined in terms of ecological outcomes.

²⁸ For example, public lending rights for libraries, exceptions for education use and for the translation of materials for the blind.

a *culture-to-culture* trade-off.²⁹ The length of copyright term must strike a balance between two *economic* imperatives: the need to incentivise investment and the need to encourage price competition.

Many of the balances the law must strike are considerably more complex. For example, the balance between public and private spheres that copyright engenders entails a trade-off between private ownership and public good. This represents a balance between the economic benefits to individuals and businesses against the economy as a whole. In such a conceptualisation, the ‘whole economy’ comprises general economic, social and cultural welfare. Here the trade-offs could be schematised as *economic-economic*, *economic-social*, and *economic-cultural*.

2.3.2 Impacts Across Realms

In order to conceptualise how the externalities of the copyright system might operate, it is necessary to have a comprehension of how the economic, social and cultural realms work together. A complete understanding of every possible permeation would, of course, be akin to a ‘general theory of everything’. However, at a colloquial level, it is possible to outline some basic interactions.

In theory we hold the three realms to be conceptually different. Our conceptualisation is based on a perception that each realm possesses its own logic and procedures. The identity is further strengthened by the way one realm is perceived in its difference from the other two. The academic study of each realm also has its own ruling assumptions and methodologies. Generally, we have absorbed these precepts enough for us to identify an issue as broadly ‘economic’, ‘social’ or ‘cultural’ in character. Generally, we also recognise that, despite such differences, each realm overlaps and intersects with its others in complex ways.

With these basic assumptions, it is possible to conceive of how a change initiated within the prevailing logic of one realm may lead to impacts that are felt in another. For example, a large economic change, such as a hike in oil prices, may necessitate a reorganisation of a major industry. The subsequent lay-off of staff has a number of impacts. Unemployment can be viewed as an *economic impact*, since the loss of income creates a corresponding loss in demand. Alternatively, unemployment can be regarded as a *social impact*, since the loss of household incomes leads to poverty and social exclusion.

This movement of ‘effects’ across the realms can also be demonstrated with an example from copyright. Economic and technological changes may lead to an aggregation of copyright-holding businesses. The greater monopoly power of merged businesses reduces competition and leads to rising costs to the consumer.

This causation chain can be viewed as having two different *economic impacts*. The rising profits and shareholder value of the businesses concerned can be viewed as

²⁹ There is a fundamental difference in character between the copyright exemptions, which service *social* purposes, and the *cultural* division copyright functions between authors and readers. The latter division is again quite different from the *economic* division copyright functions between producers and consumers. The culturally orientated behavioural norms that circumscribe the roles of author and reader are different from the economic norms that function the roles of producer and consumer.

positive economic impact. The rising cost to consumers can be viewed as a *negative* economic impact.

This chain can also be viewed as having a *social impact*. The items protected by copyright may include educational textbooks. The rising costs to consumers of such items have *negative* impacts, restricting the public's access to knowledge.

In this example, there are significant trade-offs between positive and negative economic impacts to be considered. However, the *negative economic impact* can, in addition, be rendered as a *negative social impact*. A comprehensive ESCIA, must be about to account for all relative costs and benefits. It is clear that therefore that, in the real world, they are likely to be exceedingly complex.

How economic, social and cultural impacts are ultimately traded-off against each other is a matter for policy makers. This in turn is dependent upon the ideological affiliation and political considerations of the policy maker.

2.3.3 Disciplinary Competence Boundaries

The comparatively simple examples above indicate a simple fact. The externalities of the copyright regime fall in fundamentally different realms. There the simplicity ends. The likely areas of impact straddle the penumbra of competence of a number of academic disciplines.

All academic expertise is exercised within boundaries that place logical limits on a discipline's competence. No one would suggest that a concert pianist is as competent in their understanding of economic theory as professional economist. Similarly many economic and legal approaches to the cultural practices appear as crude caricatures to those who dedicate their lives to artistic endeavour. By the same token, the understanding of copyright law by creative people is generally weak.

There are also more fundamental differences in the structures and behavioural norms of the economic, social and cultural realms. For example, academic economics and legal practice operate with respect to types of categorical thinking that are quite different from those that function cultural practice that underpins the creative or copyright industries. While a good deal of flexibility is required to make abstract, categorical systems function, they nevertheless tend towards the development of formal rules. In contrast, the desire to battle against formal systems of categorisation has been a fundamental characteristic of much cultural activity in the northern hemisphere for more than a century. 'Avant Gardism' was the greatest guiding force in cultural development during the 20th century. In visual arts, music, literature, theatre, dance, the desire to challenge 'form', escape from genre, and to slip easy categorisation, was regarded as synonymous with creativity, innovation and social, economic and political progress.³⁰

³⁰ It should be noted that 'breaking down boundaries', or 'epistemological confusion', has been central to the movement of post-modernism that has held sway in many academic disciplines of 'western' or 'northern' universities in the last 30 years. From that perspective, all boundaries are socio-cultural constructions and liable to interrogation and challenge as a matter of course. In this respect, the boundaries set out by intellectual property laws are no exception. It is also obvious to note that knowledge itself only progresses by challenging and broaching the boundaries of existing knowledge.

Such differences in structure and behavioural norms are critical. They indicate that a single unified approach to ESCIAs, may be very problematic. For example, from the perspective of many sociologists, the complexity of social behaviour is rarely captured in economic modelling. The notion of a rational maximisation of personal utility, which guides many theoretical models in economics, appears as a bizarre abstraction to a sociologist or anthropologist.³¹ Within the latter disciplines, such an apriori account of human behaviour would blind the researcher to the complexity of social phenomena under analysis. Therefore there must be considerable doubt over whether it is prudent to leave the assessment of the impact of copyright externalities on social behaviour and the fabric of culture to the discipline of econometrics.

Every academic discipline has its limits. Econometrics may be able to provide a reasonable estimate of the financial cost externalities of a given economic measure. But what of the symbolic externalities? It is common, and indeed necessary, for a discipline to ignore that which falls beyond its direct sphere of competence. Here then, econometrics must draw a line. From the econometrics perspective, comprehension of the creative industries must rest on 'hard facts' relating to statistical measures. However, within general economic theory, anthropology, sociology, socio-legal studies and cultural studies an altogether different picture emerges. Forms of symbolic exchange are indeed vital to an understanding of the economy as a whole.³² Arguably, this is even more the case in an analysis of a law that mediates cultural production.

In short, it is enough to expect an expert in econometrics to calculate economic financial cost externalities of the copyright system. Comprehending, and accounting for, other kinds of externality falls within the competence zones of other academic disciplines. The development of ESCIAs will therefore require a cross-disciplinary approach. This throws up a number of practical problems that are addressed in the recommendations of this report.

³¹ For an interesting analysis of these issues see Geoffrey M. Hodgson, *How Economic Forgot History: The Problem of Historical Specificity in Social Sciences*, Routledge London, 2001.

³² As David Throsby suggests, material and symbolic exchanges can be seen within an economising framework. And the reverse is also true. Within economics one could point to Karl Polanyi's use of cultural anthropology in *The Great Transformation: The Political and Economic Origins of our Time*, Beacon, Boston, 1957. Within sociology Jean Baudrillard's application of semiotic theory of economics has been influential, particularly as it intersects with mainstream economic theories 'conspicuous consumption'. See Jean Baudrillard, *For a Critique of the Political Economy of the Sign*, trans. Charles Levin, Telos, St Louis, 1981. (First published 1974.) For a recent study developing from insights initially given by Baudrillard, see Scott Lash and Celia Lury, *Global Cultural Industries: The Mediation of Things*, Polity Press, London, 2007. Within cultural studies see Mike Featherstone *Consumer Culture and Post Modernism*, Sage, London, 1991. For more contemporary developments in this approach see Paul du Gay and Michael Pryke (eds) *Cultural Economy*, Sage, London, 2002. Within socio-legal studies see Rosemary Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law*, Duke University Press, London, 1998.

2.4 Envisioning Economic Social and Cultural Impact Assessments for the Creative Industries

2.4.1 Definitions of Cultures for Impact Assessment

Since the development of ESCIAs will require a cross disciplinary approach, it is necessary to account for the extent to which this already occurs. Engagement within culture has occurred at number of levels in economic literature.

Broadly speaking, two different levels of engagement can be identified. The first focuses on the relation of economic to culture in its broad, anthropological sense. The second focuses more narrowly on the economics of the cultural sector.

For example, David Throsby defines culture in the ‘broad sense’ as a set of defining conditions or beliefs that delineates a group.³³ The interactions of such a group can be analysed within an economising framework. Alternatively, they can be analysed within a cultural framework. The latter approach includes fundamental debates about whether economic rationality underpins social behaviour, or whether social and economic behaviour are expressions of deep-seated cultural perspectives. It also includes business and management literature that focuses on the problems of cultural context.

Throsby defines culture in the ‘narrow sense’ as that which occurs within the arts and cultural sector.³⁴ Here conventional economic apparatus is used to account for supply and demand within the arts. Current governmental approaches to the creative industries fall within this approach.

Both approaches to culture are important for the development of impact assessments. For the purposes of this report, culture in the narrow sense of the cultural sector, will be referred to as ‘*culture A*’. Culture in its broader, anthropological sense, will be referred to as ‘*culture B*’. Culture ‘in the narrow sense’ is important for an understanding of the structures and dynamics of the creative industries. However, it is the discourse surrounding culture ‘in the broad sense’ that is critical in developing an understanding of the relative nature of cultural and social impacts.

At the most basic level, the externalities of copyright are the product of norms and behaviours developed within *culture A*. The impact of those externalities are mostly felt in relation to *culture B*. At a deeper level, *culture B* creates long term determining and structuring effects on all operations that occur within *culture A*.

³³ David Throsby *Economics and Culture* p10. Throsby even suggests that schools of economic thought (Marxist, Austrian, Keynesian, neoclassical, old institutional, new institutional etc) are bound together by beliefs and practices that constitute ‘sub-cultures’ within the overall discipline.

³⁴ The *Journal of Cultural Economics* is the main forum for such work. Throsby cites Horkheimer and Adorno’s concept of the ‘Culture Industries’ (1947) and John Kenneth Galbraith (*The Liberal Hour*, Hamish Hamilton, London, 1960) as an antecedent approaches to this sub-sectoral specialism. However, it should be noted that economic approaches had existed in art history for some time. See Arnold Hauser, *The Social History of Art*, vols. 1-4, Routledge and Kegan Paul, London, 1962. (First published 1947.) Throsby’s list economists who have made specific links between economics, art and culture is as follows: Keynes, Lionel Robbins, Alan Peacock, Mark Blaug, John Kenneth Galbraith, Willam Baumol, Tibor Scitovsky, Kenneth Boulding and Thorstein Veblen.

A more detailed analysis of this process is given in **Part 3** of this report. However, it is first necessary to give a more detailed account of current debates about economic and culture in the 'broad sense'.

2.4.2 Culture: The Broad Economic Discourse

A number of different approaches to the relation of culture and economy gather in relation to the discourse of *culture B*. For example, the prevailing assumption of a coherent nationhood that underpins Adam Smith's approach to wealth can be regarded as broadly 'culturalist' approach to economics.³⁵ The concept of 'tradition', the rules of being, thinking and behaviour that are transmitted across generations, underpinned Friedrich Hayek's conceptualisation of human behaviour.³⁶ Hayek's concept of 'tradition' borrowed loosely from conceptualisations of culture used in anthropology. Hayek's 'tradition' lies beneath, and therefore validates, market rationality. In contrast, Karl Polanyi's deployment of cultural anthropology in the context of economic history came to rather different conclusions.³⁷

At this broad level of culture as an underlying and orientating factor of social behaviour, Max Weber's analysis of the 'protestant work ethic' is often cited.³⁸ David Throsby also notes a culturally located 'Anglo-Saxon individualism' at work in the writing of Adam Smith and John Stuart Mill. Many European commentators have also noted a distinctly Anglo Saxon cultural disposition of the current 'Washington Consensus'.³⁹

On a more subtle level, E F Schumacher suggested that economic development was broadly contingent on cultural change.⁴⁰ John Maynard Keynes is also often cited for his understanding of the way that the success of economic instruments is predicated on the confidence they instil; cultural context is therefore critical.⁴¹ The broad outlines of that insight were developed in a critical analysis by Donald McCloskey.⁴²

³⁵ Adam Smith, *The Wealth of Nations* (Books I-III), Penguin Classics, London, 1986. (First published 1776.)

³⁶ See Friedrich Hayek, *The Fatal Conceit: The Error of Socialism*, Routledge, London, 1988.

³⁷ Karl Polanyi *The Great Transformation: The Political and Economic Origins of Our Time*, Beacon, Boston, 1957.

³⁸ Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, Scribner's Press, New York, 1958. See also Max Weber *Economy and Society: An Outline of Interpretative Sociology*, University of California Press, London, 1978. (Originally published 1956)

³⁹ Some universalising economic theory also clearly emanates from a specific cultural context. Joseph Schumpeter's very influential concept of 'creative destruction' follows the trajectory of the romantic notion of self-destructive genius. Joseph Schumpeter, *Capitalism, Socialism and Democracy*, Routledge, London, 2000. (First published 1943) In this vein, Chicago economist Rik Szostak has even examined the influence of concepts surrealist and cubist movements on economists of the thirties, including Hayek. Rick Szostak, *Econ-Art: Divorcing Art from Science in Modern Economics*, Pluto, London, 1999.

