

Volume 35 No.2 2002

# Southern Review

COMMUNICATION, POLITICS & CULTURE

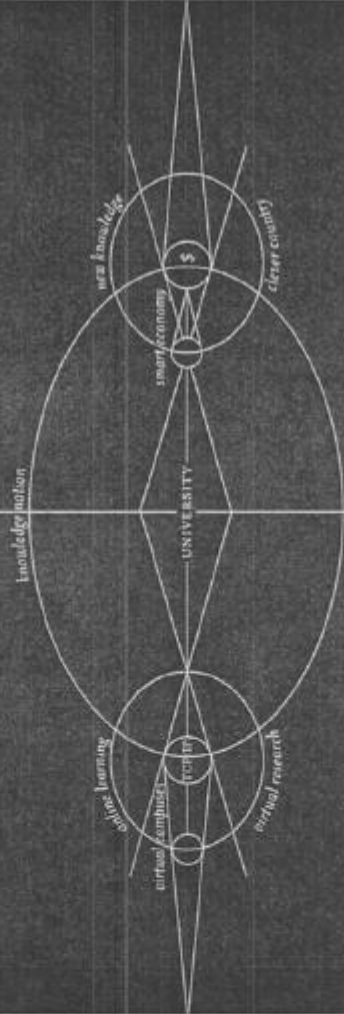


Fig. 18: 'Knowledge Production, the University and the Network Society'

## RIGHTS, COPYRIGHTS AND TECHNOLOGY TRADITIONS, TRENDS AND TROUBLE

Steve Jones

### Abstract

This article explores the connections between the rights tradition in legal thinking and technology's insertion into academic practices. It argues that technology has made copyright both more visible and lucrative by encouraging greater emphasis on the exploitation of rights by means of distance education, and by means of patents and copyrights in intellectual work. The article contends there is a need for informed debate about intellectual work and intellectual property, particularly as issues of rights have spilled over into the realm of ideas, creating a climate in the academy in which expression is to be exploited for profit rather than shared.

### Introduction

In an essay in a book commemorating the Bicentennial of the US Bill of Rights, James Carey noted that, 'the powerful imperialism of the "rights tradition" has smothered all other meanings of our founding documents...The assertion of rights has become a mere tropism, as automatic as a plant turning toward the light. In the biological world, however, tropisms get organisms in trouble when the environment radically changes' (1991, p. 108).

This is the case with copyright in a changing media environment, as shrill proclamations of the 'rights' of copyright owners grow increasingly louder. Carey's observation is congruent with Charles Taylor's criticism of the moral structure of Western liberal societies whose 'bulwarks of freedom have been...an emphasis on the rule of law, on entrenched rights recoverable by judicial action, and various modes of...distributing power in different hands' (1991, p. 258). Consequently, according to Taylor, as rights are continually contested, social fragmentation occurs, resulting in a greatly divided series of agendas resembling, but not fulfilling, the promise of democracy. The rights tradition, according to this critique, emphasises a reactive social formation in which much energy is expended on delineating social and moral issues with precision; after all, a right cannot be fractionary. And once a right is established, it can only be retracted.

In this essay I will explore some of the connections between the rights tradition and technology. The fractionising tendencies Taylor

and Carey recognised in the rights tradition now also plague the academy. They are, in no small part, due to the intersection of technology and the lure of profit from distance education and the exploitation of rights (patents as well as copyrights), and awareness of these tendencies should inform debates about intellectual work and faculty governance.

### Copyright and Control

Legal struggles over copyright during the last quarter of the twentieth century have largely been the result of changes in communication technologies that have made the process of copying content inexpensive and easy. Those struggles have, in turn, resulted in debates that seek to clearly and firmly delineate the 'right' of copyright, and thus much energy has been expended debating with whom that right resides. If a right is not assigned to an individual it stands to reason that a work belongs in the public domain, and hence the focus on rights. The notion of a 'copy', however, has gone unexamined. What is important to ask as we hear and read more and more about copyright law and cyberspace, copyright law and digitisation, and so on, at the beginning of the 21st century, is: What do we think we can do with copyright law that has not already been done? What are we hoping that copyright law will do, in commercial, political and/or social terms? What are these 'rights' that we wish to maintain? And how do we understand the nature of a 'copy' in an age of digital reproduction? To get at least provisional answers to these questions, at what is an interesting impasse in our reliance on the law for extra-legal matters, it is first necessary to consider what we have done thus far with copyright law.

