
NASHVILLE IN AFRICA: INTELLECTUAL PROPERTY LAW, CREATIVE INDUSTRIES, AND DEVELOPMENT

by Mark Schultz and Alec van Gelder*

Nashville, Tennessee, was once a struggling city in one of the poorest regions of the United States. Early 20th century policymakers pinned the city's economic hopes on industrial development founded on access to raw materials and large, government-funded public works projects. These hopes were never fully realized, but Nashville found success another way—through its creative industries.

Today, Nashville enjoys enviable economic success as “Music City U.S.A.” It is home to a multi-billion dollar country music industry, employing tens of thousands of people, and a thriving, diversified economy.

Nashville's ascent serves as an encouraging example of how creative industries can make much from little. Creative industries offer considerable potential as drivers of economic development, since they require relatively low levels of technological, physical, educational, or financial infrastructure.

In this article, we consider how Nashville might serve as a model for cultural and economic development in Africa. Like Appalachia and the Southern U.S. in the early 20th century, many African countries have rich musical traditions and abundant talent. The popular music industry in Africa has vast potential, but there are not yet “African Nashvilles.” We consider the barriers to their development and how they might be removed.

Although the presence of a successful creative industry is neither sufficient nor necessary to a thriving economy, it is an example of the type of private, locally-based entrepreneurial effort that poor economies need to foster. We begin by examining how “Music City U.S.A.” emerged from circumstances that in some ways are similar to those that persist in parts of Africa today. We then seek to explain Nashville's success, drawing on the literature on creative clusters. We then consider whether modern day Africa could achieve similar success, considering both the great promise and difficult circumstances of the African music industry. We conclude by offering some suggestions of the kinds of reforms that might help establish creative industries and thereby promote economic and cultural development in sub-Saharan Africa.

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I. Popular Music as a Grass Roots Economic Development Strategy

The city of Nashville is nicknamed “Music City U.S.A.” for good reason.¹ While the United States is blessed with several locales where popular music thrives both creatively and financially, there is no other city or region where music is more central to the local economy and identity.² A recent study estimates that music contributes over \$6 billion a year to the local economy.³ According to the same study, 20,000 jobs in the Nashville area are directly related to music production, accounting for over \$700 million in annual wages, with Nashville home to “80 record labels, 130 music publishers, more than 180 recording studios, 40 national producers of ad jingles, 27 entertainment publications and some 5,000 working union musicians.”⁴ The study estimates that 35,000 additional local spill-over jobs exist because of the music industry in fields such as music-related tourism.⁵ Since Nashville is a relatively small city, with a population of 1.2 million people, the music industry's benefits to the local economy are particularly significant.⁶

A. *The Nashville Story*

Nashville's country music success was not part of any grand centrally-orchestrated blueprint. Rather, it resulted from the actions of a few early 20th century music business pioneers—the sort of grass roots entrepreneurs who the more forward-looking development economists would laud.⁷ Important lessons can be drawn from their actions and from the conditions that aided their success.

In the early 20th century, Nashville and its surrounding region once faced economic challenges similar to those faced by today's poorest countries. During the first part of the 20th century, the American South was far less developed than other regions of the United States.⁸ The South's industries were significantly less advanced, with economic activity focused mainly on agriculture or local industry.⁹ “Nashville shared the South's dilemma of being unable to move beyond local resources and local markets.”¹⁰ Conditions in the rural regions outside Nashville were particularly daunting. In the early 1930s, per capita incomes in the Tennessee Valley were about 40 percent of the U.S. national average.¹¹ Subsistence, tenant farming was still common. As one scholar recently noted, the South's socio-economic system was considered so backward that the contemporary mass media “casually referred” to it as “feudalism.”¹² “The low incomes and general economic distress of the South made it impossible to develop educational institutions and public health facilities to the standards attained in most other sections of the United States.”¹³ In fact, 30% of the population in the Tennessee Valley was infected with malaria in the early 1930s.¹⁴

Nashville initially pinned its economic hopes on easy access to natural resources, hoping that it would become a

major manufacturing center for steel and textile production.¹⁵ Yet these aspirations were never fully realized: the mere presence of raw materials did not translate into hoped-for manufacturing prowess.¹⁶

Hopes for Tennessee's development then turned to the sort of grand projects that have been so favored by Western development agencies in Africa. In 1933, the Tennessee Valley Authority ("TVA") was established to build massive infrastructure projects to promote development in the Tennessee region. The TVA built dams, power plants, and other public works, while promoting agricultural and educational programmers. For decades after WWII, the TVA was enthusiastically embraced as the model for development projects around the world—from Aswan Dam in Egypt to the Three Gorges Dam project in China, cement factories in Nigeria, and aluminum smelters in Ghana, governments have seen TVA-style massive public works as a development panacea. Since then, the development community's enthusiasm for the TVA and its descendents has declined precipitously, because, as one scholar observes, many experts now "find these efforts questionable, if not dangerous.... Too often... these vast undertakings hurt the people in their path as the grand, 'high modernist' visions at the core of these programmers ignore people's needs, values, experience, and knowledge."¹⁷

Compared with the grandiose TVA, Nashville's "Music City" grew from far more modest seeds. The development of the country music business was not the product of detailed plans orchestrated by a centralized authority. Rather, initial events hinged on the private actions, skills, and insights of a handful of individuals: the musical talents of country music pioneers such as Jimmie Rodgers and the Carter Family and the business acumen of entrepreneurs such as Ralph Peer, a record producer and aspiring music publisher. Their success may seem almost accidental, a case of enterprising performers and businesspeople being fortunate enough to find and shape an untapped popular taste for their product. But there is far more to the story than luck.

The initial factor in Nashville's musical success was the unique musical tradition of the rural South and nearby Appalachian region. Music was an essential part of people's daily lives. Folk music was one of the chief forms of family and community entertainment and central to religious worship in the region's many, diverse Protestant religious denominations.¹⁸ A mix of history, geographic isolation, and culture had combined to foster a musical heritage that was both unique and popular.

By the mid-1920s, people were beginning to see that this folk music tradition might be converted into a more commercial art form. Some performers, such as Jimmie Rodgers, were playing engagements throughout the region, and a few, such as "Uncle" Dave Macon, had broken out of local engagements to tour the East Coast.¹⁹ Two high-powered radio stations that reached large parts of the country, WLS in Chicago and WSM in Nashville, began broadcasting weekly live country music shows that quickly proved to be very popular. (WSM's *Grand Ole Opry Radio Show*, is still running today.) Perhaps most consequentially, a New York record producer, Ralph Peer, co-produced what is known as the first commercial country music

recording, Fiddlin' John Carson's "That Old Hen Cackled and the Rooster's Goin' to Crow," for Okeh Records.²⁰ Despite the poor quality of the recording, it quickly sold out, convincing Peer of the potential popularity of country music.²¹

Fortunately for him and the musicians whose careers he launched, Peer was able to secure the financial backing to pursue his insight that there was a market in country music. He left Okeh, formed his own publishing company, and entered into a joint venture with the Victor Talking Machine Company.²² In the summer of 1927, Victor supplied Peer with \$60,000 in financing for an expedition to the American South to record country music.²³ Up to that point, few rural, Southern artists had been recorded, as the then-current analogue recording equipment was bulky and impractical to move, thus necessitating a prohibitively costly trip to New York.²⁴ With the advent of electronic recording technology in the late '20s, Peer was able, at a significant but feasible cost, to take the equipment closer to the talent. Peer used the money to send out a team of advance scouts to find musicians and ship recording equipment to Bristol, Tennessee, where he set up a temporary recording studio.²⁵