⁴⁰ E F Schumacher, *Small is Beautiful: A Study of Economics as if People Mattered*, Penguin, London, 1989 (First published 1973). More recently Charles Leadbeater (*Living on Thin Air: The New Economy*, Viking, London, 1999) has used a similar argument in his advocacy for the knowledge economy.

⁴¹ See Denis W Houck, 'Rhetoric, Science and Economic Prophecy', in *The New Economic Criticism: Studies at the Intersection of Literature and Economics*, eds., Martha Woodmansee and Mark Osteen, Routledge, London, 1999. It is also interesting to note that Keynes was a member of 'Bloomsbury Group', a loose grouping of English painters, poets, writers and cultural critics. Beyond his economic work, Keynes is also notable as the founder and first director of the Arts Council in the UK.

⁴² Donald McCloskey, *The Rhetoric of Economics*, Wheatsheaf, Brighton, 1986.

More recently, Robert Wade has examined the role of national culture in economic development.⁴³ Amartya Sen has also noted the role of culture in development in presentations for the World Bank.⁴⁴ The role of culture has been a significant feature of developmental economics in recent years, wherein the question of how to secure economic growth while safeguarding the integrity of cultural traditions has been a central question.⁴⁵

In the last two years, Douglass North and Eric Jones have returned to earlier debates on culture and economics. North focuses on the role of social institutions in negotiating economic processes and the extent to which culture and religion influence economic decision making processes.⁴⁶ Jones presents a more sceptical account, which gives some room to cultural determinism, but gives far more to economic rationality.⁴⁷

There is also a significant sector of practical business and management literature examining the relevance of culture and cultural difference to business practice. For example, Richard Lewis suggests that, in spite of the growth of multinational companies and economic globalization, culture remains a key determinate factor in social and economic organization.⁴⁸ Lewis rejects the notion that differences in human behaviour can be explained by genetics. While leaving room for economic determinism as a driver, such factors are dependant on cultural context. Management theorists Fons Trompenaars and Charles Hampden-Turner have analysed the success and failure of 'off the peg' management theories in different cultures.⁴⁹ The most successful trans-national firms are those that are able to adapt to localised cultural contexts.

2.4.3 Limits and Opportunities of ESCIAs

The economic discourse on culture demonstrates an important schism in the relation between the realms. It is a question of ideology as to whether one regards social and cultural values as a subset of economic reasoning, or whether one regards economic

⁴³ Robert Wade, *Governing the Market: Economic Theory and the Role of the Government in East Asian Industrialisation*, Princeton University Press, Oxford, 1990. The text is of note for the essential role Wade accords to selective market protectionism in national economic development.

⁴⁴ Sen's 2000 paper on culture and development for the World Bank can be downloaded from the World Bank web site. See Part 6 – Bibliography of this report for a full web citation.

⁴⁵ See Warren, Michael. D, L. Jan Slikkerveer and David Brokensha, (eds.) *The Cultural Dimension of Development: Indigenous Knowledge Systems*, Intermediate Technology Publications, London, 1999. Throsby also cites the The UN World Commission on Culture and Development - See Part 6 – Bibliography of this report for a full web citation.

⁴⁶ Douglass C. North, *Understanding Economic Change*, Princeton University Press, London 2005.

⁴⁷ Eric L. Jones, *Cultures Merging: A Historical and Economic Critique of Culture*, Princeton University Press, Oxford, 2006.

⁴⁸ Richard D Lewis, *The Cultural Imperative: Global Trends in the 21st Century*, Intercultural Press, Maine, USA, 2003

⁴⁹ Fons Trompenaars and Charles Hampden-Turner, *Riding the Waves of Culture: Understanding Cultural Diversity in Global Business*, Mc Graw-Hill, New York, 1998. For a more complex sociological take on the issues of cultural difference and interdependencies, see Jonathan Friedman, *Cultural Identity and Global Process*, Sage, London, 1994.

reasoning as a subset of particular cultural and social norms. There is not a single, correct answer.⁵⁰

The current approach to mapping and evaluation of creative industries is predicated on a particular answer. *The creative industries are regarded as a specific subset of the general economic field.* The working assumption of current econometric approaches to the creative industries is that the same economic rules and management structures operate in largely the same ways in different social and cultural contexts. This is based on four linked assumptions.

- It presupposes that a stable definition of the creative industries can be agreed.
- It presupposes that the concept can be transferred to different kinds of cultural context.
- It presupposes that the industries and cultural practices that subsist within the definition operate in the same way in different economic, social and cultural contexts.
- Finally, it presupposes that benchmarking and international comparisons can be undertaken.

As the success of the *WIPO Guide to Surveying Copyright-Based Industries* indicates, for a certain kind of measurement and evaluation exercise such assumptions are reasonable. But the general application of a ‘universal’ approach is limited to certain spheres of activity. The forward to the WIPO Guide is indeed very specific about what is, and what is not, possible within the framework it puts forward.

The data used in creative industries mappings is adapted from that gathered in relation to ISIC codes, and their national equivalents.⁵¹ In the era of economic globalisation there is a considerable level of international agreement with respect to common economic and legal instruments. For example, the TRIPs treaty provides member of the WTO with minimum standards with respect to IP protection and, as already stated, the WIPO Guide, provides assistance with respect to a set of common standards for measuring and evaluating the copyright-dependent industries.

It is a guiding assumption of the ‘scientific’ analytical and rationalist frameworks on which international instruments are based that universal rules apply everywhere. This is true. But it is true only with respect to certain kinds of context. As Fons Trompenaars and Charles Hampden-Turner suggest, universalising tendencies threaten to become a handicap when applied to interactions between human beings from different cultures.⁵² The authors point out that in business, the most successful trans-national firms are those that are able to balance centralising tendencies with a *decentralising cultural awareness*. In a telling encapsulation of their research, the

⁵⁰ If the jurisdiction conducting the impact assessment views the cultural and social realms as possessing some fundamentally different values from the economic realm, they are likely to look to indicators that measure *outcomes*. However, where there is a belief that all social and cultural values are subject to underlying economic rationales, then the chosen indicators will seek to evaluate the impact of intellectual property on the social and cultural realms in terms of *financial outputs*.

⁵¹ International Standard Industry Classification codes can be downloaded from the website of the UN Statistical agency’s website. See Part 6 – Bibliography of this report for a full web citation.

⁵² Op cit., P4

authors suggest that the very thing that inspires one culture may very one that depresses another.⁵³

Social and Cultural Impact Assessments

When it comes to social and cultural impact assessment, a single, universal approach is not the most appropriate or efficient. The creative industries may legitimately be regarded as a specific subset of the general economic field for the purposes of measurement and evaluation. However, transferring such an approach to ESCIAs is not appropriate. To treat social and cultural impacts as aspects of the economic field would be prejudicial. *Impacts that fall in the cultural and social realms are the external effects of decisions made in the economic realm.* Treating them as though they are ‘economic issues’ would be to take a determinate ideological stand. As the forgoing analysis indicates, that stand is predicated on the assumption that social and cultural realms *are* expressions of an underlying economic rationality. While that it is valid opinion, it is not an indisputable fact. Whether one agrees with it is a matter of ideology.

For this reason it is clear that decisions with respect to the *purpose* and *design* of social and cultural impact assessments must be devolved to national level. A decentralising approach is likely to produce more accurate and locally useful results. Such an approach to impact assessment is currently deployed by a number of international bodies, some of which are reviewed in **Part 4** of this report.

An approach that is sensitive to local conditions does not prevent the development of a standardised international approach to impact assessment. However, it does place a number of serious constraints on how standardisation is approached. For example, while it may be deemed appropriate to develop general principles and processes that can be adopted in different jurisdictions, it is unlikely that an agreed set of impact indicators, which could be deployed in all social and cultural contexts, is possible or desirable. The desire for a measure of international standardisation must be balanced against the need to recognise essential cultural, economic, social and political differences that pertain in different jurisdictions. In practice this is likely to mean that the experiences of other international organisations with respect to the development of impact assessment is taken into account.

Economic Impact Assessments

It is open to question whether economic impact assessments should also be undertaken in a similarly decentralised form. While copyright laws and techniques of statistical analysis are fairly universal, the specific local contexts in which economic impacts are experienced are not. Trompenaars and Hampden-Turner provide a list of local conditions that the central management systems of a trans-national organisation must adapt to. The list includes: “characteristics of the market, the legislation, the fiscal regime, the socio-political system and the cultural system.”⁵⁴ As the authors suggest, such phenomena as authority, bureaucracy, creativity, good fellowship, verification, and accountability are experienced in different ways in different cultures.”⁵⁵

⁵³ Ibid., P19

⁵⁴ Ibid., P2

⁵⁵ Ibid., P2

There is therefore a strong case for a decentralising approach for economic impact assessments. This would provide member states with autonomy in choosing economic impact indicators that they regard as appropriate. However, such an approach would not preclude international capacity building exercises conducted at state level and the production and dissemination of statements of principles of best practice and suggestions as to the desirable attributes of a good indicator.

Process

The extent of decentralisation is open to further consultation. The assumption of this report is that ESCIAs must be useful to the nations in which they are conducted. It is therefore logical that maximum autonomy is accorded to specific jurisdictions in setting specific parameters and norms that reflect as far as possible local knowledge, local concerns and local context. The level of local autonomy in shaping the studies is therefore likely to be much greater than that experienced in the context of mapping and evaluation exercises currently undertaken with respect to the creative industries.

In practice, as suggested above, the *purpose* of ESCIA is within the purview of national governments and thus, the primary questions effecting the design of such studies, are primarily local and political.

Part 3 – Process and Operational Models for ESCIAs

Part 3 – Process and Operational Models for ESCIAs

3.1 Introduction

Part 3 of this report addresses four issues. Section two outlines the form and process that would be necessary in order to carry out an ESCIA. This is presented in the form of a checklist. Section three presents the key problem of modelling the operation of copyright with the aid of an illustrative case study. Section four addresses a number of approaches to the problem of how to model the operation of copyright, and the importance of the model for the design of an ESCIA.

3.2 ESCIA Checklist

It is of critical importance to recognise that an ESCIA should be thought of as a process. The complex nature of the impacts under consideration cannot be adequately addressed using a single methodology. It is therefore necessary to think of an ESCIA in terms of a recommended *process-of-action*, rather than a recommended set *methodology*.

The process of an ESCIA is made up of a number of steps. This report identifies 10 key steps.⁵⁶ The steps to be taken fall into different categories. Some steps can be broadly categorised as *diplomatic*, or political, in character. Some steps entail *theoretical* choices that may be dependant on political choices and negotiations with stakeholders. And other steps concern areas of a more *technical*, or methodological, nature.

This section provides a check-list of the steps required in order to undertake an ESCIA in any given jurisdiction.

Stage 1: Identification of Overall Purposes and Objectives for Study

As already indicated in foregoing analysis, the overall shape of any ESCIA is contingent upon political decisions. The purpose of the study has to be agreed from the outset, before any practical work can be undertaken. This entails the establishment of a clear set of primary objectives and a decision as to what purposes the study will be put. Such considerations are ‘situated’ economically, socially and culturally. The stated purpose of the study and its primary objectives are likely to be devolved to national level. However, it is envisaged that WIPO will have a significant role in supporting and facilitating the process.

Stage 2: Identification of Expertise and Creation of Delivery Team

A cross-disciplinary group of experts will be assembled who will be responsible for delivery of the ESCIA. The experts should include copyright experts, economists, statisticians, sociologists and anthropologists and geographers. It is also essential that expertise of a localised nature is included in the team. It is recommended that WIPO,

⁵⁶ The steps identified here are intended as an initial guide. Further refinements may be necessary when putting an ESCIA into practice.

and the member state undertaking the ESCIA works with an organisation with a track record in delivering complex impact assessments, such as the International Association of Impact Assessment.

Stage 3: Identification of Stakeholders and Primary Consultations

For the ESC IA to capture a balanced picture of copyright operation, and its relative impacts, open negotiations must be undertaken with a broad range of stakeholders. The stakeholder groups will include all those with specific concerns about the economic, social and cultural impact of copyright. For example, the stakeholders may include, but are not limited to, government representatives, consumer groups, industry lobbies, educationalists, tribal and/or ethnic group representatives and civil society groups.

Primary Consultations with the stakeholder groups should aim to map the primary areas of concern of all parties. The consultations should include the identification of likely impact areas for study, and discussion of the operational models of copyright that are relevant to each stakeholder group.⁵⁷

Stage 4: Choice of Operational Models

In partnership with stakeholder groups, the delivery team will make informed choices about the operational model, or models, of copyright that are relevant to the study. As demonstrated in **Part 2** of this report, the economic, social and cultural externalities of copyright are very complex.⁵⁸ At a technical level, how copyright is conceived, and what it is conceived in relation to, are critical when conceiving of its impacts. The choice of 'operational model' is highly significant in conceptualising impacts, and is dealt with in more detail in **Part 3.4** this report. The choice of operational model will have determining effects on later technical aspects of the ESC IA process.