### Copyright's 'Strange Changes'

Much effort in critical legal studies has gone into undertaking a critical history and analysis of copyright law. Mark Rose notes, in his book *Authors and Owners*, a 'continuity between [early] literary property debates and modern copyright doctrine' (1993, p. 132) but goes on to note, in the book's last chapter 'Strange Changes', that:

The story of copyright...can be understood as an exploration of two central reifications, the 'author' and the 'work'. The narrative is one of steady expansion, of the enclosure of new territories, and this extension of dominion has occurred both at the level of the individual property—ownership of the work now includes the right to prepare all kinds of derivative products—and at the level of the basic commodity system as new technologies such as photography, cinema and sound recording have been developed (1993, p. 133).

Rose takes heed of advice to not take the 'property' metaphor too far, however, for 'the copyright owners' general dominion [is] over an

"imaginative territory" (1993, p. 133), a very salient point to which this essay will return. Suffice to say at present that the turn to property decentres the 'rights' issue: instead of grounding rights within a human creator, it externalises rights by placing them within the framework of commodities, thus establishing boundaries (in terms of a 'work') of that in which one can have a 'right'. The 'copy' issue mentioned previously is thus easily, in truth too easily, resolved, since 'property' is understood in material terms. The turn to property also, as Rose notes, drains content away from the notion of 'author' and leaves it hollow. Rights reside not in the author (or reader), but in the work.

What Rose emphasises is that one of the main reasons for copyright's 'strange changes' is the development of new technologies for mass communication, mass production and mass commodification. These technologies have further decentred the boundaries of commodities manufactured from intellectual property, and have thus thrown into disarray the 'rights' concept as a principle way of understanding copyright. As Catherine Kaha puts it:

The current explosion of information technology promises new allegiances even as it creates unprecedented threats... It is the promise of boundaries redefined versus the threat of disintegrating boundaries that motivates the debate... The crux of the issue can be grasped by understanding that our concept of boundaries is little more than a curious relic, a way of thinking that no longer matches a world where boundaries—whether of communities, self, or nations—have become strangely problematic. (1994, p. 20)

Kaha's request that we rethink the notion of boundaries points to the central problem facing copyright as it has thus far been formulated, namely, that the changes that brought about our current conception of copyright as external to the author were themselves the result of changes in our conception of the boundary between self and other (Ong 1982, Goody 1975). We are once again undergoing such a profound change, but this time it is in our understanding of the boundary between a work 'self', and its distribution and use ('other').

Until the 'industrialisation' of copyrighted material via the printing press, intellectual property was to a considerable extent similar to 'real' property, or real estate. Its boundaries could be disputed, but were, in essence, fixed, or at least 'fixable'. Additional property could be acquired, but it could not be the same property, due to its bounded nature. Just as there is no creating a 'copy' of land, there once were no means by which to create 'more' of a work. And just as there are no means by which to bring land to people, there once were insufficient means by which to bring works to many people. Mass production and mass communication, however, now produce 'unbound' copyrighted material, that which is, for instance, created via digital bits stored in a computer's RAM (Random Access Memory) or on a

hard disk drive, or wends its way across a network, briefly appearing on a user's screen (or in some instances only being passed along the network) and moving on (Elkin-Koren 1995).

### Circumscribing the Boundless

It is this notion of rights 'unbounded' that is of importance to an understanding of current debates in copyright law and its revision and to understanding the rights issues spiralling toward struggle in academia. In general, the current conception of copyright law is a law of distribution. That is to say that it is explicitly not intended to directly affect production, but rather to affect what can be done with what is produced, and it is not intended to directly affect consumption, but rather to affect what can be gained by producers from consumption. Another way to put this is that copyright law is, in a sense, a matter of the regulation and control of mediation, of the distribution and use of a 'work-as-other', and this is more and more clear as copyright holders seek establishment of trade laws and regulations that ensure income from transmission. What other option is there once control over boundaries is relinquished?

Two incidents provide particularly clear insight. First, during hearings before the US House Subcommittee on Courts and Intellectual Property regarding the *MIL Copyright Protection Act of 1995*, Broadcast Music, Inc. President Frances W. Preston argued that 'BMI supports an amendment to the bills to clarify that a transmission that qualifies as a public performance can also be a "distribution"'. The existing public performance right is defined in part as the transmission of musical works to the public by any means or device' ('New legislation...', p. 13). Second, the most important issue debated at meetings of the World Intellectual Property Organisation (WIPO) in Geneva in late 1996 concerned the rights of publishers 'over every temporary reproduction in computer memory... and every transmission of copyrighted works in digital form' (Samuelson 1997, p. 62).