Peer's recording session in Bristol established the commercial viability of country music. Johnny Cash called the Bristol Sessions "the single most important event that ever took place in the history of music."²⁶ Over the course of 15 days, Peer and his crew recorded a total of 76 songs performed by 19 different acts, capturing "an almost perfect representation of early country music: fiddle and banjo tunes, old traditional ballads, gospel music, old popular and vaudeville songs, and rustic comedy."²⁷ The recordings quickly turned into commercial success, leading to the discovery of both a mass market for the genre and the first country music superstars, Jimmie Rodgers and the Carter Family. "In a 3-month span a year after the Bristol sessions recordings first went on sale, Peer's Southern Music publishing company earned \$250,000 in royalties."²⁸ Later that year, Peer recorded Rodgers singing *Blue Yodel (T for Texas)*, a huge hit selling a million copies.²⁹

While the Bristol Sessions were a gold mine for Peer and the most successful performers, they were an important economic opportunity for everybody involved, especially as few other opportunities existed in Nashville. When Peer used stories in the local media to advertise the amounts he was paying performers,³⁰ the response was overwhelming. Peer "was deluged with long-distance calls from the surrounding mountain region. Groups of singers who had not visited Bristol during their entire lifetime arrived by bus, horse and buggy, trains, or on foot."³¹ The royalties that Peer and Victor paid were substantial by the measure of incomes of the day: Peer typically paid a recording fee of \$50 per song and a royalty of about 2 ½ cents per record side sold.³² By comparison, one of the major local industries, coal mining, then paid about 76 cents an hour.³³ Thus, a single recording session paid far more than an average week's wages for a coal miner, and sales of fewer than 6,000 copies of a record would produce royalties equivalent to a month's wages.³⁴

Once the Bristol Sessions established the commercial viability of country music, other music business entrepreneurs seized upon the opportunity Peer had uncovered. They observed that Nashville offered the advantage of local talent

and expertise.³⁵ Pioneers such as Roy Acuff, Harold Rose, and Owen and Harold Bradley set up publishing houses, recording studios, and record labels in Nashville.³⁶ In their wake, even more music-related businesses flocked to Nashville: other record labels, recording studios, and music publishers; collecting societies; record stores; performance venues; and other essential institutions. By the 1950s, these businesses were so heavily concentrated in one of Nashville's neighborhoods that it became—and remains—known as "Music Row." Those early institutions started a helpful dynamic of competition, cooperation, and shared expertise that continues to this day.

B. The Lessons of Nashville for Less Developed Countries

What country wouldn't envy the economic benefits provided by Nashville's music industry? Indeed, a team of World Bank staffers created the Africa Music Project to promote the African music industry with Nashville partly in mind, saying that their "dream" was that "African countries would create their own Nashvilles."³⁷ Creating such centers of economic activity is more than just a dream; it can also be a viable development strategy given the right circumstances. Although Nashville's success cannot simply be transplanted wholesale to different countries and times, it does yield compelling lessons.

Just as the early country music recording industry offered an attractive alternative to Tennessee's workers, today's creative industries offer a similarly alluring alternative to workers in poor countries. Most jobs in poor countries are labor-intensive and relatively unproductive; for example, 70 percent of employment in sub-Saharan Africa is agriculture-related, much of it subsistence farming.³⁸ Moreover, much agricultural work is seasonal and weather-dependent. Work in creative industries such as the recording business is likely to yield a much higher return, as the productivity and profitability advantages are vast. There is thus ample opportunity, in principle, for talented individuals to increase their income by investing some of or all their labor in creative fields such as music.

Recent work on economic development has focused attention on the importance of local centers of excellence and expertise to the economic prospects of a region. As Michael Porter has written in his widely-heralded work on competitive strategy and economic policy, regions and nations are most likely to prosper in the global economy if they foster strong "clusters" of economic activities, such as the country music "cluster" in Nashville.³⁹ According to Porter, clusters are "geographic concentrations of interconnected companies, specialized suppliers, service providers, firms in related industries, and associated institutions (e.g., universities, standards agencies, and trade associations) in particular fields..."⁴⁰

Clusters of economic activity provide a sustained competitive advantage through a self-reinforcing dynamic of cooperation and competition among related businesses. They exploit economies of scale and build up networks of skills, knowledge, and business relationships. Both employees and ideas circulate among competitors, building up a collective advantage over firms from outside the region. In addition to Nashville, other well-known examples include the microelectronics industry in Silicon Valley, high-performance auto companies in southern Germany, high-end fashion shoes

in Italy, and wine industries in South Africa, France, and New Zealand.⁴¹

Celebrated examples such as Nashville and Hollywood show that clusters of competitive advantage can form around creative industries. However, there is no reason to believe creative clusters are merely the product of wealthy societies. Indeed, Tyler Cowen has documented how specific cultural sectors in poor countries can thrive under globalization, as local creativity benefits from exposure to new technology, wealth, and outside creative influences.⁴² Examples he cites include Congolese soukous music, Haitian painting, Jamaican Reggae, Persian textiles, Cuban music, and amate painting from Guerrero, Mexico.⁴³

Creative clusters can be particularly powerful drivers of development in poor countries for several reasons. First, they play to local strengths, taking advantage of knowledge, skills, and forms of expression that arise from local culture, and are thus, by definition, largely unique and non-duplicable. Second, for the most part they do not require cutting-edge technology, large capital investments, or a robust infrastructure.⁴⁴ Third, although creative work often requires a significant personal investment in training and development, it typically does not require the sort of extensive formal educational system that still remains unavailable to the poor in many less developed countries.

Vibrant creative industries can provide benefits beyond the economic activity they create directly. A thriving creative cluster stimulates investments elsewhere. For example, Nashville's music industry has engendered a substantial tourism industry, with the additional transportation and lodging infrastructure that comes with it.⁴⁵ For the music business, Nashville's advantages outweighed any challenges presented by how backward Nashville may have been at that time. Nashville thus became the home of a thriving creative cluster.

Success also provides a large morale boost to people, economies, and cultures. Nashville's success provided such a benefit to a downtrodden region, giving credibility to an obscure, once-dismissed type of music. As Peer wrote of Jimmie Rodgers, the "impetus which he gave to so-called hillbilly music... set in motion the factors which resulted in making this sector of the amusement business into a matter of world-wide importance and a source for a high percentage of our popular hits."⁴⁶ This is the same boost that resulted from the actions of artists and entrepreneurs that helped to kick-start the development of the reggae industry in Jamaica.

Entrepreneurship is at the center of the Nashville story. The large government-directed projects of the era, such as the TVA, played little role in the growth of Nashville's creative industries. Instead, the birth of Music City depended far more on the talents and efforts of individuals such as Jimmie Rodgers, Ralph Peer, and the artists and entrepreneurs who followed in their footsteps.

The central role of private action to building creative clusters is both bad news and good news for policymakers. The bad news is that there is little governments can do to ensure success for the creative industries. The good news is that these risks can be placed on the shoulders of private parties rather than resource-strapped governments. Provided they can foresee rewards, artists and creative industries willingly take these risks.

Governments play a lesser—but essential—role in providing the right institutional framework for creative industries to thrive through the enforcement of contracts and institutions, such as copyright.

Copyright was an essential ingredient in Nashville’s success. For Peer, it was the very foundation of his entire Bristol enterprise. Peer left his job with OKeh records to found his music publishing business, while convincing Victor to invest a huge sum in the Bristol Sessions. Peer took only \$1 per year in salary from Victor, but in exchange he obtained the right to control the copyrights in the compositions he recorded. The property rights created by copyright enabled these transactions, giving Peer and Victor a reason and focus for their entrepreneurial activity.⁴⁷

Peer understood—and helped establish—the entrepreneurial and cultural value of copyright to the young recording industry. He was among the first in the pop recording industry to see the win-win potential created by copyright: “Peer’s genius lay in structuring his publishing company based on royalties, making copyrights profitable for the artist as well as himself—the financial model of the modern music industry.”⁴⁸ He was also the first record executive to encourage his performers to avoid old, copyrighted standards and public domain works in favor of new compositions.⁴⁹ The new compositions had the dual virtues of being copyrightable and more culturally relevant (and thus more commercial) than older works.⁵⁰ Indeed, once Peer and others showed the value of new, copyrightable material, commercial incentives motivated rural Southern musicians to abandon folk music for royalty-producing works.⁵¹

The story of Nashville shows just how much a region’s culture can aid its economic development, given enough talent, adequate incentives for entrepreneurs, the right laws, and supporting institutions. Although Nashville resides in one of the world’s wealthiest countries, it was once a struggling city in the U.S.A.’s most underdeveloped region. Nashville now has a thriving, modern economy. The country music industry played an essential part in Nashville’s transformation into a world-class city, sustaining it through difficult times and contributing enormously to its modern economy, cultural identity, and business reputation.