Stage 5: Identification of Impact Areas

Having identified relevant operational models of copyright and consulted on likely areas of impact, the delivery team will move towards the identification of actual *impact areas* and will identify the conduits, or pathways, through which impacts are to be delivered to impact areas.

Stage 6: Review of Prior Art

The delivery team will be responsible for undertaking a wide-ranging review of prior art on the creative industries within the jurisdiction should be undertaken. This may include measure and evaluation studies undertaken in relation to the WIPO Guide, or using methodologies that pertain at national level. Consideration should also be given to supplementary international sources of information, such as the UNESCO Framework for Cultural Statistics and to relevant cultural sector studies conducted at regional and national levels. Of particular relevance here are studies made in relation

⁵⁷ The complex issue of underlying operational models of copyright is undertaken in **Part 3.4** of this report.

⁵⁸ A more detailed analysis of how copyright operates with respect to the economic, social and cultural realms is undertaken in this part of the report. That analysis illustrates a number of practical problems that such exercises are likely to encounter.

to ‘social and cultural impact indicators’ undertaken in the publicly funded cultural sector.⁵⁹

The aim of the prior art will be to build a more complex picture of the operation of the creative industries sector in the locale. This includes developing an understanding of how the relevant cultural and businesses processes operate, and of the specific role of copyright within those practices. This may include mapping and data related to ‘production cycles, or ‘creative cycles’, and input-output mappings of specific creative industries.

Stage 7: Identification of Impact Indicators by Impact Area

Once an agreement on impact areas and conduit has been reached, technical work can be undertaken. This will focus on the selection of appropriate ‘indicators’ that can be used in relation to each specified impact area and conduit.

It should be noted that though this work is of a more technical nature, the choice of indicator will reflect the situatedness of the agent undertaking the work. For this reason, some indication of appropriate indicators for each impact should be sought at the consultation stage.

Stage 8: Identification and Creation of Data Sources

Once indicators have been selected, further technical work can be undertaken to match the indicator to an existing data source. In many cases it is likely that new sources will have to be identified and/or new methods will have to be devised to capture data relevant to each indicator.

Stage 9: Undertaking an ESC IA

With this process described above in place, an actual *economic, social or cultural impact assessment* can be conducted. As suggested above, an ESCIA must be carefully targeted to specific areas of concern of the relevant stakeholders. The areas of concern will always reflect ideological beliefs, political realities and socio-cultural context. It therefore follows that a broad range of academic expertise and methodologies will be required to assess economic, social and cultural impacts. A single methodology, such as that currently used in measurement and evaluation of the creative industries, is unlikely to emerge in relation to ESCIA. The final ‘form’ of an ESCIA is difficult to determine in advance. However, some indications as to what an ESCIA may look like in practice is given in **Part 5** of this report.

Stage 10: From Assessment to Policy

Finally, the point of impact assessment is to inform policy. As already suggested, trade-offs between economic, social and cultural priorities are implicit in intellectual property laws and explicit in many areas of government policy. It is likely that the final form of the ESCIA will present policy makers with information, presented in different forms, that will have to be traded-off against each other. The ultimate

⁵⁹ There are considerable differences in public funding for culture in different jurisdictions. However, in many jurisdictions where public funding is available, assessments of cultural and social impact are already undertaken. Such studies are useful because, in many cases, there is considerable overlap between the cultural sector and the creative industries. Where they exist, such studies provide a useful guide to impact indicators already considered important by government. Some examples of such studies will be discussed in **Part 4**.

decisions about what is traded off is a matter for the legitimate authority in any give jurisdiction.

3.3 Case Study: Exploring Shangri-la

The overall process required to undertake an ESCIA laid out above will be the same in any jurisdiction. However, the context in which the assessment is carried out will vary greatly. This section explores a case study that dramatises the complex problems that will need to be addressed in an ESCIA. The case is taken from real life.

Shangri La

In 1933 a book, *Lost Horizon*, was published. It's author, the novelist James Hilton created a fictional utopian city in the Himalayas. He called his lost city *Shangri-la*. The success of the novel, and a number of films based on it, created a legend that gripped the mind of north American and European readers in the mid 20th century, such that *Shangri-la* entered everyday language as a term for a lost utopia and even a mind set.

James Hilton was an Englishman who never visited the Himalayas. He based *Shangri-la* on a number of sources, including the isolated valley town of Weaverville in northern California. His knowledge of the Himalaya's was based on travel books, particularly the work of the American 'explorer' Joseph Rock, who visited the region in the 1920s and 1930s.

On the first level of analysis, Hilton's fiction relies in part on the use and re-functioning of a number of 'cultural' sources, including a copyrighted non-fiction work. These are transformed by his imagination into a new copyrighted work - the *Lost Horizon*. One economic and cultural *output* is built on the back of another. At a further stage, Hilton's book (unlike Rock's) provides additional follow-on economic *outputs* in terms of film rights and the production and distribution of a film, with its attendant *economic outputs*.

However, Hilton's novel has additional *cultural impacts*. For example, one *outcome* of the book was that Franklin D Roosevelt named his presidential retreat in Maryland *Shangri-la*.⁶⁰ In the 1960s, a US soul band took up the name, and it has also proved a popular commercial name, particularly for Chinese restaurants around the world.

Those primarily *cultural outcomes* from Hilton's novel are in turn producing new economic, social and environmental impacts. The name and concept of *Shangri-la*, the legend and ideal created originally by the novel, has now spread across the world.

After the Cultural Revolution in China, local officials in the town of Zhongdian, a county in the Diqing Tibetan autonomous prefecture of the north-west Yunnan prefecture, lobbied to change the name of their town to *Shangri-la*.⁶¹

⁶⁰ It was renamed Camp David by Eisenhower.

⁶¹ *Xiang-ge-ri-la* in Mandarin. There is some debate on the origin of the name. Chinese government officials suggest it is an amalgam of three characters – *shang* (heart), *ri* (sun) and *la* (moon) that symbolise perfect harmony. However, it has also been suggested that the name is derived from the Sanskrit word *Shambhala*, which is a spiritual utopia in Buddhism.

However, a number of other Himalayan regions claimed to be the true inspiration for the fictional city. In order to settle the claims, the Chinese authorities created a contest to find the most appropriate city to be renamed *Shangri-la*. The debate raged for a decade. In 2001, the state council of Yunnan announced that the town of Zhongdian would be re-branded *Shangri-la* on all maps.

The *cultural outcomes* from Hilton's book are now producing new *economic outputs*, which in turn are producing new *social outputs* and *outcomes*, which, in turn, are producing new *environmental outcomes*.

In the year before the name change, the relatively impoverished town of Zhongdian had 20,000 visitors a year. By 2005, the number had rocketed to 2.6 million visitors. The mountain road that leads to the city has now been supplemented by an airport. Visitors are expected to triple over the next 15 years to approximately 8 million a year. In the ten years to 2005, the economic expansion has delivered a six-fold increase in revenue income for the *Shangri-la* government. The surge in economic growth is the result of the 're-branding' and a push by the Beijing government to develop tourism in the area, for which a budget of 50 billion yuan has been made available.⁶²

As we can see, these new *economic outputs* are relative easy to measure in terms of impact. The *social outputs*, for example in terms of rising incomes and employment, are also evident.⁶³ The *cultural outcomes* of Hilton's book are producing an expanding economy in the region, which have some positive *economic and social impacts*. However, these *outputs* have other *outcomes* in terms of culture and the environment.

The cultural characteristics deemed to be essential to the concept of *Shangri-la* – that of an isolated utopia – are increasingly destroyed by the economic development created by the cultural tourism. Where Zhongdian may have possessed some of those characteristics of *Shangri-la* before being renamed, being renamed has caused it to begin to lose those very characteristics. Ultimately, there is a danger that the 'cultural capital' on which the city is now drawing – the cultural outcomes of Hilton's book - will be devalued, which will in turn devalue the financial, human and social capital now being invested in the city.

There is also some concern that the speed of change created by the re-branding is creating *environmental impacts*, which for the purposes of this study can be considered under the rubric of *social impacts*. Visitors are growing at 60% a year and the local government is concerned. It considers a 10% growth rate would be more sustainable.

While cultural tourism is preferable to logging and mining - the alternative means of economic development in the region – there are signs that the rich ecology of the area is beginning to suffer. New roads, cable cars, hotels and an expanding airport are have

⁶² Figures and background story reported in the UK newspaper The Guardian, Thursday June 1st 2006. 'Welcome to Shangri-la', report by Jonathan Watts from Shangri-la.

⁶³ Notwithstanding a debate about how far local industries and individuals are benefiting from the investment as opposed to tour operators, construction firms and investors from outside the area.

negative impacts on the environment. The city lays close to the Three Parallel Rivers national park, which is a world heritage site.⁶⁴ The region is one of the most diverse temperate regions in the world and is host to 7,000 plant species and has a climate that ranges from subtropical to alpine.⁶⁵

3.4 Envisioning Impacts in Shangri La

3.4.1 Identifying Causation Patterns and Impact Areas

Impact assessment must, by definition, establish a *causal* relationship between a particular stimulus and a particular reaction. The overall picture the assessment builds must include both positive and negative impacts. Within this one example, there are a vast array of possible lines of ‘causation’ and a large number of potential ‘impact areas’. The job of an ESCIA exercise will be to identify *reasonable* lines of causation, and *reasonable* impact areas.

The lines of causation and impact areas identified for study are dependant on a large number of variable factors. Those factors reflect the theoretical model chosen to explain the operation of copyright; decisions taken at the political level with respect to defined objectives and the purposes to which the assessment will be put; the refinement of the theoretical model based on existing prior art within the locale; the process of consultation with stakeholders to identify areas of concern; and the specific identification of impact area and causation lines.

3.4.2 Theoretical Models of Copyright Operation

As suggested in **Part 2**, the potential number of variables, particularly in relation to social and cultural impacts, means that a devolved process for ESCIA is essential. However it equally important to recognise that the legal form under analysis is not a single, monolithic entity. In the age of TRIPs, the basic principles of copyright law are effectively international. However, as with any legal instrument, how those principles are interpreted is subject to a large number of variables. Copyright is context sensitive.

The conceptual identity of copyright reflects the economic, social and cultural milieu of the individuals who utilise it. Depending on where the actor is located in terms of cultural, legal and philosophical tradition its *nature* will be conceived differently. Depending on where the actor is located in terms of business, policy, academic discipline or culture sector, its *operation* will be conceived of differently.

For example:

- To some copyright is a legal instrument that developed from the regulation of the book trade, that has gradually been adapted to new reproductive technologies, moving from printed text, to images, works of art, film, sound recording and digitisation.

⁶⁴ At this point, the Yangtze, Mekon and Salween rivers run a mere 50 miles apart.

⁶⁵ According to the US NGO *Nature Conservancy*, quoted in the Guardian op.cit.

- To some it is the gift of the state to a specific class of cultural workers, now adapted to the needs of international trade.
- To some it is a grant of limited private monopoly to an individual or company.
- To some it is an extension of the person of the creator.
- To some it is a utilitarian regulatory measure.
- To some it is a natural right.
- To some it is a legal instrument arising from socially constructed and gendered concepts of originality and genius, which are now outmoded.
- To some it is a property to be bought and sold, either as a discrete entity or as a series of separate rights, or an asset on which rents accrue.
- To some economists it is a government-imposed impediment to a free market.
- To some multinational corporations it is a protection for investment, a tool in international trade.
- To some states it is a trade regulation that impedes knowledge and technology transfer and impedes local economic development.
- To some activists it is a method of privatising common assets, to others an impediment to the free spread of knowledge.
- Within government, it may appear as a market regulation measure to a Central Bank; a cultural right to a Minister of Culture; an international market regulation to a Trade Ministry; an obligation under human rights agreements to a government lawyer.

Clearly, this list is not exhaustive. Copyright is context sensitive. How the law is viewed, what we take the law to be, will colour:

- a) how we conceptualise its operation;
- b) what we think it should achieve;
- c) what we don't want it to achieve;
- d) and, hence, how we conceive of its 'impact'.

The aim of the ESCIA is to conceptualise the economic, social and cultural externalities of copyright, and produce a useful assessment of the overall costs and benefits. How copyright is conceptualised is a key determining factor in how its externalities are envisaged. At the earliest stage of the ESCIA, very careful consideration must be given to this question.

As the above list indicates, it is likely that the answer will reflect how its *nature* is conceived. This is often a matter of localised legal and philosophical tradition. The answer will also reflect how key stakeholders view its *operation*. The former could be defined, loosely, as the *jurisprudential approach* and the latter, loosely, as the *stakeholder approach*.

3.4.3 Outline Models of Copyright Operation

An ESCIA is a process. The process requires a number of steps. The *jurisprudential* and *stakeholder* approaches will reflect negotiations at member state level. However, these variable approaches to the question of how copyright operates intersect with a more fundamental issue. To have an understanding of the operation of copyright and its externalities, one must have an understanding of what the 'outside' of copyright looks like. The impacts of copyright are external to copyright. To conceive of an

impact area, one has to have a concept of what copyright is interacting with. How that is conceived depends on the operation model.

In the following sections, we consider four possible models:

- The legal-economic (or public goods) model
- The public domain model
- The cultural circulation model
- The knowledge circulation model

Each model has value in conceptualising how a local copyright system might operate in practice, what its traditions might be, what objectives it might have. At a general level, all models envisage that copyright operates within a set of operational restraints. There are common features. To an extent, each model views a copyright item as a nodal point in larger field of circulation. To an extent, each views copyright as a form of temporary closure in an otherwise open field. Beyond such commonalities, each model plays to quite different aspects of the system.