Similarly, at many universities in the US, debates continue on ownership of intellectual property. At most institutions it is clearly stated that scholarly work is work-for-hire in copyright terms. It belongs to the institution that employs the scholar. Few institutions, however, enforce their ownership except in the realm of patent law, where they most often negotiate an agreement to split royalties. Nevertheless, the institutions do also hold the copyrights in the scholarly, creative and educational work. It remains unclear at most universities whether the institution will enforce that ownership. To do so strictly would mean, for instance, that the syllabus a professor creates in the university, can be used by it after the professor leaves the institution or retires, and cannot be used by that professor except in direct connection with employment at the institution. It should not be a surprise that this kind of issue is arising in the realm of distance education, where it is

believed by many higher education administrators that it is possible to offer a course repetitively with little need for its creator once the course has been developed.

Relatedly, US public universities have shown a tendency toward increasingly seeking private funding as public support has decreased. One result has been increasing reliance on sources of patent income. A report by the Association of Technology Managers showed that in fiscal 2000 US colleges and universities took in over US\$1 billion in royalties, filed over 8500 patent applications, and created 368 companies (Blumenstyk 2002). Furthermore, in a news release, the association noted that 'The commercialisation of academic research in 1999 resulted in more than \$40 billion in economic activity' (2000). But these new 'revenue streams' (some of which have dried up since the 'dot-com bust' of the past year-and-a-half) do not come without strings attached. As Press and Washburn noted:

The freedom of universities from market constraints is precisely what allowed them in the past to nurture the kind of open-ended basic research that led to some of the most important (and least expected) discoveries in history. Today, as the line between basic and applied science dissolves, as professors are encouraged to think more and more like entrepreneurs, a question arises: Will [they] have the freedom to explore ideas that have no obvious and immediate commercial value? (2000, p. 54).

Further, will they be able to share ideas that are considered to have potential commercial value, and if not what will be the future of academic work?

These incidents point to a need for understanding and studying copyright differently than in the past if only because copyright is being enforced, if not deployed, differently than in the past. Particularly in critical legal studies and in the work of communication scholars who address copyright issues via political economy, critical studies, and cultural studies, three issues are most commonly addressed (Jones 1993). These can be broadly categorised as authorship, uniqueness or originality, and reproducibility. Within these categories, most scholars have regarded copyright as authors' protection against copying, pirating, bootlegging etc., without compensation to the author (though in point of fact remuneration in cases of copyright violation is directed to the copyright holder who may, or may not, be the author). Consequently most of the intellectual property debates, and certainly much scholarship in critical legal studies, centres on ownership of a work (rather than creation or origination), because in pragmatic terms anyway, it seems authorship matters most to the extent that it assists in determining rights ownership, from which other consequences follow.

Such debate and scholarship underlies a looming convergence that undermines many of the premises on which critical legal studies rests.

First, as already mentioned, transmission of works, rather than ownership, makes it a necessity to critically examine and understand the nature of distributive communication (via distributed networks such as the Internet, most importantly) and the distributed nature of electronic and digital media. To resort automatically to considerations of 'property' is an inappropriate response when property itself has been redefined. Most of what one may term the 'liberal' defence of Fair Use and critique of copyright restrictions (such as those in the US *Digital Millennium Copyright Act*) rest on invocation of Jeffersonian ideals of property rights and ownership. However, Jefferson himself would likely not have too closely to such a defence, for the meaning of property in his day and age was far different, and certainly did not account for what one may term 'immaterial copying', that is, copying without labour, cost or consumption of resources.

But perhaps the greatest concern with the 'property metaphor' is that we have taken it too far and allowed it to decentre the 'rights' issue. As previously noted, reliance on property commodifies creative work and eviscerates the author. The author's evisceration is also that of the audience. Instead of centring on the connection between author and reader, most of the debate about copyright and technology has focused on the connection between the commodity and the consumer. But, as John Perry Barlow often remarks, no one 'consumes' music by listening to it.

And it is a good thing it is not consumed in that fashion, for it is part of our culture. Intellectual activity is cultural, social activity. A consequence of legal studies that operate themselves from within a rights perspective is that an orientation toward the individual precludes sufficient analysis of the social, distributed nature of intellectual property. As Hettinger points out:

Invention, writing, and thought in general do not operate in a vacuum; intellectual activity is not creation *ex nihilo*. Given this vital dependence of a person's thoughts on the ideas of those who came before her, intellectual products are fundamentally social products. Thus even if one assumes that the value of these products is entirely the result of human labour, this value is not entirely attributable to any particular labourer (or small group of labourers) (1989, p. 38).