The question, then, is what it will take to create other “Music Cities” in less-developed countries. As the example of Nashville illustrates, certain conditions must be met before local talent and entrepreneurship can result in creative success and economic development.

II. Where are the African Nashvilles?

While Nashville provides an encouraging example of how creativity and entrepreneurship can help lift people out of poverty, one might reasonably ask whether it can be replicated in Africa and other poor parts of the world. Some of the ingredients are certainly present in Africa: rich musical traditions; entrepreneurs who have sought to develop those musical traditions into a profitable business enterprise; and copyright laws in most of Africa. Unfortunately, realizing the dream of creating African Nashvilles has proven challenging.

A. *Abundant Talent, Abundant Potential*

Nashville is hardly the only, and certainly not the greatest, concentration of musical talent on the globe. For example, a popular guide for adventurous tourists touts Bamako, the capital of Mali, as one of the world’s “musical hot-spots”: “The West African city’s anarchic collection of neighborhoods sprawls from the Niger river in Mali, filled with single-story dwellings and women cooking in their courtyards on charcoal braziers. The place feels like one big village, with music everywhere.”⁵² The guide continues:

[N]one of this should be surprising, given Mali’s 600-year-old musical tradition. And in the last 15 years, artists like singer Salif Keita and singer-guitarist Ali Farka Touré have shot to international fame, making Mali the centre of West African music and Bamako one of the premier places on the planet to hear it live.⁵³

While Mali’s musical traditions may be unusual in their richness, many African nations have their own traditions that can be traced back decades if not centuries, from Rai music in Algeria to Highlife and Afrobeat in Nigeria and Ghana; from Mbablax in Senegal to Soukous in Congo and the Democratic Republic of Congo; from Township jive in South Africa to Chimurenga music in Zimbabwe.⁵⁴ So great is the influence of African creativity that many of the world’s most popular forms of music, from blues and jazz to gospel and reggae, from soul and funk to R&B and hip hop, rely heavily on the rhythms, melodies, and musical traditions of Africa.⁵⁵

The potential of Africa’s music industry is widely recognized. As a recent report from the United Nation Conference on Trade and Development (UNCTAD) observed, the creative industries offer some of the best prospects for high growth in least developed countries.⁵⁶ One researcher estimated that the Ghanaian music industry alone could generate \$53 million a year from foreign sales if local conditions were more amenable to supporting creativity.⁵⁷

In a few spots in Africa, this potential is being realized, at least partly. South Africa’s music industry is strong and diverse, with internationally-known musicians such as Hugh Masekela, Miriam Makeba, Ladysmith Black Mambazo, Ray Phiri, and the Soweto Gospel Choir. Elsewhere in Southern Africa, the Zambian music industry is being revived after a near-total collapse in the 1990s.

The Zambian experience illustrates how pioneering entrepreneurs can ignite a creative industry, given the right conditions. First came a new copyright law in the mid-’90s.⁵⁸ Then, in 1999, a new Zambian record label, Mondo Music Records, sparked a revival. Much like Ralph Peer showed the way for Nashville’s early country music pioneers, Mondo showed the way for other entrepreneurs.⁵⁹ “[T]here has been exponential growth in the amount of Zambian music being produced in the last seven years, and also in the consumption and the appreciation of it. Right now, Zambian music dominates... local radio, and [is] also becoming a little bit noticed outside of the country.”⁶⁰ Mondo’s founder, Chisha Foltiya, recognizes the potential value of a creative industry to his country’s economy and to creative individuals. He says “we want Zambian music to

contribute towards the economic development of our country. On a small level, as individual artists, retailers, producers, choreographers, dancers who are involved in the music itself, and also at the macroeconomic level, the entire retail sector, and manufacturing sector.⁶¹

Such bright spots in African popular music show what is possible if the right conditions are created. The possibilities for creative industries are both readily visible and seemingly endless. Such creative clusters present the sort of grass-roots opportunity that is increasingly seen as fundamental to economic development.⁶²

B. The Reality

Unfortunately, these hopeful examples remain isolated. Despite widely acknowledged potential, the music industry remains beleaguered in most African nations.

Bamako, Soweto and Lusaka notwithstanding, there are as of yet no Nashvilles in Africa.

African creativity remains an underappreciated and underexploited resource. Rarely do creative sectors contribute more than 1 percent of the relatively low GDPs of any African country.⁶³ Africa's share of trade in cultural goods constitutes less than 3 percent of the global total.⁶⁴ One researcher estimates Africa's share of the world market for sound recordings at a mere 0.4 percent.⁶⁵ By comparison, creative industries in wealthy countries employ millions and contribute significantly to national economic production—over 11 percent of GDP in the United States, for instance.⁶⁶ European creative industries are the fastest growing industries across the continent and employ over 4.7 million people, according to 2005 figures from UNCTAD.⁶⁷

Despite a few celebrated examples on the world music scene such as King Sunny Ade, Ali Farka Toure, and Youssou N'Dour, African music has yet to become a successful export industry. For example, Senegal is justly celebrated for its illustrious artistic history and for relatively well-known stars such as N'Dour who have been able to transform their musical roots to international success in "outside markets."⁶⁸ However, the Africa Music Project estimated that in Senegal only "one dozen of the estimated 30,000 artists enjoy international sales and publicity."⁶⁹ Another study attempted to gauge the number of "internationally recognized [music business] celebrities" in other African countries (with "international" connoting success anywhere outside of their home country, rather than global stardom).⁷⁰ The relatively successful South African music business boasted a high of 22 percent, but the next most successful country was the Democratic Republic of Congo with only 8 percent.⁷¹

To the extent that African creators do succeed, their success often fails to produce economic benefits for their home countries. For example, most African music is recorded in either London or Paris—largely depending on where the artist in question originates.⁷² Those products are also most often consumed in Western countries as well. The situation is similar for other creative sectors: "Half of a Yellow Sun," a tale of a bloody civil war in the early 1970s written by Chimamanda Adichie, is one of the most popular African books in the first decade in the 21st century. But it has sold just 5,000 copies in

the author's native Nigeria, as opposed to at least a quarter of a million in Britain, where Adichie has won critical acclaim.⁷³

In stark contrast to the high incomes earned by many musicians in wealthy countries, African musicians are often poorer than their fellow countrymen. The Africa Music Project estimated average income for musicians in Senegal was \$600 per year—15 percent lower than the country's GDP per capita.⁷⁴ The study further observed that "eighty per cent of Senegalese musicians are either unemployed or underemployed."⁷⁵

C. What's Missing

The failure of Africa to produce healthy creative clusters is disappointing—and may in part explain their lack of economic development. It is certainly not for a lack of entrepreneurial talent. As we noted above, the African Ralph Peers exist, but most are hampered by local policies and practices.

Among the major obstacles to the emergence of successful creative clusters in Africa are:

- Difficulties enforcing copyrights against piracy;
- Government control of copyright collection agencies;
- Irrational, burdensome taxation.

We now consider each of these in turn.

Difficulties enforcing copyright against piracy

Piracy of music is a serious problem in sub-Saharan Africa. Pirated versions of creative works represent *at least* 25 percent of the entire marketplace across Africa.⁷⁶ That figure is as high as 90 percent in some West African countries.⁷⁷

Piracy deprives creators and legitimate distributors of sales. As we discuss below, by undermining the potential for downstream revenue, it also prevents creators from securing capital to finance their work—and, indeed, undermines the emergence of a local recording industry.