In conducting an ESCIA, the perceived purpose of the study is a paramount factor in determining its design. That is further moderated by a rapprochement between the juridical and stakeholder frameworks. However, the underlying theoretical framework will also inform how the operation of copyright and its economic, social and cultural externalities are conceptualised.

The models outlined here are intended to be indicative of a potential range options. They are not the only options. Some options may be more appropriate in certain circumstances than others.

3.4.4 The Legal-Economic (or Public Goods) Model

At the international level, there is a basic agreement on the principles of copyright. The agreement rests on an aggregation of historical and culturally specific approaches to the law. It also represents an amalgam of legal and economic approaches to the right.

The outline of this view is simple. Copyright is an exclusive right granted to creators with respect to a specific expression. The right is limited in scope and length of term, the latter usually being the life of the author plus seventy years.⁶⁶ The copyright is a bundle of rights that can be traded as a whole or in part. A copyright is, in part, a public good. The knowledge or idea expressed is itself is a non-rivalrous good. One person's use of an idea does not exclude another's use. In part, the copyright is an private right accorded to a 'legal individual'. Thus, the copyright confers exclusive rights over the 'form' or specific expression of the idea. While the idea expressed remains a public good.

The right is granted in order to the incentivise the production of public goods for the general benefit of society. Thus a limited private monopoly is granted to the creator in order to protect upfront investment in time and costs.

⁶⁶ Term and effective scope vary depending on the jurisdiction.

The public goods nature of the right means that its exclusive nature has to be set against broad public benefits. Thus, in addition to limitations to scope and length of term, a number of exemptions are also usually included that permit the reproduction of material under given circumstances.⁶⁷

On this generally agreed model, the copyright is a temporary closure of economic and social usage around a particular item. This represents a distinction between material that is protected, or ‘closed’, and material that is ‘open’. This is primarily expressed in three ways.

1. The ideas/expression dichotomy ensures that the closure around a private right is balanced by openness with respect to the public goods aspect of the protected item.
2. The length of term ensures that the temporary economic closure provided by the limited monopoly is balanced against ultimate free competition on the reproduction of the item.
3. The exemptions provide open access for users to protected materials under certain socially desirable conditions.⁶⁸

The guiding principle that supports this model suggests that the temporary closures afforded by copyright have to be balanced against various kinds of openness.

1. The public goods aspect is predicated on principles of economic, social and cultural openness. The public interest is served by open access to ideas. This principle encourages broad engagement with knowledge and culture. Thus it encourages the new cultural activity and the production of new knowledge, and, potentially, the development of new copyrights.⁶⁹
2. The competition aspect is predicated on the principle that protection for investment must be proportionate. It has to balance an economic closure against open competition. The copyright has to be strong enough to incentivise the creation of new public goods, thus creating competition based on *innovation*. But the right granted must not create a permanent monopoly that eliminates *price* competition. Thus the time limit thus encourages price competition and market efficiencies in the longer term.
3. The user rights aspect is predicated on the principle that the rights of creators and owners have to be balanced against the legitimate rights of users. Under some circumstances, the public goods aspects of a protected item have to be supplemented by an additional opening. Thus the right to reproduce material is granted to users where it is deemed to be of public benefit. These rights can be characterised as primarily social and cultural.⁷⁰

⁶⁷ Exemptions under ‘fair use’ (to use the US terminology) vary according to the subject matter protected and jurisdiction.

⁶⁸ It should be noted that what is regarded as socially useful varies. This reflects different historical circumstances with respect to the law and different forms of cultural and social organisation.

⁶⁹ It should be noted that the level of control rights owners can exercise has increased considerably in recent years.

⁷⁰ This general characterisation of ‘fair use’ does not preclude such rights from being utilised in new expressions that are themselves subject to copyright, and traded in economic contexts.

In common usage, the outline of this model expresses a binary logic. An item is 'in copyright' or 'out of copyright'. An item is protected as private property, or it is not protected as property. Usage of a protected item is legal, or illegal. The more complex circulations that lay beneath the characterisation of the law are revealed only in relation to the specific limitations laid out by the law. The model therefore alludes to broader economic, social and cultural contexts, but those contexts are not the central focus.

3.4.5 The 'Public Domain' Model

Currently, one of the main ways of conceptualising copyright in relation to its broader field of operation is the concept of the 'public domain'. At the most simple level, that which is protected by intellectual property is contrasted with that which is not, and which is free for all comers to build on.⁷¹ Thus, copyright has to be viewed in distinction to the public domain.⁷²

In the digital age, this conceptualisation has become increasingly important. The scope and term of copyrights have increased at the same moment that new technologies have vastly increased reproductive capabilities. The expansions of copyright have been seen by some as an 'enclosure' of material that previously would have been 'outside' the scope of property protection.⁷³ The public domain is therefore sometime conceptualised as that which is 'outside of property'.

The identity of this 'outside of property' is complex. It can be viewed as work that is not in copyright. It may in addition include the ideas (or public goods aspects) of a copyrighted work that are free to use. It may further include, the specific exemptions related to works currently in copyright.

From the public domain reading, copyright is an instrument historically designed to feed the public domain. The ultimate goal of the system is to promote free access to knowledge and culture.⁷⁴ The position stands in contrast to other contemporary views that deploy copyright as a means of promoting the interests of particular creative

⁷¹ See for example, Duke Universities The Centre for the Study of the Public Domain. The centre was founded in 2002 under the university's wider intellectual property programme, to study the contributions of the public domain to speech, culture, science and innovation. The department's web pages can be found at <http://www.law.duke.edu/cspd/about.html>

⁷² It should be noted that the increasing use of the term in relation to the digital world is largely due to the activities of IP reform movements. This has been particularly, though by no means exclusively, associated with movements and debates originating in the US and conducted in English. The origin of the term comes from the French concept of 'domaine public', where the concept has a much longer history that can only fully be appreciated in relation to the particularities of the French legal system, culture and history.

⁷³ The French concept of 'domaine public' spread internationally through its inclusion in the Berne convention. For an early analysis relating the concept to the contemporary debates in the English speaking world see David Lange 'Recognising the Public Domain', *Law and Contemporary Problems*, Autumn 1981 at 147. See Part 6 – Bibliography of this report for a full web citation. For a current overview of the debate about the public domain in the US, internationally and in relation to digital environments, see James Boyle 'The Second Enclosure Movement and the Public Domain', in James Boyle (ed.) *Duke Conference on the Public Domain: Collected Papers, Law and Contemporary Problems*, Vol 66, Winter/Spring, 2003, Numbers 1 & 2. See Part 6 – Bibliography of this report for a full web citation.

⁷⁴ Lyman Ray Patterson and Stanley Lindberg, *The Nature of Copyright: A Law of User's Rights*, University of Georgia Press, Athens, 1991.

industries, creating growth in capital accumulation, and protecting national economies in the global market place.

As with copyright, the identity of the public domain is also modulated depending on the concerns of the actor utilising the concept. In recent years, the property/not-property dichotomy has been re-expressed in relation to power and control.

‘Old’ conceptualisations of the public domain envisage a division between that which is not property and free to use, and that which is property, the use of which is subject to a number of temporary constrictions. ‘New’ conceptualisations present the division as between the “realm of individual control and the realm of distributed creation, management and control.”⁷⁵

In the digital age, it has been argued that the fundamental issue of monopoly is not about the growth of inefficient accumulations of capital, market domination and monopoly pricing to consumers. The fundamental issue is whether the exercise of property rights impedes innovation. The basic infrastructure of the digital age, such as the core internet protocols TCP/IP and HTML, are open and must remain so. Such open standards are key parts of the public domain. On this reading the danger is that intellectual property rights will be extended over materials that should remain open. It is argued that proprietary rights give some business excessive levels of control over the future direction of innovation.

The ‘new’ public domain model therefore focuses on the dangers to innovation – economic, social and cultural – as opposed to the dangers emanating from straightforward market domination of monopolies.

3.4.6 Cultural Circulation Model

It is increasingly common to see copyright as part of the complex of cultural flows. The notion of a flow of cultural expressions is frequently conflated with ideas of the public domain and innovation. For example, the forward by Andrew Gowers to his recent review of intellectual property in the UK suggests that the “ideal IP system creates incentives for innovation, without unduly limiting access for consumers and follow-on innovators. It must strike the right balance in a rapidly changing world so that innovators can see further by standing on the shoulders of giants.”⁷⁶

However, there are considerable differences between the conceptualisation of the ‘new public domain’ that is focussed on innovation and the idea of cultural flow. The former is derived from debates relating to software and industrial development. In contrast, the notion of cultural flow is embedded in historical concepts relating the cultural sector, cultural ‘in the narrow sense’, and culture ‘in the broad sense’. In Part 2, these were defined as *culture A* and *culture B* respectively.

There are two kinds of cultural circulation model. One explains creativity on an

⁷⁵ Boyle, op cit.

⁷⁶ Report is available on the UK government’s web site: <http://www.hm-treasury.gov.uk> See Part 6 – Bibliography of this report for a full web citation. Similarly, the Adelphi Charter suggests: “creative imagination requires access to the ideas, learning and culture of others, past and present.” See Part 6 – Bibliography of this report for a full web citation.

individual and group level. In this mode, the model gives insight into the limits of individual creative practice and thus suggests limits to the legitimate and useful functioning of copyright. The other attempts to explain the macro relation between culture A and culture B. At this level, the model gives an insight into how inputs to copyright items might operate in relation to copyright externalities.

Individual Cultural Circulation

This model has its origin in social history approaches to art developed in the 1940s.⁷⁷ In more recent years, the model has been developed in sociology by Pierre Bourdieu, and more generally under the aegis of ‘actor network theory’, where the concepts have been applied to the analysis of innovation.⁷⁸

On this model, the creative capacities of an individual can only be expressed in relation to a cultural field. For example, a painter may make a painting, but the creation of the work of art does not end there. The cultural field of which the painter is a part constructs the painter’s role. On this view, the actions of the individual only exist in relation to a specific set of culturally located concepts. The artwork, like the artist as a social entity, is constructed the other ‘actors’ that make up the cultural field. These include ‘human actors’, such as other artists, gallery owners, critics, art collectors, museum curators, art audiences etc., and ‘non-human actors’; the latter including the material support systems, such as a studio, gallery and museum; and incorporeal support systems such, financial and legal structures, the conceptual infrastructure of cultural institutions – the idea of art, and that painting is an art, and that art is a vital part of culture.⁷⁹

In this example, the copyright that is produced is ‘created’ by the artist and may subsequently be traded. Providing the painter creates an expression in a fixed and tangible form, and that the artwork is sufficiently original, and has not infringed another copyright, it secures the protection of the law. However, it is clear the ability to recognise the item as an artwork, together with its meaning and its cultural and economic value, is not created by the painter, but by the interaction of the painter with a broader network of actors. Mihaly Csikszentmihalyi puts this succinctly when he suggests that creativity cannot be separated from the system that recognises it as creativity.⁸⁰

The larger cultural field therefore feeds the artist. In turn, the artist creates an item protectable by copyright. In turn, further stages of creation occur as that item interacts

⁷⁷ See Arnold Hauser, op. cit.. Hauser’s approach was deeply indebted to Weberian sociology.

⁷⁸ See for example, Pierre Bourdieu, ‘The Field of Cultural Production, or: The Economic World Reversed’, in *The Field of Cultural Production: Essays on Art and Literature*, trans. Richard Nice, Polity, London, 1993.

Also see John Law and John Hassard, *Actor Network Theory and After*, Blackwell, Oxford, 1999.

⁷⁹ This approach can be used to the cultural operations of any art form. The underlying analytical principles of the approach have been used in innovation theory. See Michel Callon’s seminal analysis: ‘The Sociology of an Actor-Network: The Case of the Electric Vehicle’, in *Mapping the Dynamics of Science and Technology*, eds., Michel Callon, John Law and Arie Rip, Macmillan, London, 1986

⁸⁰ Mihaly Csikszentmihalyi *Creativity: Flow and the Psychology of Discovery and Invention*, Harper Collins, London, 1996. It should be noted that this points raised by this form of analysis can also be applied to works made in collaborative groups. Further than that, it also indicates that all cultural production is in some form collaborative.

with the cultural field. Through that interaction, the identity of the work is established along with its *cultural* and *economic* value. The latter aspects of the artwork wax and wane according to changes in the relational structure of the field. To complete the cycle, the ideas expressed by the painter, and ultimately the copyright-protected expression of those ideas, become constituents of the cultural field, feeding back into the creative cycle.

On this model then, the copyright marks a temporary constriction point, or node, in a much larger cultural circulation. An individual actor's ability to create is constrained and enabled by their relative position within the cultural field. Both the raw materials that feed their creative process, and the eventual cultural and economic value of the copyright items produced, are effects of a more general open circulation of culture.

This cultural circulation model can be related to the main articulation points of the *Legal-Economic Model* and *Copyright and Public Domain Model* above. Those models describe the *limits* of copyright as it intersects with other areas of social and economic concern. The cultural circulation model similarly describes the limits of copyright but from a cultural perspective. Ideas circulate freely in the cultural sphere, feeding into, and out of, any given copyright item. Works currently outside of copyright, and aspects of protected works covered by exemptions, may also feed into the copyright item, and (ultimately) feed out of the item.