Simply because there exists a copyright 'owner' does not mean, of course, that the 'owner' was an author, but, more importantly, scholarly analyses of copyright that rely on critiques based in (usually post-modern notions of) authorial indeterminacy (or the 'death' of the author) slip by the dissolution of the self/other boundary mentioned earlier, trading the 'self' (author) for the 'other' (reader, consumer, etc.). Copyright debates concerning digital media should force us to critically examine the dissolution of that boundary, and to discern and understand our adaptations to its practical disappearance and its rhetorical reappearance in definitions of transmission as reproduction.

Second, something missing from the conception of ownership as regards copyright law is an issue that has been at the forefront of hotly contested debate concerning ownership of media since the first third of this century: 'the public interest, convenience and necessity'. As Benjamin Compaine stated:

The notion of broadcasters having a public interest responsibility was initially articulated in 1922 at the First National Radio Conference by then Commerce and Labor Secretary Herbert Hoover. ... Senator Clarence Dill, one of the architects of the Radio Act of 1927, wrote that '[t]he one principle regarding radio that must always be adhered to, as basic and fundamental, is that the government must always retain complete and absolute control of the right to use the air' (1995, p. 759).

Compaine makes clear the connection (and tension) between the rights perspective and the conception of the media of communication as public utilities. If, in fact, media can be understood as public utilities (and, interestingly enough, utility companies themselves are finding points of convergence with media companies, if only because they share distribution capacity), then universal access comes to the fore; indeed, the *Communications Act of 1934* made it clear that universal access was central to the conception of media operating in the public interest.

Public access, however, has never necessarily meant individual access; accessibility to the telephone in its early years in the US, for instance, meant not that a phone would be within reach in each home but that a phone would be near enough in a town, community or neighbourhood for most people to reach it. That we have come to understand universal access as virtually the 'wiring' of every American home underscores the link between access and individual rights, the sense of entitlement to communication that is now part of our society. But how does one reconcile universal access with a concomitant adherence to individual rights? The convergence of universal access, transmission as the 'linking pin' of copyright law, and the 'boundless' nature of the electronic copy, leads to an environment within which a 'work' takes on a life of its own, constituted as bit and electron. There is potential for a bottleneck not only at every point of use, as copyright owners seek to control and regulate the mediation of works, but at every point of movement within a distributed network.

Interestingly enough, the public interest is precisely at the root of the argument by those who wish to strengthen the rights of copyright holders. An information superhighway, the argument goes, will itself not be built unless sufficient protection is provided to content creators to enable them to reap 'just rewards' from the distribution of their works. The US government's Information Infrastructure Task Force put it this way:

[T]he potential of the NII will not be realized if the information and entertainment products protectible by intellectual property

laws are not protected effectively when disseminated via the NII. Owners of intellectual property rights will not be willing to put their interests at risk if appropriate systems—both in the U.S. and internationally—are not in place to permit them to set and enforce the terms and conditions under which their works are made available in the NII environment. Likewise, the public will not use the services available on the NII and generate the market necessary for its success unless access to a wide variety of works is provided under equitable and reasonable terms and conditions, and the integrity of those works is assured. ... What will drive the NII is the content moving through it. (US Department of Commerce 1994, pp. 6-7).

The argument is as old as copyright law itself—what is the appropriate balance between an author's reward and the public's access? Fair use debates revolve around determination of just such a balance (Lawrence & Timberg 1989). They simultaneously must determine the balance of rights between the individual and the social. In this instance the reward is not only financial but one of control. More importantly, the demand is for control of something uncontrollable, namely, something that has been, as earlier stated, 'unbound', just as the self, the other, and their expression circulate among mediated, distributed, networked, temporarily fixed, but never necessarily permanent.

In the US the next iteration of the *Digital Millennium Copyright Act* (DMCA), the *Consumer Broadband and Digital Television Promotion Act* (CBDTPA), is being debated in Congress at the time of this writing. Like its predecessor the DMCA, the CBDTPA makes it a crime to remove any security technology, even when one does so to exercise legal rights. But the CBDTPA goes one (giant) step further, mandating that all digital devices (from computers to cell phones to watches) conform to the federally mandated copy protection schemes.