In spite of nominally strong copyright laws, enforcement is a major problem.⁷⁸ According to Nwauche, this results from a combination of: "[i]nadequate funding of enforcement agencies; lack of trained and properly motivated staff [of copyright offices]; stakeholder apathy in the enforcement of their rights; a weak institutional base; poorly trained and paid enforcement (police, customs, and specialized institutions) agents; a cumbersome and tardy judicial system; and unorganized stakeholders."⁷⁹

The lack of enforcement has effectively empowered the pirates, who are better organized and more successful than their victims and probably act in cahoots with the public enforcement agencies. In Senegal, the Africa Music Project observed that "pirates have more means at their disposal than those responsible for policing them." They further observed that "criminals guilty of wide scale commercial piracy are often pardoned because of well-placed connections within local government."⁸⁰

In places where life is already hard, such conditions are not merely unfair—they have tragic consequences. Alhaji Sidiku Buari, President of the Musicians Union of Ghana, has described how all of these unfortunate realities conspire against creators in Ghana: "A musician will do his music and somebody else reframes it and gets all the money in his pocket.... Our musicians have no social security, no insurance, no pension

scheme and most of them die as paupers.⁸¹ Creators' hard work and talent are betrayed by a poor institutional climate. As Orrack Chabaagu, Director of EMI South Africa has observed, "It is unfortunate that after one has gone through thick and thin to produce his music, he does not live to enjoy its results because of piracy."⁸²

Piracy also hampers individual musicians from securing capital to finance their creative work or other ventures. Their primary potential assets—their copyrights and the revenue streams that should result from them—are effectively worthless. As a result, musicians are unable to obtain loans from local financial institutions, thus forcing them to pay for instruments, recording time and other business expenses up front and out of their own pockets.⁸³

The problem is the same one recognized by Hernando De Soto in his *Mystery of Capital*: without clearly defined, readily enforceable property rights, the poor have no assets with which to secure loans and other capital. They are thus prevented from climbing the economic ladder.⁸⁴ The experience of African musicians shows that De Soto's insight regarding physical property applies to IPRs as well.

Ineffective enforcement of copyright has led to a host of other unintended consequences, including pushing the production of African music out of Africa. For example, in the late 1980s most legitimate music businesses in Ghana, including production houses and record factories, were shut down due to competition from piracy. Moreover, "Ghanaian musicians fled to other countries, thereby creating a vacuum in the industry."⁸⁵ Zambia's experience was the same, where a once "massive music industry" faded to almost nothing in the early '90s, as local record production shut down because of pirated cassette tapes from abroad and a shortage of capital.⁸⁶

There are many factors that might weigh toward local production, including lower labor costs, local knowledge of and familiarity with local tastes, the existence of some production infrastructure, and convenience. Yet in spite of all of these potential advantages, recording and production in the UK or France is often still the wiser choice, which exacts a further opportunity cost to local economies in lost jobs, lost local income, and lost spending on related goods and services.⁸⁷

The tolerance of rampant piracy also thwarts the development of regional markets for music. Piracy not only deters non-African companies from investing in the development of the African marketplace, but also acts as a barrier to intra-Africa trade as well.⁸⁸ Kenyan copyright experts estimate that of all the content emanating from creators across the border in Tanzania, material from just two artists is legitimately sold in Kenya, despite both countries sharing at least two common languages, English and Swahili.⁸⁹ The forgone investments represent an important loss for two creative cultures that could potentially feed off each other in order to develop new techniques, styles, and markets. The missed opportunity suppresses the creation of jobs and wealth in desperately impoverished East Africa.

Another consequence of the inability to enforce copyright in Sub-Saharan Africa is the lack of downstream royalty payments, which seriously undermines long-term investment. While there is a place for one-hit-wonders, most artists and

record labels are motivated to produce, market, and distribute well-crafted recordings that will sell for years to come. The motivation comes in large part from the ability of copyright holders to earn royalties on the sale of recordings.

The inhospitable environment created by piracy for the music industry in Africa leads to a short-term focus.⁹⁰ Outside South Africa, there are few substantial, financially stable record labels.⁹¹ The recording industry tends to be a fragmented, fly-by-night business with irregular distribution. In Ghana the consequence has been a "peculiar and unique" distribution system, whereby many retail outlets sell the work of only one particular record label, making it frustratingly difficult for fans to find recordings.⁹²

Recording artists respond to this lack of stability by trying to collect as much revenue as possible in the short-term, exchanging their future (and largely theoretical) royalties for one-off payments from record companies.⁹³ They then offer very similar work to other recording companies in exchange for further one-off payments. Record companies in turn anticipate that duplicative output and competition with piracy will lead to a brief sales cycle, and thus tend to underpay artists for their work, which further perpetuates the supply of largely unimaginative material. While this vicious cycle of deteriorating quality may seem to be against the interests of all those involved, the institutional environment makes for little alternative.

Government control of and interference in copyright collection agencies

A well-functioning, robust music industry provides many creative and financial opportunities for creators besides selling recordings and earning royalties from sales. Many of these opportunities are facilitated by licensing. For example, composers and musicians often license their work for broadcast on radio and television, for cover versions, for inclusion in movies, television shows, and advertisements, and increasingly, for derivative uses, such as rap songs, re-mixes, and ring-tones. All of this activity expands creative clusters, making them even more significant and beneficial to creators and the local economy.

Unfortunately, most African musicians are not able to enjoy the benefits of such downstream uses of their creations. Some of this failure results from shortcomings in the legal system already discussed, but this is exacerbated by the lack of effective, dependable collective rights organizations (CROs). In most wealthy countries, CROs secure payment to artists for various small uses of their works, such as when records are played in nightclubs or on the radio. The small size of each potential transaction makes it uneconomic for individual parties to pursue agreements or to enforce their rights on a case-by-case basis. CROs remedy this problem by granting blanket licenses in exchange for aggregate subscription fees, which are then allocated to copyright owners in proportion to the use of their works.

Unfortunately, it appears that many CROs are not doing their jobs well in Africa. There are widespread complaints that the amounts bear no relation to the actual frequency of play by radio stations or other public venues.⁹⁴ For example, in Senegal, royalties are supposed to be collected by the Bureau Sénégalais

du Droits d'Auteurs (BSDA), but it rarely succeeds in rewarding artists appropriately, as royalty payments are inconsistent at best.⁹⁵ In part the problem is that radio stations and other music distributors in Senegal withhold sales information from the BSDA, making it impossible to determine how to allocate royalties.⁹⁶ Artists also accuse the BSDA of over-charging for its services.⁹⁷

Similar problems plague musicians in both Ghana and Kenya.⁹⁸ Meanwhile, musicians claim that officials of the Copyright Society of Ghana (the Ghanaian CRO) and the government copyright office have corruptly diverted the royalties they do collect.⁹⁹

A significant part of the problem is that many CROs are run by the government or are government-sanctioned monopolies. Such arrangements undermine the effectiveness of CROs by making them less accountable to their members. Such is the case in Senegal, where the Ministry of Culture controls the BSDA, and in Kenya, where the "Music Copyright Society of Kenya" is the only collecting house sanctioned by the Kenya Copyright Board.¹⁰⁰ CROs in Nigeria can only operate with the explicit approval from the government-controlled Nigeria Copyright Commission.¹⁰¹

Such restrictions on competition undermine the incentives for collecting agencies to respond to artists' concerns. As the authors of the Africa Music Project observe, "distribution [of royalties], when it takes place, is a political process rather than an objective one."¹⁰²

Government involvement with CROs can also threaten the independence of musicians. Artists in Ghana have accused the Chairman of the Ministry of Culture-controlled Copyrights Office of withholding payments from artists in an attempt to influence the content of their music.¹⁰³ Such actions amount to a gross violation of the right to free speech.

Similarly, a station manager for a radio station in Dakar has said government stipends earmarked for local radio stations tend to arrive "only during election time."¹⁰⁴

Perhaps it is not surprising that African governments should use their power in this way. According to the most recent Freedom House ranking of political freedom, just eight African countries were classified as "free."¹⁰⁵

Burdensome Taxes

Many governments in Africa impose taxes specifically targeted to musical instruments and other aspects of the music industry.¹⁰⁶ These taxes make a tough business that much tougher.