Macro Cultural Circulation

Cultural circulation can also be expressed in other ways. As indicated in **Part 2** of this report, there is a circular movement between culture A, 'culture in the narrow sense' of the cultural sector (where the copyright-based industries are located in cultural terms) and culture B, that is 'culture in the broad, anthropological sense'. The cultural sector that pertains within any region or nation can be viewed as a manifestation of deeper underlying cultural flows. In this sense, the products of the cultural sector are an explicit manifestation of deeper cultural differences. These outward expressions serve as markers or tokens of those cultural differences.

Thus, as suggested in **Part 2**:

“At the most basic level, the externalities of copyright are the product of norms and behaviours developed within *culture A*. The impact of those externalities are mostly felt in relation to *culture B*. At a deeper level, *culture B* creates long term determining and structuring effects on all operations that occur within *culture A*.”

In this model, the cultural sector (which includes the creative industries) is a nodal point in a larger cultural circulation. Culture in its broad sense feeds the creative industries. In turn, those industries create items protectable by copyright. Those items interact with culture in its broadest sense. To complete the cycle, the ideas developed by the copyright industries, and ultimately the copyright-protected expression of those ideas, become constituents of the culture in the broader sense, thus feeding creative cycle.

In a similar way to *Individual Cultural Circulation* described above, the copyright industries are a temporary constriction point in a much larger cultural circulation. The

ability of the sector to create is constrained and enabled by their relative position within the cultural field. Both the raw materials that feed their creative process, and the eventual cultural and economic value of the copyright items produced, are effects of a more general open circulation of culture.

On both cultural circulation models it is clear that copyright is a necessarily limited tool. It is functioned by an open and fluid movement of cultural ideas. It creates a temporary constriction in the cultural flow. The specific limitations of the right that operate through the idea/expression dichotomy, scope and length of term, and fair use exemptions are critical in ensuring that the overall flow does not silt up, thus restricting the use, enjoyment and creation of culture.

3.4.7 Knowledge Circulation Model

Another way of conceiving the operation of copyright is through theories of knowledge circulation. In 1967, Michael Polanyi laid out the differences between *tacit* knowledge – knowledge that related to skills and know-how that are transmitted person to person – and *explicit* knowledge - knowledge that can be spelled out and formalised.⁸¹

Polanyi's analysis sought to recognise the role of human subjectivity in scientific endeavour. On this view, personal feelings and commitments were crucial in the development or discovery of knowledge that could later be proved, or made explicit, by scientific methodology. In particular tacit knowledge, a 'pre-logical' state of knowing, was a key driving force. In his schema, tacit knowledge comprised a disparate and inchoate range of conceptual and sensory information that is used in problem solving, but which is not formalised. The process of problem solving composes those forms of knowing into explicit knowledge, represented by a new scientific theory. The latter can then be expressed in a fixed form, transmitted, and the experiment repeated and verified by another scientist.

Polanyi's concepts have been adapted to the theory of the firm and to the production of intellectual properties. In 1995, Nonaka and Takeuchi published an influential study on knowledge flow based on a study of Japanese firms.⁸² The SECI model splits knowledge production in four parts: Socialisation, Externalisation, Internalisation and Combination (SECI). Knowledge is created in a continuous cycle that sees interchanges between tacit and explicit knowledge.

At the *socialisation* stage, knowledge is shared face-to-face by employees in a tacit manner. This results in an *externalisation* phase that formalises the knowledge in an explicit form, allowing it to be shared and tested within the firm. In the third phase of *combination*, various types of explicit are brought together. And in the final phase of *internalisation*, the knowledge is distributed in the firm as new forms of organisation and practice, and is thus returned to a tacit state, becoming a part of an employees everyday routine.

⁸¹ Michael Polanyi, *The Tacit Dimension* 1967.

⁸² Ikujiro Nonaka and Hirotaka Takeuchi, *The Knowledge Creating Company: How the Japanese Companies Create the Dynamic of Innovation*, Oxford University Press, Oxford and New York, 1995.

The circular tacit-explicit model is then applied to an analysis of a firm's knowledge assets. *Experimental knowledge assets* are those assets held by employees in tacit form. *Routine knowledge assets* are those held in tacit form in the operations of employees. *Conceptual knowledge assets* are knowledge held and circulated in explicit form through fixed systems, including designs and concepts for new products, the company brand etc. Finally, and most importantly for this analysis, *systematic knowledge assets* are explicit knowledge that has been 'packaged' and protected by some form of intellectual property. Typically, this will include material in a fixed and tangible form protected by copyright, and patents, trademarks and databases. In this model, it is systematic knowledge products that are traded.⁸³

In this model of knowledge circulation, the production of copyright items rests in the first instance on the circulation of tacit knowledge. Tacit knowledge eventually coalesces into an explicit form. This can be thought of as definite concepts. Once such explicit knowledge is expressed in a fixed and tangible form, it becomes subject to copyright. However, for the copyright item to have any social, cultural or economic value, it must be comprehended. This is an individual cognitive process that occurs within the mental faculties of the user, or the 'consumer', the knowledge. It entails converting explicit knowledge back into tacit knowledge.

As with the other models discussed in this section, copyright is here positioned as a temporary constriction in a larger flow of knowledge. Knowledge held and shared as tacit knowledge feeds the production of explicit knowledge. The necessary condition for the existence of a copyright is that knowledge is rendered explicit. Further, the explicit knowledge must then be rendered in a fixed and tangible form. For the explicit knowledge protected by a copyright to have any value, it must be rendered as tacit knowledge by a user.

3.4.8 The Copyright Operation Models and Shangri La

In conclusion, the four models outlined above – based on public goods, public domain, cultural theory and knowledge theory – each provide different conceptualisations of what the temporary enclosure around a copyrighted item draws on, interacts with, and ultimately contributes to.

It is necessary to make clear decision with respect to the conceptual model of copyright operation in the early stages of any ESCIA. How one views the 'source' from which copyright items arise, and how one thinks of the 'outside' of copyright, is central to the way areas of impact are conceptualised.

There are a number of *commonalities* in the four operational models presented for the purposes of this study. However, each model will draw the researcher to fundamentally *different* perspectives on what the impacts of copyright are, and whether they should be seen as positive or negative. If the researcher assumes that

⁸³ In Nonaka and Takeuchi's study, knowledge flow ends in intellectual property production. I should be noted that the tacit and explicit model does not necessarily end in protected items. For example, many large firms trading open source software, effectively give away the underlying copyright, profits are not made by selling IP, but rather by selling services. The latter can be expressed in tacit and explicit form. For a recent analysis and typology of types of tacit knowledge in the context of the theory of the firm, see Ash Amin and Patrick Cohendet *Architectures of Knowledge: Firms, Capabilities and Communities*, Oxford University Press, Oxford 2004.

copyright operates in such a way as to create optimum flow between explicit and tacit knowledge, one view of positive and negative impacts may be taken. If the researcher assumes that copyright operates to create an optimum flow between property and the public domain, another view of positive and negative impacts may be taken.

The choice of operational model will therefore have a significant bearing on how the impacts of copyright are seen.

In order to get a picture of the importance of the operational model in creating an ESCIA, it is necessary to say a little more about the commonalities and differences between the models.

Commonalities and Differences Between the Operational Models

There are four principles on which the operational models are in agreement. In each, copyright is seen to operate in the context of a broad circulation of open, freely accessible material, ideas and concepts.

These are four commonalities can be schematised thus:

1. In each model, copyright is a part of a broader and more open picture, which can be described variously in terms of public goods, non-property, culture, or knowledge.
2. In each model, copyright is a narrowing of a larger circulation around a particular item (or sector).
3. In each model, the copyright is a right that is necessarily limited in order to protect the larger flow on which it feeds and to which it ultimately contributes.
4. In each model, the economic, social and cultural value of the copyright item does not subsist *within* the right, but in its ability to *interact* with the open field that it draws on and contributes to.⁸⁴

Despite such commonalities each of the four models described thus far would provide a *different* understanding of impacts. Each model could be applied to understand the operation of copyright in the complex case of Shangri La.

For example, the transmission of the picture of the Himalayas from Joseph Rock's travel book to novelist James Hilton's imagination can be rendered in different ways using the different operational models.

1. It can be understood as a transmission of the public good aspect of Rock's copyright to Hilton's imagination.

⁸⁴ While any commodity is valuable in terms of its use, the ideas/expression dichotomy goes somewhat further. The expression, protected by copyright, is clearly a commodity. The ideas expressed are not a commodity. Thus, the 'use value' of copyrighted items is considerably more complex than the use value of a straightforward commodity. A book for example, is valuable to a reader because of the ideas or concepts that can be disinterred from it, not because the paper and cardboard cover are valuable. Critically, the ideas and concepts are valuable to the reader precisely because they interact with existing ideas, knowledge and/or aesthetic experiences that the reader brings to the work. Thus the value of the copyrighted work is dependant on existing knowledge and experience that are brought by the reader. Without that interaction, an interaction that itself remains necessarily outside of the property system, the property aspect of the copyright item would be worthless.

2. It can be understood as the transmission of ideas that are a part of the public domain to Hilton's imagination.
3. It can be understood as a cultural influence within a field of creative-cultural relations.
4. It can be understood as a transmission of tacit knowledge between Rock and Hilton.

An analysis of the chains of causation in the Shangri La case study could be undertaken with respect to any of the four operational models. To take one model as our example (number 4), the chain of causation at play in Shangri La can be rendered in terms of the circulation between tacit and explicit knowledge.

Hilton's concept of Shangri La can be thought of as the composition of a number of stands of tacit knowledge into a single piece of explicit knowledge. That knowledge can, in turn, be viewed as 'an expression in fixed and tangible form' to which a copyright attaches. It can then be viewed as a property right that is traded with a publisher and a film company.

In order to be useful, the explicit knowledge is turned into tacit knowledge by readers and viewers. The tacit knowledge is then exchanged legitimately from person to person, outside of the property system. Occasionally, the knowledge is rendered explicit again. For example, it becomes the name of a presidential retreat. But in such cases, it does not automatically fall under copyright or any other intellectual property protection.

Later, when the tacit knowledge is again rendered explicit in the name of a soul band and a restaurant, commercial rights attach to the name. This may result in an intellectual property infringement, depending on the laws of the particular jurisdiction in which it occurs. However, elsewhere the tacit knowledge continues to circulate freely within society. As it does so, it adds more value to the property rights in Hinton's work, since the economic and cultural value of those rights depends entirely on the circulation of tacit knowledge. Eventually, it is the value stored and circulated by the burgeoning tacit knowledge that leads to the tourist boom in the previously quiet town in Yunnan.

3.5 Conclusion: Operational Model and Jurisdiction of the ESCIA

Each operational model discussed above is valid. It is important to recognise that it is impossible to undertake ESCIA without an operational model of copyright. Consideration of which model, or models, are deployed must be taken in the early stages of designing an ESCIA. Each model will help to define what a reasonable impact area might be, and can be used to aid the identification of the pathway, or causal chain, through which an impact is transmitted.

Despite the commonalities of the four models, the differences between the models are critical. For example:

- The concept of public goods is not identical to that of the public domain.
- The concept of the public domain is not identical to that of culture.

- The field of culture is not the same as the concept of tacit knowledge.
- Tacit knowledge is not the same as public goods, and so on.

Each model of copyright operation will give very different answers to the question of what impact copyright has. The decision of which operational model to use, and in which part of an ESCIA, is likely to reflect the position of the situated actors undertaking the practical research. Similarly, how the different accounts of impacts (that will result from the deployment of different operational models) are weighed against each other is a decision that will be made by the actors undertaking research in specific circumstances.

What the researcher imagines copyright to be interacting *with* is the critical issue. That decision has a determining effect on what impacts are envisaged, which impact areas are judged relevant and which pathways are selected.

Which Model is Best?

This report does *not* recommend the use of any particular model or combination of models. Responsibility for such choices will fall within the ‘diplomatic’ remit of the person or authority within a particular jurisdiction who is undertaking the ESCIA.⁸⁵

It should be noted that all the operational models described in this report *are* currently in use. The public goods model is common in copyright textbooks, and since the early 1990s, has undergone considerable conceptual clarification, particularly in the field of endogenous growth theory and knowledge economics. The public domain model is used extensively in debates about digital copyright, user access rights, and innovation. The cultural circulation model, and variations on it, has deep roots in European cultural history, and has been influential on contemporary sociological analysis of innovation. The knowledge circulation model has been central to theoretical descriptions of the knowledge economy and to contemporary theorisations of the firm.

No model is more ‘correct’ than any other. Each has emerged and evolved in relation to different questions and priorities.

For the purposes of this current study, a number of issues remain, of necessity, open to further analysis. It is not clear whether one particular operational model should be assumed when addressing cultural impacts, and another model when addressing social impacts. As suggested in ‘Checklist’ in **Part 3.2** of this report, the overall purpose and shape of an ESCIA is a political, or diplomatic, question that must be devolved to member states. Specific decisions made with respect the operational model(s) of copyright will have a determining effect on the outcome of the ESCIA. Decisions on operational model(s) are taken at Stage 4 of the ESCIA process.