### Out of Bounds, Out of Control

It is important to remember that copyright law has never provided protection against copying, only recourse once illicit copying is discovered. It was possible 300 years ago to recite a work to an audience that would memorise it and pass it on, as the characters in Ray Bradbury's book *Fahrenheit 451* do, just as it is possible for a teacher in a classroom today to ask students to memorise entire copyrighted texts. Of course, such things are not asked of people, not because the law states that they should not be asked but because most people simply cannot do them easily. It is easier to write or otherwise record a text.

Nevertheless technology ought not therefore be a primary concern (though it should remain on the table) and instead we should focus on what we seek to accomplish via copyright law. To some extent it is simply a given that new technologies make it easier to copy and thus

to violate copyright law. That digital technologies continue that trend should not be a surprise, for what drives the development of these technologies is the desire by content producers, media industries, to reach audiences. What matters is that copyright law has always been violated, and that we have continued to try to build that better mousetrap, fix that latest loophole (whether induced by new technology or not) not to prevent copyright violation but to ensure that income continues to derive from the ownership of rights.

Nowhere is this more evident than in the entertainment industry's insistence on technology 'taxes' to offset purported losses from copyright violation, implementation of 'micropayments' for access to copyrighted materials, and its insistence on use of protection systems. It is, simply put, easier to tax hardware (and in some cases software) products than it is to organise teams of law enforcement officials and attorneys to engage in anti-piracy efforts in various countries, or to create a 'copyright police' in the US. Even the addition of copyright protection systems to hardware and software is unlikely to deter any but the least knowledgeable from finding hacks that bypass these systems.

But whether these schemes and methods actually work, what might be the consequences? What might happen to public libraries, for instance? And what indeed of notions of Fair Use? Ultimately micropayments do not address copyright law per se, for they do not prevent violation of the law so much as require that we pay up front for violating it, further evidence that the forces motivating changes in copyright law are less interested in preventing copying of their materials and obviously more interested in profiting from having them copied.

Copy-protection schemes address reproducibility, and what digital technology has quite pointedly done is made reproducibility problematic, because it is easier than ever to reproduce works in an externalised, commodified form, copyright or no. In some instances reproduction is absolutely necessary, as it is in the case of distributed networking: To move an item across a network requires each node along the way to 'store and forward' a copy of that item. Not only the original but also the copy has been unbound.

Yet copyright law based in conceptions of bounded property requires externalised, or actualised, fixed, reproduction, to operate successfully. For digital technology and copyright, then, a work is not a work until it is actualised, or rendered in performance, at the point of consumption, made real and not virtual, be that on the computer screen, audio loudspeaker, or what have you. To return to the *Fahrenheit 451* example mentioned earlier, would we consider it copyright infringement if, to memorise whole passages from a book or an entire song, we hum it to ourselves? And yet, whether we 'fix' it or not, we do actualise the work when we transform it from thought to sound.

Another question, then: Where does the work, say, a song, reside between the times that we hum it to ourselves? An interesting take on this can be found in Wim Wenders' film 'Until the End of the World',

and in a report on the development of a 'human memory chip' that would 'store memory and sensory sensations such as smell, sights and sounds...that can later be downloaded into a computer' ('Scientists Foresee' 1996). Will memory soon be externalised in a form beyond that of our experience of current forms of expression? What is problematic about the transmission of works is that we continue to use technology to abstract physical reality to degrees that make it almost infinitely easy to move copyrighted works, as easy as it is to memorise them ourselves and move about from place to place reciting them. In some sense the very lack of a physical presence means transmission in pragmatic terms is not problematic. There is no 'thing' or material object to be moved, only its representation.

### Conclusion: Distributed Network Distributing Works Distributing Thoughts

For the most part scholars with an interest in copyright law and political economy have focused on creative, industrial and commercial activity at the point of physical presence. The result has been insufficient attention to distribution. There is often a focus on production and consumption, a focus on senders, receivers, channels, messages, media, and so on. But only rarely is it asked: What happens to communication when it is not 'there' for us to study, when it is in transit? Where does meaning reside, how is communication constituted and re-constituted as it moves from one place to another, one mind to another?

Note that this is not tantamount to asserting that the study of communication needs to be rooted in its transmission. A most intellectually satisfying and substantive understanding of communication comes from the distinction James Carey has made between the transmission and ritual views of communication. Perhaps now is the time to examine the ritual of transmission and become interested in the notion that transmission itself is what enables ritual, the sharing and communion that constitute ourselves and our culture in and through communication. Trade, in this sense, can come to mean sharing as well as economic activity. Our analyses of copyright have too long privileged the latter and paid little attention to the former. The result has been to understand copyright in its textual sense, as the possession of property, and to largely ignore its spatial rendering, via distribution, as a means of controlling the movement of words, pictures, ideas.