One particularly troubling target of taxation is live performance. Because of the other difficulties faced by the music business in Africa, musicians often have no option but to scrape a living from live performances. Unfortunately, the very nature of live performances (at least those that have some chance of success) is that they are centrally organized and well publicized. That makes them natural targets for the tax collectors.

One example of such burdensome taxation comes from Ghana, which has recently introduced an arbitrary and confusing tax on tickets sold for live performances. Previously, a 25 percent surcharge was imposed on ticket sales. Now, an indeterminate Value Added Tax is levied.¹⁰⁷ The situation is

similar elsewhere: a hefty 25 percent duty and an additional 16 percent Value Added Tax is levied on live performances in Kenya.¹⁰⁸ The results are predictable and are well described by "Dou Dou" Sow, a Senegalese musician: "[T]here are fewer live performances today than in the old days because there isn't enough money [to perform]."¹⁰⁹

Anecdotal evidence from the Africa Music Project illustrates how complicated tariffs were levied on imported musical instruments, pushing the cost of putting on live performances out of reach for artists struggling to make it from one show to the next.

Various other government-imposed barriers prevent small-scale entrepreneurs with few resources—the epitome of the African artist—from engaging in productive economic activity. Long waiting times and overly-complicated requirements put what should be simple tasks, such as registering property and trading with foreigners, out of reach for poor, struggling artists. These frustrating realities are quantified by Doing Business, a World Bank project that measures the difficulty of engaging in entrepreneurial activities. Doing Business estimates that it takes an *average* of 33 procedures and 780 days to enforce a contract in Senegal. It takes a further 6 procedures and 114 days just to register a property.¹¹⁰ Clearly these barriers affect the entire economy, but they are nevertheless particularly pernicious to artists, who already scrape by with fewer resources than the average citizen.

III. What to do? Policy Recommendations

Africa's experience bears out Nobel laureate economist Douglass North's truism that "institutions matter." Creative clusters require not only talent and entrepreneurship, but also effective institutions that enable the talented and the entrepreneurial to flourish. In this monograph we have identified a number of institutional failings which, if corrected, would, we believe, lead to the flourishing of creative industries in Africa. In order to ensure strong and credible institutions that support the development of local creative industries, we recommend that governments:

- Enact, implement, and enforce effective copyright laws;
- Reduce intervention in royalty collection;
- Encourage private cooperation; and
- Reduce taxes and regulatory burdens.

A. Enact, Implement and Enforce Effective Copyright Laws

Property rights are generally far more effective when people are able to demonstrate ownership easily and potential licensees and buyers can locate owners quickly and at low cost.¹¹¹

One of the simplest and most effective steps that can be taken to improve conditions for musicians and other creative artists would thus be to establish a simple means of registering ownership of creative works, as well as for recording assignments, licenses, and other transfers. There is much to learn from the experience in wealthy countries, as they often have complicated and inefficient systems for tracking ownership, but are able to afford the sizeable costs of overcoming these defects.¹¹² People in less-developed countries are less likely to be able to afford the costs of investigating ownership through these archaic systems,

so the best option would be to employ modern information technology to ensure titling systems are quick and easy to use.¹¹³ Registering and tracking ownership through a system that uses this modern technology may perhaps be more costly initially, but will likely reap significant rewards in the cost and time saved for all those involved in creative production.

Aside from employing the optimal system for tracking and registration, copyright laws should also be well equipped to provide creators with the best opportunities to combat piracy. As we have noted, this has a devastating impact on creators in less-developed countries.

Generally speaking, copyright laws must provide for swift, affordable means of immediately halting the distribution of pirated works. Laws should provide for preliminary or “interlocutory” injunctions—in lay terms, this means copyright owners can force the pirates to cease distribution at the start of the case, rather than waiting for a trial and its conclusion. In some cases, it is necessary to provide swift, temporary emergency relief, even if the alleged infringer cannot be found or is absent from court. For example, if an imported shipment of pirated CDs is about to flood the market, the copyright owner should not be required to find the foreign infringer before obtaining any relief. For these remedies to be effective, copyright owners require the cooperation of law enforcement to seize and impound the infringing products. These remedies stop pirates from making money and evading liability while the IP owner suffers lost sales and the cost of litigation while attempting to find infringers and prove liability.

Copyright laws should provide for (and courts should routinely award) financial remedies that make piracy too financially risky. In many cases, remedies that merely deprive the pirate of profits or even of gross revenue are not useful deterrents. In such situations, damages are merely an additional business risk calculated against the likelihood of getting caught and thus are not an effective means of tackling the critical problem.

It should be made clear to the pirate that he would stand to lose significantly more than the potential gains of infringing copyrighted works. Laws thus should provide for payment of the copyright owner’s attorneys’ fees and either a multiple of actual damages or what are known as “pre-established” or “statutory” damages—significant amounts set by statute that aim to exceed the typical value of an infringement.¹¹⁴ If sufficiently sizeable, the threat of such compensation should act as a deterrent to potential pirates.

Additionally, copyright laws ought to enable trade associations to combat infringement on behalf of their members. Sometimes, copyright owners cannot afford to pursue legal action. In other instances, a pirate might be infringing the works of many different copyright owners, with each individual infringement too small to pursue. To address such problems in many jurisdictions trade associations are able to act on behalf of their members.¹¹⁵ However, in some African countries, only registered collecting societies can bring such suits on behalf of members,¹¹⁶ while in others only the copyright owner can bring suit.¹¹⁷ These restrictions make it more difficult to tackle piracy. Extending the rights to bring action to a wider range of potential litigants, especially to trade associations (with the

consent of the allegedly affected party), would greatly aid the battle against piracy.

Civil enforcement by private parties ought to remain the first and foremost means of defense against piracy. Those with the greatest interest in stopping piracy—the creative industries—are likely to be most effective in monitoring and halting the trade in pirated goods. However, they do require help from law enforcement in doing this job, as they play a limited but essential role in combating copyright piracy. To be safe and effective, the seizure and removal of pirated goods from channels of commerce often requires the backing of police or other law enforcement personnel.

The state’s most important direct role in preventing copyright piracy is in investigating and stopping large-scale commercial piracy of CDs and other copyright material. Where criminal gangs conduct piracy, individual copyright owners are often no match (especially where trade associations are barred from acting on behalf of copyright holders). Local creative industries also find it particularly hard to combat piracy where foreign counterfeiters flood the market with pirated copies of local creative works. In such situations, government can help by providing and coordinating credible enforcement.

Crucially, any criminal penalties must be appropriate. More is not always better where criminal penalties are concerned. For example, the Chinese head of the Food and Drug Administration was recently executed on grounds of the continued prevalence of counterfeit medicines in China—and under pressure from the flow of sub-standard goods into the United States.¹¹⁸ While such actions create a strong impression, they likely are counterproductive. If penalties seem excessive to local sensibilities, then local law enforcement and courts are less likely to apply them, thus making the laws less of a deterrent in reality.¹¹⁹

Regardless of the content of IP laws, the courts must be well-prepared to enforce them. As Robert Sherwood says, “until judicial systems in developing and transition countries are upgraded, it will matter little what IPR laws and treaties provide.”¹²⁰ Judges thus must understand and have the right tools to adjudicate the claims of creators. One way to improve the efficiency of courts would be to allow judges in courts of general jurisdiction to volunteer to take IP cases. This proposal is currently being considered in the United States¹²¹ and has also been advocated for courts in poor countries.¹²² The advantage of this proposal is that scarce training resources and experience can be focused on a smaller number of judges.

More generally, all participants in the system—law enforcement, private parties, and judges—would benefit from education. They need both technical training regarding the law and a better understanding of the significance of the creative industries and the importance of their enforcement efforts.

An offshoot of this would be through highly visible and credible anti-piracy campaigns, coordinated by industry and, in some cases, government. In part, the objective of such campaigns is to convince offenders they are likely to be caught.¹²³ Ideally, they would also change public perceptions of the morality of piracy, change buying habits, and make the business of piracy less socially acceptable.

concern, African economies would do much to stop their loss if talented local creators and innovators were able to secure more benefit from their work at home.