However, it should be remembered that, whatever operational model(s) deployed, the choice of model will have a strong determining effect on the account of impacts ultimately provided by an ESCIA. Each model, or combination of models, will provide different accounts of impacts.

⁸⁵ See Part 3.2 of this study

How the operation of copyright is modelled will also render some aspects of copyright operation visible and render other aspects invisible. The identification and assessment of some aspects of copyright in 'official' analysis will give those aspects a new importance. Those that fall outside of the process of assessment will be effectively relegated in importance. This creation of a 'new perspective' is in the nature of any mapping exercise or impact assessment. Thus, open consultation with all stakeholders is critical in the early stages of the ESCIA process.

Finally, it must be noted that, as with monitoring and assessment exercises, impact assessments can create targets and incentives that have the effect of skewing the actual operation of the field under analysis. This underlines the fact that the early consultation phases of an ESCIA must be open, broad and rigorous. Great care has to be taken when making the primary decisions with respect to overall purpose of the ESCIA, its specific objectives and the choice of operational model(s) in particular.

Part 4 - Case Studies in Impact Assessment

Part 4 - Case Studies in Impact Assessment

4.1 Introduction

Part 4 of this report addresses four issues. Section two provides a summary of the problems of identifying relevant impact areas and selecting relevant impact indicators. Section three outlines a number of approaches to economic, social and cultural impact analysis currently used within different realms and jurisdictions. Section four provides some conclusions as to potential cross-disciplinary approaches for the future.

4.2 Technical Issues

As the 'Check-List' in **Part 3.2** of this report suggests, an ESCIA is most accurately conceived of as a *process-of-action*. It can be broadly divided into three types of activity: *diplomatic, theoretical and technical*. All three activities will help shape exercise.

The principle 'diplomatic' and 'political' issues were overviewed in **Part 2** of this report. The principle 'theoretical' and 'operational modelling' issues were overviewed in **Part 3** of this report. **Part 4** of this report will provide a general account of likely 'technical' issues to be addressed.

Before moving on to discuss the technical issues, it is useful to return to the recap 'Check-List' process and define clearly how each step can be categorised in relation to *diplomatic, theoretical and technical* issues.

As the Check-List suggests, diplomatic and political negotiations must be undertaken at **Stage 1** of the ESCIA process. This establishes the purpose and desired outcomes of the assessment.

At **Stage 2**, a delivery team of specialists and experts is assembled. The process of choosing the team falls under the category of diplomacy and theory. Who is chosen to undertake the research will have a bearing on the outcome. Economists and statisticians may have one view about the role of culture in society and economy. Sociologists and anthropologists have another. For a full picture of the operation of copyright, both views are necessary. The choice of team thus falls into the area of diplomatic and political choices.

At **Stage 3**, relevant stakeholders are identified and consulted. Who is consulted will clearly have a determinate effect on the final outcomes of the ESCIA. Who to consult with is both a political and theoretical issue. Thus it is a negotiated process, which requires diplomatic skill. In principle, all stakeholders should be consulted. The ultimate value of the ESCIA is undermined if it is viewed as an unrepresentative or partial in its overall design.

At **Stage 4** and **5**, decisions have to be made with reference to the relevant operational models of copyright and impact areas. These decisions have to be negotiated. In part, they depend on relevant specialist expertise in relation to theoretical modelling of copyright and impact assessment. However, that expertise has to be matched to the areas of concern identified by the relevant stakeholders. Agreement has to be reached on how copyright is modelled and in relation to what impact areas, and this is clearly a negotiated, diplomatic process.

At **Stage 6**, an assessment is made of the ‘prior art’ is made, pertaining to the relevant jurisdiction. This stage is largely technical in character, though it may require further consultation with relevant local and international experts.

At **Stage 7**, the identification of impact indicator for each impact area, the process of the ESC IA is theoretical and technical in nature. **Stage 8**, the identification and/or creation of data sources, similarly falls into the theoretical and technical categories. **Stage 9**, the undertaking of an actual ESCIA and the delivery of a final report, falls entirely under the technical category.

Finally, **Stage 10**, entails moving from assessment to policy and is thus entirely, diplomatic and political in character.

4.2.1 Outline Technical Issues for ESCIAs

The principle ‘diplomatic’ issues were overviewed in **Part 2** of this report and the principle ‘theoretical’ issues were covered in **Part 3**. It is now necessary to give some account of the likely ‘technical’ issues. These are issues that are likely to arise in relation to **Stages 7-9** of the ‘Check-List’.

It should be noted that the technical issues can only be addressed in general terms in this report. Detailed technical questions are likely to arise in the course of conducting an actual ESC IA. However, as already suggested, such technicalities will be largely determined by prior ‘diplomatic’ and ‘theoretical’ decisions.

A key problem in ESCIA is likely to focus on the different kinds of measure that pertain in different sectors. Economic impacts can generally be expressed in monetary terms in relation to ‘inputs’ and ‘outputs’. When expressed in the same units (i.e. currency) a cost benefit analysis is relatively straightforward.

However, the impact areas relating to creative industries extend into the realm of what are sometimes terms ‘outcomes’. Whereas *outputs* correlate to economic measures (e.g. proportion of GDP, volumes of product and resources consumed), *outcomes* correlate to cultural factors (e.g. personal experience and inspiration) and social factors (e.g. community identity and cohesion). While *quantitative* methods are appropriate for outputs, *qualitative* methods will be more appropriate when assessing outcomes. As with all methods of assessment, there are well-recognised problems. Quantitative statistical methods used in mapping and evaluation exercises require ‘subjective’ interpretation. However, they also have some indexical relation to the item being measured. In contrast, qualitative methods have a far greater room for error. They are usually dependant upon the impressions and views of individuals

interviewed during a survey. However, this is often the only method of capturing the essence of complex social and cultural phenomena.⁸⁶

An ESCIA must be capable of bringing together assessment of both outputs and outcomes. Thus, a single framework is impossible. It is more likely that the ESCIA will comprise three separate reports that employ different methodologies. A summary of the findings will have to present trade-offs between fundamentally different kinds of policy.

Currently, mappings of the creative industries focus on economic ‘outputs’. In the cultural sector that in most cases overlaps the creative industries, much work has been undertaken in recent years to examine ‘outcomes’. For example, within the publicly-funded parts of the cultural sector, assessments of ‘leaning outcomes’ and ‘social outcomes’ are increasingly a condition of grant applications. In the UK and elsewhere, such conditions have been developed in response to governmental requirements and are often linked to other policy agendas such as, social inclusion, educational attainment and stable communities.

It is likely therefore, that cultural sector assessment studies may be a useful source of social and cultural indicators that might be adapted for use in ESCIAs. However, for use in impact assessment, the standards of proof will, in most cases, need to be raised. Impact assessment requires the identification of a chain of causation. Most impact indicators in the cultural sector provide no more than approximate correlations between a stated cause and a possible effect.

Assuming that the kinds of impact area and indicator are deemed appropriate to the study, a good deal of work will be required in order to establish actual chains of causality. However, it should be remembered that the best any impact assessment can achieve is a *balance of probability*. Doubts will, and should, always remain.

It is sometimes suggested that it is impossible to undertake an impact assessment in relation to a measure, such as the application of copyright in a new jurisdiction, *before* the measure has been implemented. This is not true. Impact assessments can be conducted in relation to incidents that have occurred and ones that are yet to occur. For example, *Environmental Impact Assessments* can be made in relation to the effects of an existing oil spill, or the expected effects of the development of a nuclear power station. More recently, an impact assessment has been undertaken in respect of a proposed extension to copyright law. There is therefore no reason why an ESCIA cannot be undertaken, prior to the implementation of any new law.

In the following section, a number of examples of impact assessment, impact indicators and methodologies are reviewed. Their relevance to any specific ESCIA will depend on diplomatic and theoretical choices made at earlier stages of the ESCIA process.

⁸⁶ Despite such the subjective nature of such exercises, governments and business rely on opinion polls conducted in this manner.

4.3 Impact Assessment Case Studies

In this section, some approach to impact analysis are identified and outlined. They range from recent government studies into the economic impact of copyright law, to specimen methodologies for specific kinds of assessment, to general advice issued on the selection of cultural impact indicators when assessing the cultural sector.

This is not intended as a comprehensive ‘survey’ of methods or existing studies. At the end some conclusions are drawn with respect to this material. The material is gathered under the following headings:

- 4.3.1 Social Impact Assessment
- 4.3.2 Economic Impact Assessment of Copyright
- 4.3.3 Economic Mapping of Creativity
- 4.3.4 Social Impact Indicators for the Cultural Sector
- 4.3.5 Cultural Impact Indicators for the Cultural Sector
- 4.3.6 Impact Analysis in International Development

4.3.1 Social Impact Assessment

Social Impact Assessment (SIA) was developed in the 1970s in order to assess the impact of capital projects such as roads, industrial facilities ports, airport, dams, etc. and are now part of the formal planning process in many jurisdictions.

The International Association for Impact Assessment (IAIA) produces international principles for Social Impact Assessment. SIA’s are often used in conjunction with Environmental Impact Assessment (EIA) to measure the likely impacts of policy measures or projects in terms of effects on human health and on the ecology.⁸⁷

The principles are a guide to the objectives of social impact assessment. A number of issues raised in these guidelines have been outlined in the foregoing text. The guidelines are therefore clearly relevant to a researcher attempting ESC IA.

The principles for SIA described by the IAIA are as follows:

1. The goal of impact assessment is to bring about a more ecologically, socio-culturally and economically sustainable and equitable environment. Impact assessment, therefore, promotes community development and empowerment, builds capacity, and develops social capital (social networks and trust).
2. The focus of concern of SIA is a proactive stance to development and better development outcomes, not just the identification or amelioration of negative or unintended outcomes. Assisting communities and other stakeholders to identify development goals, and ensuring that positive outcomes are maximised, can be more important than minimizing harm from negative impacts.

⁸⁷ The Association’s website can be found at <http://www.iaia.org> IAIA *Guidelines on Social Impact analysis*, IAIA *Guideline on Impact Analysis in Corporate Context* and *US Guidelines on Social Impact Analysis* can be found on the Association’s web site. See Part 6 – Bibliography of this report for a full web citation.

3. The methodology of SIA can be applied to a wide range of planned interventions, and can be undertaken on behalf of a wide range of actors, and not just within a regulatory framework.
4. SIA contributes to the process of adaptive management of policies, programs, plans and projects, and therefore needs to inform the design and operation of the planned intervention.
5. SIA builds on local knowledge and utilises participatory processes to analyse the concerns of interested and affected parties. It involves stakeholders in the assessment of social impacts, the analysis of alternatives, and monitoring of the planned intervention.
6. The good practice of SIA accepts that social, economic and biophysical impacts are inherently and inextricably interconnected. Change in any of these domains will lead to changes in the other domains. SIA must, therefore, develop an understanding of the impact pathways that are created when change in one domain triggers impacts across other domains, as well as the iterative or flow-on consequences within each domain. In other words, there must be consideration of the second and higher order impacts and of cumulative impacts.
7. In order for the discipline of SIA to learn and grow, there must be analysis of the impacts that occurred as a result of past activities. SIA must be reflexive and evaluative of its theoretical bases and of its practice.
8. While SIA is typically applied to planned interventions, the techniques of SIA can also be used to consider the social impacts that derive from other types of events, such as disasters, demographic change and epidemics.⁸⁸

4.3.2 Economic Impact Assessment of Copyright

Economic impact assessments, as opposed to measurement and evaluation exercises, have been undertaken by academics. For example, one of the most frequently cited is by Paul Heald.⁸⁹ Heald's study is a straightforward, and limited, empirical examination of the impact of extensions to copyright term in the US and their effect on the market and price of fiction books. Heald's findings suggest that extensions to term do not have the effect of increasing availability of books that would otherwise be in the public domain, as advocates of extension claim, and that extensions to term over such books raises the price paid by consumers.

It should be noted that Heald's analysis was conducted as an independent academic analysis of the impacts of the Digital Millennium Copyright Act (DMCA) in the US. As such, it was, of necessity, conducted *after* the DMCA was enacted.

⁸⁸ These principles are quoted directly from IAIA materials.

⁸⁹ Heald, Paul J., "Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Best Sellers" (January 9, 2007). UGA Legal Studies Research Paper No. 07-003 See Part 6 – Bibliography of this report for a full web citation.

For relevant evidence of economic impact assessment conducted *prior* to proposed changes to the law, and undertaken under the aegis of a national government, one must turn to recent experience in the UK.

In 2005, the government of the United Kingdom launch an independent review of intellectual property, led by Andrew Gowers. The review's 'call for evidence' received submission from a variety of individuals, businesses and public sector institutions. The extension of the term for sound recordings, from the current 50 years to 75 or 95 years, has been strongly lobbied for by music industry representatives. *The Gowers Review* took evidence relating to this issue. It further took the step of commissioning the *Centre for Intellectual Property and Information Law* at Cambridge University to review the evidence on this specific issue.

The 'Review of the Economic Evidence Relating to an Extension of the Term of Copyright in Sound Recordings', examined the case for retrospective extensions, the likely net effect of extension, its effect on UK consumer and on UK society as a whole in terms of the overall balance of trade.⁹⁰

The review found that extension would be likely to have "a significant, negative effect, on balance of trade". Retrospective extensions were estimated to cost UK consumers "between 240 and 480 million pounds." The UK government has formally adopted the findings of the Gowers Review team.

