

**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**

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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 *Shangrila* 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 refunctioning 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*¹. 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*².

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 available³.

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 evident⁴. 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.

¹ It was renamed Camp David by Eisenhower.

² *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.

³ Figures and background story reported in the UK newspaper The Guardian, Thursday June 1st 2006.

⁴ 'Welcome to Shangri-la', report by Jonathan Watts from Shangri-la.

⁴ 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.

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 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 having negative impacts on the environment. The city lies close to the Three Parallel Rivers national park, which is a world heritage site⁵. 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 alpine⁶.

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 dependent 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 is 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.

⁵ At this point, the Yangtze, Mekong and Salween rivers run a mere 50 miles apart.

⁶ According to the US NGO *Nature Conservancy*, quoted in the Guardian op.cit.

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.
- 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 years⁷. 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

⁷ Term and effective scope vary depending on the jurisdiction.

another's use. In part, the copyright is a 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 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.

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 circumstances⁸.

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 conditions⁹.

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 copyrights¹⁰.
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 incentivize 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

⁸ Exemptions under 'fair use' (to use the US terminology) vary according to the subject matter protected and jurisdiction.

⁹ 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.

¹⁰ It should be noted that the level of control rights owners can exercise has increased considerably in recent years.

is deemed to be of public benefit. These rights can be characterised as primarily social and cultural¹¹.

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 on¹². Thus, copyright has to be viewed in distinction to the public domain¹³.

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 protection¹⁴. 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 culture¹⁵. The position stands in contrast to other contemporary views that deploy copyright as a means of promoting the interests of particular creative industries, creating growth in capital accumulation, and protecting national economies in the global market place.

¹¹ 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.

¹² 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>

¹³ 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.

¹⁴ 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.

¹⁵ Lyman Ray Patterson and Stanley Lindberg, *The Nature of Copyright: A Law of User’s Rights*, University of Georgia Press, Athens, 1991.

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/notproperty 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.”¹⁶

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.”¹⁷

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 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.

¹⁶ Boyle, op cit.

¹⁷ 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 Cultural Circulation

This model has its origin in social history approaches to art developed in the 1940s¹⁸. 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 innovation¹⁹.

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 culture²⁰.

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 creativity²¹.

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 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

¹⁸ See Arnold Hauser, op. cit.. Hauser’s approach was deeply indebted to Weberian sociology.

¹⁹ 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.

²⁰ 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

²¹ 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.

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.²²

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.²³ 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 organization and practice, and is thus returned to a tacit state, becoming a part of an employees everyday routine.

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.²⁴

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

²² Michael Polanyi, *The Tacit Dimension* 1967.

²³ 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.

²⁴ 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.

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 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.²⁵

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.
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.

²⁵ 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 bought 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.

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.²⁶

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

²⁶ See Part 3.2 of this study.

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.

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.