IV. Conclusion

Creative industries are an important opportunity for less-developed countries. In particular, those creative endeavors that tap into existing local talent and skills, such as music industries in Africa, represent low-hanging fruit. While thriving music industries clearly require considerable individual skill and training, they do not require extensive formal education or the development of sophisticated physical infrastructure.

Prioritizing creative clusters requires political will and a commitment to legal and institutional reform. What is required is the right legal environment—no simple task, but one that is more manageable when focused on empowering specific industries. While governments sometimes devote extra resources to enforcement in order to mollify trading partners, we advocate a greater, sustained effort to ensure that the copyright system is supportive of *local* creators.¹³³ In the case of African music industries, we believe that the relatively modest investment is warranted by the likely economic and social payoff.

Devoting specific resources to the creative industries can provide a strong foundation for spill-over growth in other sectors by providing quick growth and demonstrating that local industry can thrive in less-developed countries without government or donor subsidy. Creative industries are among the fastest-growing economic sectors in *both* rich and some poor countries.¹³⁴ Not only will the early growth of creative industries benefit creators and the local economy, it can provide a moral victory, showing that home-grown industries and home-grown culture can compete and thrive.¹³⁵ Such proof of the benefits of markets is essential.

However, creative industries are unlikely to prosper in the long run if the rest of the economy is not liberalized. Ultimately, the creative sector alone cannot drive the economy, nor can it flourish without financially healthy local customers and investors. Many of the policies we suggest here—e.g., greater enforcement of property rights, more effective courts, and regulatory and tax reform—would benefit the economy if applied generally across all sectors. And they should be.

Although a thriving popular music industry would help only a small proportion of Africans lift themselves from poverty, its success would be an important moral, economic, and cultural victory for African entrepreneurs. Moreover, the reforms that stimulate its success would also generate stable conditions for other entrepreneurial efforts based on local talents and tastes to follow. They would also hopefully lead to increased support and demand for the rule of law throughout society. That would truly benefit all.

Endnotes

1 For a history chronicling how Nashville became “Music City,” see M. Kossler, “How Nashville Became Music City U.S.A.; 50 years of music row” (2006).

2 Other U.S. musical hotspots include Seattle, Austin, Memphis, and the state of Georgia. A recent study estimates that Nashville’s local music industry

contributes twice as much to Nashville’s local economy as all those other places *combined* contribute to their own local economies. P. Raines & L. Brown, *The Economic Impact of the Music Industry in the Nashville-Davidson-Murfreesboro MSA 4*, Nashville Area Chamber of Commerce (2006), available at <http://www.nashvillechamber.com/president/musicindustryimpactstudy.pdf>. While New York and Los Angeles also have very large music industries, they do not define the local identity, as they span more genres and are less central to the local economy.

3 *Id.* at 4.

4 *Id.* at 6, 15-20.

5 *Id.*

6 *Id.* at 6. Nashville has a diversified economy, with the music industry at least the second-most important industry (depending on how one accounts for the impact of music-related tourism and other music-related economic activity), and healthcare, higher education, and the automotive industry also playing a role.

7 See, e.g., W. Easterly, *The White Man’s Burden: Why the West’s Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (2006) (lauding modest projects with measurable, accountable goals that involve locals).

8 H.A. Curtis, “The TVA and the Tennessee Valley—What of the Future?” *Land Economics*, 28(4), at 333 (1952).

9 *Id.*

10 L.M. Kyriakoudes, *The Social Origins Of The Urban South: Race, Gender, And Migration In Nashville And Middle Tennessee, 1890–1930*, at 39 (2003).

11 W.E. Cole, “The Impact of TVA Upon the Southeast,” *Social Forces*, 28, at 435, 438 (1950).

12 D. Ekbladh, “Mr. TVA: Grass-Roots Development, David Lilienthal, and the Rise and Fall of the Tennessee Valley Authority as a Symbol for U.S. Overseas Development, 1933–1973,” *Diplomatic History*, 26(3), at 335-374 (2002) (quoting P. Hutchinson, “Revolution by Electricity,” *Scribners Magazine*, Oct 1934, at 193-200 (1934)).

13 Curtis, *supra* note 8, at 334.

14 U.S. Department of Health and Human Service, Center for Disease Control, *The History of Malaria, an Ancient Disease*, available at <http://www.cdc.gov/malaria/history/index.htm> (last accessed January 15, 2008).

15 Kyriakoudes, *supra* note 10, at 31, 33, 37.

16 “The hopes that Nashville would emerge as the South’s leading iron or textile center were never realized. While the city did develop other industries based upon access to the raw materials and markets in its hinterland—lumber, wheat, and livestock—these resources did not develop the city into a great manufacturing center.” *Id.* at 39.

17 Ekbladh, *supra* note 12, at 336. The TVA built a great deal of impressive infrastructure, improved economic conditions in the Tennessee Valley, and unambiguously succeeded in some of its ancillary programs like eradicating malaria. Over the years, however, it has come to be criticized by some as an inefficient wealth transfer program that may have impeded the growth of the region. See, e.g., W.U. Chandler, “The Myth of the TVA: Conservation and Development in the Tennessee Valley, 1933-80,” *Journal of Policy Analysis and Management*, 4(1) (1984). Chandler contended that the TVA would have been more successful if it had focused on projects with more direct, immediate benefits to local people rather than massive projects.

18 K.B. Raitz et al., *Appalachia: A Regional Geography* 138-140 (1984).

19 Macon was a regular on the East Coast vaudeville circuit. *Uncle Dave Macon*, Country Music Hall of Fame and Museum, available at <http://www.countrymusichalloffame.com/site/inductees.aspx?cid=142> (adapted from Kingsbury, P. (ed.), *The Encyclopedia of Country Music*, compiled by Country Music Hall of Fame and Museum, Oxford University Press).

20 See Peer Music’s “Company History,” available at <http://www.peermusic.com/aboutus/companyhistory.cfm>.

21 *Id.*

22 Ralph Peer, *Ralph Peer Remembers Jimmy Rodgers* (c.1953), available at http://www.peermusic.com/news/press_detail.cfm?announcement_id=273&back=press (last visited August 19, 2007) (the article was written by

Peer circa 1953, according to the Bluegrass West site, <http://www.bluegrasswest.com/ideas/jr-rpeer.htm>.

23 J. Maeder, "Bristol Celebrates Birthplace of Country Music," *The Appalachian Voice* (2003), available at <http://www.ncpress.net/cgi-local/search.cgi?gffd=774>.

24 A number of country musicians did make the trip to New York, experiencing enough early success to indicate the existence of a market. For example, "Uncle" Dave Macon, a successful performer on the East Coast vaudeville circuit, had a number of hits recorded by New York labels in the mid to late '20s. *Uncle Dave Macon*, Country Music Hall of Fame and Museum, <http://www.countrymusicshalloffame.com/site/inductees.aspx?cid=142> (adapted from Kingsbury, P. (ed.), *The Encyclopedia of Country Music*, compiled by Country Music Hall of Fame and Museum, Oxford University Press). But the country music market fully materialized once the Bristol sessions brought performers together with recording technology, finally giving them a national audience.

25 *Id.*; C.K. Wolfe, "The Legend that Peer Built: Reappraising the Bristol Sessions," in *The Bristol Sessions: Writing About the Big Bang of Country Music*, 21 (T. Olson & C.K. Wolfe eds., 2005).

26 Wolfe, *supra* note 25, at 18.

27 *Id.* at 31.

28 Maeder, *supra* note 23.

29 Available at <http://www.alamhof.org/rogersj.htm>

30 Peer, a consummate salesman, persuaded local newspapers to assist him with recruiting acts to record. As he later recalled: "I then appealed to the editor of a local newspaper, explaining to him the great advantages to the community of my enterprise. He thought that I had a good idea and ran a half column on his front page. This worked like dynamite..." Peer, *supra* note 22. Newspapers noted the relatively princely sums earned by other recording artists previously recorded by Victor: "[Ernest] Stoneman [received] \$100, and each of his assistants \$25 per day. Stoneman... received from the company \$3,600 last year as his share of the proceeds on his records." Wolfe, *supra* note 25, at 25.