The review of evidence is, in effect, an economic impact analysis. It uses a range of standard methodologies and tools to present a cost benefit analysis of the likely effects of a change to the law. It is significant that this analysis was undertaken *prior* to a proposed extension. The idea that a law must be enacted before it can be assessed does not stand up to scrutiny.

It should be noted that this assessment was very carefully focused around a particular issue of concern. Economic impact assessments within an ESCIA are likely to have much more in common with this approach to the impact of the creative industries than they do with the more common 'mapping and evaluation' exercises currently undertaken with respect to those industries. In these terms it should be noted that ESCIAs will form complex supplements to work already undertaken by WIPO with respect to the basic measurement and evaluation of copyright-dependant industries.

4.3.3 Economic Mapping of Creativity

'Mapping and evaluation' of the creative industries has moved on in recent years. The 'Hong Kong Creativity Index' is an interesting example of how such mapping can be deepened. The Index goes beyond the usual measurement indicators of GDP, annual economic growth, employment rate etc. It does so by extending the range of indicators to include 'knowledge, information and creativity' indicators, that provide the fundamental underpinning of the creative economy. This approach builds on work

⁹⁰ All reports can be downloaded from the Gowers Review pages of the UK government's Treasury's web site. See Part 6 – Bibliography of this report for a full web citation.

conducted in relation to the cultural industries and urban creative clusters that was pioneered by Richard Florida.⁹¹

The Creativity Index has been devised to:

“capture different aspects of creativity and their impacts on local economy and society. It provides analysts and policy makers with a tool to evaluate the performance of a creative society in terms of its outcomes and to examine the relative strengths and weaknesses in the factorial development of major contributors that promote the growth of creativity.”⁹²

The methodology is intended to map how forms of social, cultural and human capital in Hong Kong create the base conditions for the creative industries. The methodology is similar to that described in Part 3 of this report examining *cultural circulation*. It examines how Social, Cultural and Human Capital can be combined and how such capital forms are related to Structural/Institutional Capital.

The Index is a mapping exercise. It establishes correlations, but not causative chains. It is therefore not an impact assessment. It has also been focussed to examine the conditions that enable creativity. However, the overall methodology is interesting in so far as it attempts to examine, in a statistical way, the inputs to creativity. In theory, the method could be inverted to study the way such creativity – or the creative industries - impacts on social, cultural and human capital. In principle, this is what an ESCIA is also trying to achieve. However, tracing causative chains using this methodology is likely to be problematic.

4.3.4 Social Impact Indicators in the Cultural Sector

In the last twenty years, the national governments that fund cultural activities have been increasingly keen to see evidence that public funding has desirable outcomes. Assessments of social and cultural impact are regularly undertaken in by such governments. Since the scope of the cultural sector intersects with that of the creative industries, it is likely that methodologies and impact indicators used in this area could be adapted to localised ESCIAs.

The UK government’s has been at the forefront of developing measurement and evaluation exercises for the creative industries. The UK government has also instigated a demand for social impact assessments relating to spending on the cultural sector. Such assessment now correlates with studies undertaken internationally. An

⁹¹ The study used Pierre Bourdieu’s concepts of social and cultural capital as they were deployed by Richard Florida in *Rise of the Cultural Class* (2002). Florida has developed the *Creativity Index* concept in a more recent *Euro-Creativity Index* study with Irene Tinagli (*Europe in the Creative Age*, 2004). Florida’s original *Creativity Index* comprised a *High-Tech Index*, *Innovation Index* and a *Creative Class* measurement. The *Creativity Index* was balanced against a *Composite Diversity Index* comprising a *Gay Index*, *Bohemian Index*, *Talent Index* and *Melting Pot Index*. As with the original *Creativity Index*, the *Euro-Creativity Index* has two main indices, a *Technology Index* and a *Talent Index*. However, it adds a *Tolerance Index*. The latter index was compiled from the findings of the *World Values Survey*. See Part 6 – Bibliography of this report for a full web citation.

Source: Hong Kong Creativity Index report P18

⁹² Op.cit., P42

account of the *International Federation of Arts Councils and Cultural Agencies* (IFACCA) work in this area is reviewed in the next section of this part of the report.

For the purposes of this report, the UK will serve as an example of the kind of the nation-specific approaches that have developed in recent years. In 2002, the Arts Council of England produced a report, *Measuring the Economic and Social Impacts of the Arts: A Review*.⁹³ The report surveys materials relating to economic and social impact indicators used in UK cultural policy. The report gives an overview of a number of methodological approaches that have developed in the UK since the early 1990s. It also provides examples of the kind of indicators deployed in relation to economic and social impacts in UK cultural policy.

For example the report lists the following social indicators used in assessments of cultural regeneration programmes.⁹⁴

- Enhancing social cohesion
- Improving local image
- Reducing offending behaviour
- Promoting interest in the local environment,
- Developing self-confidence
- Building private and public sector partnerships
- Exploring identities,
- Enhancing organisational capacity
- Supporting independence
- Exploring visions of the future

Where social, cultural or economic indicators are imposed on publicly funded culture they provide a good guide to the priorities of the policy makers. As such they may reflect areas of policy concern that are relevant to an ESCIA.

However, the following should be noted.

- a) There are differences between the cultural sector and the creative industries.
- b) There are differences in the levels of public funding for culture depending on the jurisdiction.
- c) The impact indicators general reflect national political priorities and are therefore subject to change and do not necessarily transfer from jurisdiction to jurisdiction.

4.3.5 Cultural Impact Indicators for the Cultural Sector

At the international level, *The International Federation of Arts Councils and Cultural Agencies* (IFACCA) has undertaken a review of cultural impact indicators used in the cultural sector. The IFACCA is a global network of national arts and cultural funding bodies that was founded in 2000.⁹⁵ In June 2005, its main research service *Discover-*

⁹³ Michelle Reeves 'Measuring the economic and social impacts of the arts: a review' Research Report 24, Arts Council England, May 2002

⁹⁴ Op cit., P15

⁹⁵ www.ifacca.org

Decouvrir-Descubrir, or D'Art, produced a report *Statistical Indicators for Arts Policy*.⁹⁶

The aim of the report was to collate information about work being undertaken with respect to develop cultural indicators in its member states. The report provides an introduction to the literature on quantitative cultural indicators and suggests 'best practice' guidelines in the field.

The report provides an overview of current work by a number of member states to improve cultural impact indicators they employ. There is no room in this report to survey this survey material, however, the overview can be found in *Appendix 1* of the report which is available on the IFACCA web site.⁹⁷ The indicators used to measure cultural impact for public spending on culture may provide some guide to the kind of indicators that could be developed for the cultural impact aspects of the ESCIA.

Thus the IFACCA report is a valuable resource for the development of indicators for ESCIA. However, the same reservations apply to this material as to the UK material discussed above. The cultural context and policy context in which ESCIA are to be undertaken will be very different. In view of this the IFACCA refrains from recommending the use of particular indicators. But rather IFACCA devolves the choice of indicators to member states. However, the report does provide a ranking system that outlines the 'attributes of a good indicator'.

Figure 1: Attributes of a good indicator

Attribute

- Grounded in theory
- Relevant (serve a practical or valued purpose)
- Grounded in and/or linked to policy practice
- Comparable across regions
- Comparable across time periods
- Measurable (able to be measured, and data available)
- Easily understood
- Unambiguous/clear
- Able to be disaggregated by population subgroups
- Consistent with purpose
- Timely (up-to-date)
- Measurable over time
- Universal
- Able to be benchmarked
- Contextualised (presented with additional contextual information)
- Revisable
- Methodologically defensible ('valid')
- Reliable
- Sensitive to cultural diversity
- Realistic
- Capture the essence of an issue
- Designed through consultation

⁹⁶ *International Federation of Arts Councils and Cultural Agencies (IFACCA)*, D'Art Report Number 18, *Statistical Indicators for Arts Policy*, Sydney, June 2005

⁹⁷ www.ifacca.org The report also cites recent seminars on cultural indicators and broader conferences where cultural statistics and indicators have been the subject of discussion. (see *International Seminars on Cultural Indicators* p6)

- Trusted

[Source: D'Art Report P10]

In addition, the report provides a guide as to how to develop indicators. It reads as follows:

'How to' develop indicators

1. Conceptualisation – consideration of the theoretical foundations and institutional context of the proposed indicators
2. Selection – exploration of possible indicators and delineation of key indicators.
3. Definition – definition and description of the indicators chosen at (2).
4. Collection – collection of data and 'population' of indicators.
5. Ongoing management and evaluation – implementation of an information management system to collect data over time and to evaluate and re-evaluate the indicator system within the policy or program cycle.

As outlined in the proceeding parts of this report, the methodology of the ESCIA will have to be adaptable to a great diversity of cultural contexts. For this reason, such assessments must be devolved. In this respect, other international organisations, such as IFACCA and the IAIA, focus on advice with respect to process and best practice, but do not attempt to impose particular indicators.

4.3.6 Social Impact Analysis and Economic Development

The World Bank (WB) provides a 10-point check-list for the conduct of *Poverty and Social Impact Analysis* conducted in relation to new economic policies. The aim is to provide guidelines for assessing “the distributional impact of policy reforms on the well-being or welfare of different stakeholder groups, with a particular focus on the poor and the vulnerable”.⁹⁸

PSIA specifically seeks to:

- Analyse the link between policy reforms and their poverty and social impacts
- Consider trade-offs among reforms on the basis of their distributional impacts
- Enhance the positive impacts of reforms and minimise their adverse impacts
- Design mitigating measures and risk management systems
- Assess policy reform risks
- Build country ownership and capacity for analysis

The Bank admits there is no standard methodological template for assessing the social impact of policy. Instead it offers guidelines for good practice in PSIA's. It is important to note that the guidelines were conceived in relation to changes in policy or the introduction of *new* economic policies. In some instances, WIPO member states, who are considering introducing new sui generis IP forms, such as TCEs, may

⁹⁸ A handbook can be downloaded from the World Bank web site. <http://web.worldbank.org> See Part 6 – Bibliography of this report for a full web citation.

find the guidelines a useful starting point in the design of an ESCIA. Where IP forms are long established the guidelines would require some sensible adaptation.⁹⁹

As with the IFACCA and the IAIA, the WB offers general guidance about process.

1. Asking the right question
2. Identifying the stakeholders
3. Understanding the channels of transmission
4. Assessing institutions
5. Gathering data and information
6. Analysing impacts
7. Contemplating enhancement and compensation measures
8. Assessing risks
9. Monitoring and evaluating impacts
10. Fostering policy debate and feeding back into policy choice

The following account of the PSIA process has been adapted from World Bank documents.

1) Asking the Right Question

The measure to be assessed must be clearly identified. The purpose of the study, a clear set of objectives and key questions need to be agreed. This requires an understanding of the context in which the measure exists and how it operates in that context.

2) Identifying Stakeholders

Identifying the key stakeholders, the organisations, groups and people who are significant in relation to the key questions. These groups must be consulted in relation to the orientation of the impact analysis. If the analysis is intended to build support for the policy, it is important that the impact research is carried out in an open and transparent way, and that the reach and limitations of the methodology are clear. The PSIA suggests that the stakeholders are likely to be those who are effected by the policy and those who may influence the policy.

3) Understanding the Channels of Transmission

There are the various channels through which a policy impacts on the various stakeholder groups. The WB notes that impact may be direct – when the impacts are felt through those identified channels – or indirect – when they are felt through other channels. They also note that direct and indirect impacts vary over time. Crucially, the ‘net impacts’ on stakeholders may be different from immediate impacts.

4) Assessing Institutions

The channels through which a policy reaches stakeholders can be viewed in institutional terms. They are the formal and informal rules that determine how various

⁹⁹ The working assumption behind the PSIA is that the subject under consideration is a policy reform or instrument. This implies flexibility. While, this is clearly applicable to many more recently developed IP forms, such as TCEs and GIs, there may be problems in some jurisdictions with older IP forms, such as copyright. Where copyright is presented as a solely as a property right there is little room for flexibility as regards ‘policy’.

actors in the field operate. These institutional frameworks are the site and mechanism through which the actors/stakeholders interact.

5) Gathering Data and Information

Once points 1-4 have been agreed. Relevant data sources can be identified. This phase may also include adaptations of the framework and/or the collection of new data.

This is expressed in a 4-step approach:

- Mapping out the desirable data – both quantitative and qualitative
- Taking stock of the available information and prior analysis
- Adapting the PSIA to the available data. This involves setting the limitations for the PSIA and selecting a feasible analytical approach and/or collecting supplementary data.
- Planning to prevent limitations in the future. Creating a strategy for collecting missing data in order to build future capacity.

6) Analysing impacts

The approach and tools will depend on type of study, the objectives set, the nature of the effects and the availability of data.