Technology's designers seek, in a sense, to create tools that do the impossible, and when it comes to copyright some are beginning to succeed. Through legislative action technology is allowing culture to be owned, bought and sold, and, most worryingly, *controlled*. What should be of great concern to us is that 'works' can also be understood as bits (pun intended) of a larger whole, namely, culture. And, like the emphasis on the individual that arises from copyright law's insistence

on an author and/or copyright holder, an emphasis on individual works and rights therein obscures the social nature of the network of works that constitutes culture. Consequently, the issues facing us as we grapple with copyright and technology are ones of culture, of memory and history.

But the narrative that emerges from our struggles with copyright law these past couple of decades is one that seems less concerned with those issues, and shows us more concerned with the view that the expression of our ideas of the individual, lies firmly within the aforementioned 'rights' tradition. Our expressions are to be eminently exploitable, as 'content'. Rights become a means by which to enact and enforce scarcity in a climate in which we believe, it appears, that ideas are a limited resource, much like the frequency spectrum is to broadcasting, when in fact they are not, and Heaven help all of us, not just those engaged in intellectual and creative work, if they become so.

#### References

- Association of University Technology Managers (2000), Academic research last year helped nation boost jobs, 14 November  
<http://www.autm.net/pubs/survey/1999/pr99finalweb.html> viewed 9 April 2002.
- Blumenstyk, G. (2002) 'Income from university licenses on patents exceeded \$1-billion', *Chronicle of Higher Education*, (March 22), p. A.31.
- Bradbury, Ray (1993), *Fahrenheit 451*, New York, Simon & Schuster.
- Carey, J. W. (1988), *Communication as Culture*, Boston, Unwin-Hyman.
- (1991), 'A Republic, if you can keep it: Liberty and Public Life in the Age of Glasnost', in R. Arsenault (Ed.) *Crucible of Liberty: 200 years of the Bill of Rights*, New York, The Free Press, pp. 108–28.
- Compaine, B. M. (1995), 'The Impact of Ownership on Content: Does it Matter?', *Cardozo Arts & Entertainment Law Journal*, vol. 13, pp. 748–81.
- Elkin-Koren, N. (1995), 'Copyright Law and Social Dialogue on the Information Superhighway: The Case against Copyright Liability of Bulletin Board Operators', *Cardozo Arts & Entertainment Law Journal*, vol. 13, pp. 345–411.
- Goody, J. (1975), *Literacy in Traditional Societies*, Cambridge, Cambridge University Press.
- Hettinger, E. C. (1989), 'Justifying Intellectual Property', *Philosophy and Public Affairs*, vol. 18, pp. 30–49.
- Jones, S. (1993), 'Critical Legal Studies and Popular Music Studies', *Stanford Humanities Review*, Autumn, pp. 77–89.
- Kaha, C. W. (1994), 'Of Boundaries and Variable Flex-space', *Proteus*, Spring, pp. 18–25.
- Lawrence, J. S. & Timberg, B. (1989), *Fair Use and Free Inquiry: Copyright Law and the New Media*, Norwood, NJ, Ablex Publishing Corp.

'New legislation addresses copyright protection in cyberspace', *BMI MusicWorld*, Summer 1996, p. 13.

Ong, W. J. (1982), *Orality and Literacy*, New York, Methuen & Co. Press, E. & Washburn, J. (2000), 'The Kept University', *Atlantic Monthly*, 2000, pp. 39–54.

Rose, M. (1993), *Authors and Owners*, Cambridge, MA, Harvard University Press.

Samuelson, P. (1997), 'Big media beaten back', *Wired*, March, pp. 62–5.

Scientists foresee human memory chip in 30 years, *Reuters*, newswire report, 18 July 1996.

Taylor, C. (1995), *Philosophical Arguments*, Cambridge, MA, Harvard University Press.

Turow, J. (1997), *Media Systems in Society*, 2nd edn, New York, Longman.

US Department of Commerce (1994), Intellectual Property and the NII, *Preliminary draft of the report of the Working Group on IP Rights*, Washington, DC, July.

Wenders, Wim (1991), *Bis ans Ende der Welt (Until the End of the World)*, Argos Films/Road Movies Filmproduktion/Village Roadshow, Warner Bros.