31 C. Wolfe, *Liner Notes of The Bristol Sessions*, Country Music Foundation (1987), available at <http://www.birthplaceofcountrymusic.org/node/32>.

32 *Id.*

33 The 1928 Statistical Abstract of the United States 336, United States Government Printing Office. The .76 number is the general average hourly wage for all jobs in the bituminous coal industry.

34 *See id.* The numbers are based on the assumption that workers worked 48-hour work weeks, as mines operated on such a work week, although the Statistical Abstract notes that many miners worked fewer hours.

35 Nashville was home to the *Grand Ole Opry* Radio show and other important early country music institutions. Kyriakoudes, *supra* note 10, at 18. Country music talent came to Nashville to play the show, which drew record producers, which in turn drew more talent.

36 Acuff and Rose established the future powerhouse of music publishing Acuff-Rose in the 1940s, and the Bradleys founded the first recording studio on what was to become Nashville's famous "Music Row," where they recorded Patsy Cline and many other legends. *See* Kosser, *supra* note 1, at 10-14, 19-26.

37 F. Penna, M. Thorman & J. Finger, "The Africa Music Project," in *Poor People's Knowledge* (M. Thorman & J. Finger eds., 2004). We take inspiration from the Africa Music Project's enthusiasm for "African Nashvilles" and share its promoters' belief in grass-roots efforts. We depart from and elaborate on their analysis, however, in our views of the primary benefits from local music industries and the way to achieve them. While the Africa Music Project sought an export market via the Internet, we see great benefits from the establishment and support—through very specific and defined terms—of local and regional markets. We also map out specific legal and institutional reforms focused on the industry and private capacity building, which we believe should take precedence over particular marketing schemes.

38 *Office of the United States Trade Representative*, "The Benefits of Trade for Developing Countries," Trade Facts, June 2006. <http://usmission.ch/Press2006/0701TradeFacts.pdf>.

39 M.E. Porter, *The Competitive Advantage of Nations* (1998).

40 M.E. Porter, "Locations, Clusters, and Company Strategy," in *Oxford Handbook of Economic Geography*, 253 (G.L. Clark et al. eds., 2000).

41 M.E. Porter, "Clusters and the New Economics of Competition", *Harvard Business Review*, 76(6) (1998).

42 T. Cowen, *Creative Destruction: How Globalization Is Changing the World's Cultures* (2002).

43 T. Cowen, *Markets and Cultural Voices: Liberty vs. Power in the Lives of Mexican Amate Painters* (2005). The World Intellectual Property Organization has similarly recognized the possibilities of creative clusters as part of development efforts. *See, e.g.*, http://www.wipo.int/ip-development/en/creative_industry/creative_clusters.html.

44 As Keith Maskus has observed, most economies in poor countries are unlikely to reap the rewards of capital- and knowledge-intensive industries immediately. In order for countries to benefit from these types of industries, they need to enhance capacity in three areas to benefit from IPRs: first, they need "strong levels of educational attainment and sizeable endowments of human capital;" second, local firms must invest in research and development; and third, "financial markets [must be] capable of managing the significant risks involved in technology development." K.E. Maskus, "Intellectual Property Rights and Economic Development," *Case Western Journal of International Law*, 32, at 471,497 (2000).

45 *See* Raines & Brown, *supra* note 2.

46 Peer, *supra* note 22.

47 Copyright per se did not play as direct a role in Victor's financing of the Bristol Sessions, as sound recordings were not then protected by U.S. copyright law, but rather by a patchwork of state laws. Still, Victor's rights in these recordings were effectively protected by law and the difficulty of copying at the time. In 1972, sound recordings were brought under the U.S. Copyright Act in reaction to the growing problem of piracy.

48 Maeder, *supra* note 23.

49 Georgia Music Hall of Fame, "Ralph Peer Biography", available at <http://www.georgiamusicstore.com/artist/P219557/>.

50 For example, Jimmie Rodgers' first big hit, *Blue Yodel (T for Texas)*, was one of six songs that Rodgers recorded during his first two recording sessions with Peer. C. Comber & M. Paris, "Jimmie Rodgers," in *Stars of Country Music*, 127-128 (1975). Of the six, only *Blue Yodel* was completely original. *Id.*

51 Kyriakoudes, *supra* note 10, at 8. The Southern traditionalist intellectual Donald Davidson bemoaned the abandonment of folk music in favor of "new songs—quasi folk songs or frankly popular ditties—which will bring [the musician] royalties from phonograph records and music sheets." D. Davidson, "Current Attitudes Toward Folklore" in *Still Rebels, Still Yankees and Other Essays*, 134 (1957).

52 Editors of *Travel and Leisure Magazine*, "100 Greatest Trips", American Express Publishing Corporation (2007).

53 *Id.*

54 We are grateful to Julian Morris for his insights into African music. *See also, e.g.*, T. Cowen, *Creative Destruction* (2004).

55 *See* S.A. Floyd, Jr., *The Power Of Black Music: Interpreting Its History From Africa To The United States* (1995); P.K. Maulsby, "Africanisms in African American Music," in *Africanisms In American Culture*, 326 (J.E. Holloway ed., 2nd ed. 2005).

56 UNCTAD, "Background Paper for Secretary-General's High-Level Panel on the Creative Economy and Industries for Development", TD(XII)/BP/4 (2008), available at http://www.unctad.org/en/docs/tdxiibpd4_en.pdf.

57 GhanaMusic.com, "BUSAC Support For Ghana's Music Industry", June 23, 2007, <http://www.ghanamusic.com/modules/news/article.php?storyid=1754> (quoting Professor John Collins, a Lecturer at School of Performing Arts of University of Ghana).

58 Ellyn Hament, Zambia: *A Melting Pot of Musical Styles*, Exploratorium <http://www.exploratorium.edu/eclipse/zambia/music.html> (2001).