The WB gives a list that may be used in a PSIA:

- Social tools (social impact assessment, participatory poverty assessment, beneficiary assessment, and social capital management)
- Direct impact analysis tools (such as average and marginal incidence analysis, poverty mapping, and tools to assess public service delivery)
- Behavioural models (including supply and demand analysis, behavioural incidence analysis, and household models)
- Partial equilibrium analysis (such as multi-market models or reduced-form techniques)
- General equilibrium models (including social accounting matrices and computable general equilibrium models – CGEs)
- Tools linking microeconomic behaviour or distribution with macroeconomic frameworks or models

7) Contemplating enhancement and compensation measures

The impact of a policy may be negative or positive. If the impact is negative the WB suggests three options.

- Consider an alternative design: the design of the ‘instrument’ can be improved by including enhancement or mitigation measures or a different sequencing of public actions.
- Consider direct compensatory mechanisms: when adverse effects are unavoidable, one can consider such measures on poverty, equity, or political economy grounds.

- Consider delay or suspension of the ‘instrument’: if the benefits of the reform are lower than the costs of mitigating or compensating the poor.¹⁰⁰

8) *Assessing risks*

Risk assessment is undertaken in relation to the possibility that some of the assumptions underpinning the reform may be compromised. When combined with monitoring this can help “anticipate and address major unintended consequences”, and allow room for adjustment during the implementation period.

The WB envisages four kinds of risk.

- Institutional risk: risks that assumptions regarding institutional arrangements and/or organisational performance were incorrect (for example, unexpected market failure, reform complexity, exceeding institutional capacity, vested interests in the agency).
- Political economy risk: risks that groups may block implementation, capture benefits, or reverse reform actions.
- Exogenous risk: risks of shocks such as conflict, financial crisis, terms of trade shocks, or natural disaster.
- Other country risk: risks of political instability, conflict and social tension undermining the reform.

9) *Monitoring and evaluating impacts*

Monitoring and evaluation should be undertaken at every point in the process. The process is ongoing and the ‘instrument’ should be adjusted in light of any revealed negative impact. By following impact indicators, and the assumptions underlying analysis, the monitoring should reveal unexpected developments.

10) *Fostering policy debate and feeding back into policy choice*

Finally, the WB notes that fostering and drawing on public discussion of policy can be useful at all points of the PSIA process. Ultimately, the lessons learned from the analysis must be feed back into policy.

4.4 Case Studies Conclusion

The foregoing case studies suggest a number of different approaches to impact assessment in the economic, social and cultural sectors. The case studies suggest that different methodologies prevail in the economic, social and cultural sectors. The studies also suggest that the question of which impact indicators are relevant to which realm, and in which jurisdiction, is a question that is only likely to be resolved at a level of national politics rather than at the intergovernmental organisation (IGO) level.

The case studies also provide an overall indication as to current best practice by international cross-jurisdictional agencies when approaching the question of what level of advice and guidance it is appropriate to give to member states.

¹⁰⁰ The language in the WB document is related specifically to economic reforms. The word reform here has been replaced with instrument for ease of understanding in the context of this report. It should be noted that in many developing states, IP rights are effectively an economic reform.

It is important to note that international agencies such as the World Bank only provide general guidance in relation to the *process* of a PSIA, and do not provide a rigid centralised methodology that is ‘good-for-all contexts’.

Similarly, when deciding which impact indicators may be relevant in any given situation, the International Association of Arts Councils only provides advice about the *general attributes* that may make an good impact indicator, and refrain from providing a centralised set of indicators that could be said to operate in differing national contexts.

These conclusions have been incorporated into the findings of this report, and carried through into the recommended ESCIA Check-List laid out in **Part 3**.

Finally, the specific relevance of the particular case studies presented in this part of the report to the practical development of ESCIA’s in the future will depend on the *diplomatic* and *theoretical* choices made in the early stages of the ESCIA process as it is conducted in any given jurisdiction. The examples above do not provide a comprehensive ‘survey’ of all possible material and methods that could be adapted to the ESCIA process. As practical steps are taken to develop the ESCIA concept, it is likely that many other case studies and/or techniques will be deemed relevant.

5 - Executive Summary and Conclusion

5 - Executive Summary and Conclusion

This report has reviewed some of the key issues relating to the development of economic, social and economic impact assessments of the intellectual property forms used within the creative industries, with a specific focus on copyright. The report makes practical suggestions with respect to how *Economic, Social and Cultural Impact Assessment* (ESCIA) can be developed.

There is considerable room to move beyond the limited ambitions of the 'measurement and evaluation' exercises currently used to assess the economic contribution of the creative industries to national economies. ESCIA will be considerably more complex in terms of methodology. However they offer the opportunity of developing cost benefit analysis systems that are not currently a part of 'measurement and evaluation' exercises. Such cost benefit analysis includes an accounting of both positive and negative impacts related to the IP system. It is without doubt that a more comprehensive means of conceptualising the operation and impacts of particular intellectual property forms will greatly enhance the evidence base that is currently available to policy makers and will improve the decision making process.

Before practical steps can be taken to develop the ESCIA concept, a good deal of ground must be covered and cleared. This report has outlined some, but by no means all, of that ground.

The problem of defining the creative industries is widely recognised. The original definition was a political construct. As such, the definition is liable to change over time. The precise definition is also liable to differ depending on the jurisdiction. Thus, the definition is also liable to differ across different jurisdictions.

The definition is thus dependant on political, social and cultural variations and on technical differences pertaining in different jurisdictions with respect to the collection of data. Currently, the best general definition of the creative industries is 'the copyright-dependent' industries. Wider definitions, though more inclusive, run the risk of rending the concept incoherent. The concept, thus defined, straddles the often diffuse dividing line between culture and industry. Thus, depending on where a researcher is situated, the impacts associated with the creative industries are likely to be experienced and conceptualised differently.

As already suggested, an ESCIA is far more than a 'mapping and evaluation' exercise. An impact assessment must identify the lines of causation between a stimulus and a related effect. It must also be capable of presenting complex trade-offs as they operate between the different realms of economy, society and culture. Each realm has its own structure, logic and protocols. The ESCIA therefore must be able to present policy makers with a parallel series of impact assessments such that a cost benefit analysis can be conducted. The trade-offs presented through the totality of an ESCIA report are likely to cut across different areas of public policy. In most cases, they are also likely to have implications for the ministerial responsibilities of more than one governmental department.

The 'externalities' of the copyright regime are experienced in different ways in the economic, social and cultural realms. However, there may be overlap and confusion

with respect to the characterisation of some impacts, and whether specific impacts are best described as economic, social or cultural in character. Thus, it must be noted that the comprehension of the impacts of the copyright regime is not within the purview of one academic discipline.

It follows from this that the skill-base required for the successful execution of an ESCIA is likely to be very broad. For a ESCIA to be implemented in a given jurisdiction, a cross-disciplinary team will have to be assembled and charged with its execution and delivery. The delivery team will have to weigh international expertise against local knowledge and experience. The delivery team will also need to give representation to a number of academic disciplines including, but not limited to: general economic theory, econometrics/the economics of the creative industries, cultural economics, sociology and social policy, anthropology and cultural studies. Thus an ESCIA will differ very significantly from current mapping and evaluations of the creative industries, the responsibility for which has largely been devolved to statistical offices and experts in the field of econometrics.

The fundamental structural differences in the approach of various disciplines to the comprehension of copyright and its impacts indicates that a single unified framework, such as that which exists for assessing the economic contribution of copyright industries to GDP, is unlikely to emerge in the context of an ESCIA. It is more likely that the material outcomes of an ESCIA will comprise a final report made up of a series of parallel and complementary assessments deploying specific methodologies targeted to different kinds of impact experienced in the economic, social and cultural realms.

This report that relation between economics and culture is hotly debated, both within economic theory, and between economic theory and other disciplines. The report also demonstrates, with best practice examples from other IGOs, that strenuous attempts should be made to avoid recommending methodologies for conducting impact assessments that, however inadvertently, result in the imposition of contestable ideological viewpoints on member states.

The operation of legal and economic instruments differs according to the socio-cultural context. The experience of the instrument, and of its associated impacts, are also subject to differences in the socio-cultural context. Thus ESCIAs that are developed in the future must balance the *centralising* effects of ‘general guidelines’ and ‘capacity building assistance’ given to member states against the need to *decentralise* critical decisions relating to the purpose and shape of an ESCIA to the government of the state in which the assessment is undertaken.

For the ESCIA process to be valuable, it must become a tool that is useful to all the stakeholders of the jurisdiction in which the assessment is undertaken. Key questions as to the purpose of the ESCIA must therefore be devolved to state level.

To this end, WIPO should avoid recommending specific approaches that tie member states to a particular view of the relations between social, economic and cultural realms. To do would be to impose a particular, and contestable, ideological viewpoint on member states. It would also run the risk of cutting across socio-cultural norms in different jurisdictions and cut across the political functions of state governments with

respect to the setting of national policies. For the same reason, WIPO should avoid recommending specific impact areas, and specific indicators relating to economic, social and cultural impacts. The choice of indicator reflects culturally and ideologically embedded viewpoints. The choice of indicators therefore must be devolved to state level, where negotiations should be held with all relevant stakeholders, including but not limited to, government representatives, consumer groups, industry lobbies, educationalists, tribal and/or ethnic group representatives and civil society groups. However, this does not preclude the development by WIPO of the findings of this report and the development of guidance with respect to the process required to undertake an ESCIA and practical support in facilitating the process.

This report finds that an ESCIA is best conceived as a *consultative process*, and not as a single methodology or framework. The final shape of any given ESCIA is dependant on the primary *purpose* accorded to it. If the ESCIA is to be useful to national governments, then maximum autonomy must be accorded to specific jurisdictions in setting the specific parameters and ‘norms’ for the assessment. This will ensure that the internationalised aspects of the ESCIA do not compromise the socio-cultural norms and specific policy objectives set at state level. Decentralisation will thus build on local concerns, local knowledge and other particularities of the local context.

The ESCIA process outlined in this report can be broken down into a series of practical steps. Each step can be described in general terms as either *diplomatic*, *theoretical*, and *technical* in character. The ‘Check List’, contained in **Part 3** of this report, outlines 10 steps and provides initial guidance on the process. It is necessary to underline the fact that the ‘diplomatic’ steps that establish the specific purpose and objectives of any given ESCIA, and which entail consultation with all stakeholders, can only be effective if they are devolved to state level. It should also be underlined that decisions taken during the ‘diplomatic’ stages will have strong determining effects on the outcome of the ESCIA.

From the ‘theoretical’ perspective, it is critical that guiding assumptions about the underlying purpose and functioning of copyright are stated consciously early on in the ESCIA process. The identity of copyright differs according to jurisprudential approach and the approach of different stakeholders within different jurisdictions. The general theoretical model of copyright ‘operation’ deployed is also critical. To conceive of impacts, it is necessary to imagine an ‘outside’ of copyright with which the system interacts. Four specimen ‘operational models’ are reviewed in this report: the legal-economic (public goods) model; the ‘public domain’ model; the cultural circulation model; and the knowledge circulation model.

The operational model, or models, of copyright that is deployed will have a determinate effect on what any given researcher, in any given context, thinks the instrument should achieve and what it should not achieve. Hence, the operational model deployed is critical in conceptualising the nature of the impact of copyright.

Each operational model described in this report provides a different view of impacts. It is clear that a range of possible models exist. No single model captures the total operation of copyright. Neither does this report does not propose that the operational

models described are the only models. During the process of an ESCIA, decisions will have to be made as to which model, or models, are most relevant to a particular jurisdiction or to a particular kind of impact. The choice of operational model(s) is not objective. The choice of model is subjective and reflects the situation and context of the researcher. For this reason, the choice of model, or models, used in the ESCIA should not be recommended or imposed by the IGO, but must be devolved to state level and the formative ‘diplomatic’ stages of the ESCIA process.

An ESCIA will have to negotiate a number of ‘technical’ issues. These may include how to identify a pattern of causation, how balance assessments of ‘output’ against assessments of ‘outcomes’, and how to present trade-offs between data that may be quantitative and qualitative in character. It is also likely that the final report of an ESCIA will have to present potential trade-offs between economic, social and cultural priorities.

Thus an ESCIA will not be resolved within a single methodological framework. It is likely that the ESCIA will comprise a final report made up of a series of parallel and complementary studies deploying specific methodologies targeted to different kinds of impact related to the economic, social and cultural realms. A summary of the different kinds of impact will have to present the policy maker with trade-offs between fundamentally different kinds of impact. The impacts recorded by the ESCIA are likely to fall across the responsibilities of a number of governmental departments.

A key technical question emerged during the research for this report. Since this question also has important political ramifications, it is necessary to state the problem clearly in the summary and conclusion. It is sometimes suggested that it is not possible to undertake an impact assessment in relation to a legal measure that has yet to be implemented. On this reading, a legal measure must first be enacted within a jurisdiction. Only *after* the measure has been in operation for a period of time can an impact assessment be undertaken.

It is critical to recognise and reiterate that this common assumption is false. Impact assessments can be conducted in relation to incidents that have occurred *and* in relation to incidents that are yet to occur. Environmental Impact Assessments are made in relation to the effects of existing measures and in relation to the expected effects of new measures. In many areas of public policy it is both desirable and necessary to have a strong evidence base before developing and deploying a policy. This report has cited a recent case where a detailed economic impact assessment was undertaken in an industrialised country prior to a proposed extension to copyright law. It is therefore necessary to state clearly that an ESCIA can be conducted prior to changes in IP laws, as well as in respect of existing laws.

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Part 6 - Bibliography

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