59 Eyre Banning, *Interview with Chisha Foloriya*, Afropop, <http://www>.

- afropop.org/multi/interview/ID/102/Chisha+Folotiya-2006 (2006).
- 60 *Id.*
- 61 *Id.*
- 62 Easterly, *supra* note 7, at 4; *see also* Laurie Garrett, *The Challenge of Global Health*, 86 FOREIGN AFFAIRS (Jan/Feb 2007). Garrett chronicles the sadly disappointing results of the extraordinary rise in public and private donations directed to public health spending in the developing world in recent years. The fundamental problems of lack of trained health professionals, shortcomings in sanitation and infrastructure, and corruption have frustrated much of this generosity.
- 63 UNCTAD press release, "Creative Industries Emerge As Key Driver of Economic Growth With Trade Nearly Doubling in Decade", January 14, 2008, available at <http://www.unctad.org/Templates/webflyer.asp?docid=9467&intItemID=1528>.
- 64 *Id.*
- 65 M. Tchebwa, *African Music: New Challenges, New Vocations*, UNESCO (2005).
- 66 S. Siwek, "Copyright Industries in the US Economy; The 2006 Report," Economists Incorporated, prepared for the International Intellectual Property Alliance, available at http://www.iipa.com/pdf/2006_siwek_full.pdf.
- 67 UNCTAD press release, "Creative Industries Emerge As Key Driver of Economic Growth With Trade Nearly Doubling in Decade," January 14, 2008, available at <http://www.unctad.org/Templates/webflyer.asp?docid=9467&intItemID=1528>.
- 68 The popularity of Youssou N'Dour is undisputable, but it should be known that what many consider to be his breakthrough album, *The Lion*, released in 1989, featured a popular song he recorded with already hugely popular Englishman Peter Gabriel.
- 69 Penna, Thorman & Finger, *supra* note 37.
- 70 R. Letts, *The Promotion of Musical Diversity*, UNESCO (2006), available at http://www.unesco.org/imc/programmes/imc_diversity_report.pdf.
- 71 *Id.*
- 72 Creative industries in Paris tend to support Francophone artists, whereas London is more typically suited to Anglophone musicians and filmmakers.
- 73 *The Economist*, "Bleak Publishing Houses", November 22nd 2007.
- 74 World Development Indicators, World Bank.
- 75 Penna, Thorman & Finger, *supra* note 37, at 98.
- 76 Penna, Thorman & Finger, *supra* note 37.
- 77 *Id.*
- 78 E.S. Nwauche, "Intellectual Property Rights, Copyright and Development Policy in a Developing Country: Options For Sub Saharan African Countries," Copyright Workshop at Zimbabwe International Book Fair, presented June 30th, 2003.
- 79 *Id.*
- 80 Penna, Thorman & Finger, *supra* note 37.
- 81 Ghana Billboard, Interview with Alhaji Sidiku Buari, Ghanamusic.com, http://ghanamusic.com/artman/publish/article_1309.shtml (December 4, 2004).
- 82 Government Urged to Enact Tough Laws to Address Piracy in Music Industry, Ghanamusic.com, http://ghanamusic.com/artman/publish/article_1809.shtml (April 28, 2005).
- 83 *Id.*
- 84 Hernando De Soto, *The Mystery of Capital* (2000).
- 85 N. Norley, "Musicians Bemoan Fall of Industry," *Ghanaian Chronicle* Feb 7, 2007, available at <http://allafrica.com/stories/printable/200702070880.html>.
- 86 *Interview with Chisha Folotiya*, Afropop, <http://www.afropop.org/multi/interview/ID/102/Chisha+Folotiya-2006> (2006). As discussed earlier, the Zambian industry revived at the turn of the century after the efforts of pioneering entrepreneurs and passage of a copyright law.
- 87 It should also be noted, however, that large expatriate communities, originating from the same countries from which many African creators come, now reside in the UK and France. These communities constitute a growing market demanding "home-grown" music.
- 88 The Africa Music Project notes that non-African copyright owners are still largely unwilling to license their property to the African marketplace. Penna, Thorman & Finger, *supra* note 37.
- 89 D. Wabala, "Kenya: Illegal Trade in Pirated Music Gets Bloody As Dealers Scramble for Control," *The Nation*, March 25, 2007, <http://allafrica.com/stories/200703260049.html>, accessed March 28, 2007.
- 90 Penna, Thorman & Finger, *supra* note 37.
- 91 M. Tchebwa, *African Music: New Challenges, New Vocations*, UNESCO, at 52-53 (2005).
- 92 "Carlos Sakyi Slams Ghana's Music Distribution System," *The Ghanaian Chronicle*, July 6, 2007, available at <http://news.thinkghana.com/entertainment/200707/6540.asp>.
- 93 Penna, Thorman & Finger, *supra* note 37.
- 94 "Ghanaian musicians are worried!" <http://www.myjoyonline.com/tools/print/printnews.asp?contentid=1407>, accessed Mar 20, 2007.
- 95 *Id.*
- 96 Afrik.com, "Les radios sénégalaises ne paient pas leurs artistes," July 10, 2001, available at <http://www.afrik.com/article3021.html>.
- 97 *Id.*
- 98 *See, e.g.*, GhanaMusic.com, "Carlos Sakyi returns Sidiku's fire," Jan 12, 2008, available at <http://www.ghanamusic.com/2008/01/12/carlos-sakyi-returns-sidikus-fire/>.
- 99 The charges are hotly disputed, as Alhaji Buari, Acting Board Chairman of Copyright Society of Ghana, has filed a libel suit against a newspaper that repeated the charges. Ghanamusic.com, "Alhaji Sidiku Buari Sues Weekly Fylla," April 4, 2007, available at <http://www.ghanamusic.com/modules/news/article.php?storyid=1368>.
- 100 <http://www.mcsk.or.ke/>.
- 101 For a complete description of the Nigerian Copyright Commission's responsibilities, *see* <http://www.nigeriafirst.org/cgi-bin/artman/exec/view.cgi?archive=1&num=6616&printer=1>.
- 102 Penna, Thorman & Finger, *supra* note 37.
- 103 The Chairman of the Copyright Office of Ghana, Alhaji Sidiku Buari, is allegedly withholding more than \$6 million that is owed to musicians. He is accused not paying artists and attempting to exert influence over their content. Personal communication on March 3, 2008 with Franklin Cudjoe, Executive Director, IMANI, Accra, Ghana.
- 104 Penna, Thorman & Finger, *supra* note 37.
- 105 Freedom House Map of Freedom in the World, available at <http://www.freedomhouse.org/template.cfm?page=363&year=2007>.
- 106 Penna, Thorman & Finger, *supra* note 37.
- 107 *Id.*
- 108 Personal correspondence with Michael Andrews, Managing Director, Kenya Association of Producers & Videograms.
- 109 Penna, Thorman & Finger, *supra* note 37.
- 110 Doing Business Database, World Bank, available at <http://www.doingbusiness.org/ExploreEconomies?economyid=164>.
- 111 De Soto, *supra* note 84.
- 112 Thus the discussion in the United States about the "orphan works" problem, where users and potential licensees find it impossible to track down owners of many older works.
- 113 Unfortunately, the current international copyright system created by the Berne Convention is not fully amenable to such formal titling requirements. The U.S. had to give up its registration and notice requirements to join Berne in 1989. Nevertheless, there are ways to encourage them without requiring them.

114 Article 45 of TRIPS requires only compensatory damages and the availability of expenses. It also permits, but does not require, attorney fees and payment of pre-established damages. Copyright laws in several African countries give courts discretion to award “additional damages... as the court may consider appropriate in the circumstances” where the infringement is flagrant. While this approach could be helpful, its utility is limited because it is confined to special cases at the court’s discretion. Kenya, South Africa, Zimbabwe, and Nigeria all employ this language in their copyright acts in nearly identical provisions.

115 In many wealthy countries, business rivals pool their efforts to combat the collective problem of piracy through a number of trade associations such as the International Federation of Phonographic Industries (IFPI), International Publishers Association, Recording Industry Association of America (RIAA), Motion Picture Association, Business Software Alliance, and the Industry Trust for IP Awareness. Pirates typically do not specialize in the works of any one business, so it is more effective to pool private resources in order to combat them collectively. Moreover, these organizations develop specialized knowledge and skills in combating piracy that is best housed and shared in one place, rather than scattered among many players.

116 See, e.g., Copyright Law of Nigeria, Sections 15, 15A, available at http://www.wipo.int/clea/docs_new/en/ng/ng001en.html#P203_18719.

117 See, e.g., Copyright Law of Mozambique, Section 59, available at http://www.wipo.int/clea/docs_new/en/mz/mz002en.html#P386_36415.

118 *Associated Press*, “China executes former FDA chief amid product safety crisis,” July 10, 2007, available at <http://www.cbc.ca/world/story/2007/07/10/china-tainted-products.html>.

119 See Mark F. Schultz, “Copynorms: Copyright Law and Social Norms,” in *Intellectual Property and Information Wealth vol. 1* (P.K. Yu ed., 2007).

120 R.M. Sherwood, “Some Things Cannot Be Legislated,” *Cardozo Journal of International and Comparative Law*, 10, at 42 (2002).

121 See “An Act to establish a pilot programmed in certain United States district courts to encourage enhancement of expertise in patent cases among district judges,” H.R. 34, 110th Congress, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h34>.

122 Sherwood, *supra* note 120, at 42.

123 Schultz, *supra* note 119, at 201, 217.

124 We also think that private, competitive CROs would work best in rich countries as well, but that is a discussion for another day.

125 For example, in the United States, composers’ rights are administered by three competing, private organizations: The American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.

126 See Section III(C)(iii).

127 *Id.*

128 Article 67 states:

In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favor of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.

TRIPS, Article 67, available at http://www.wto.org/english/docs_e/legal_e/27-trips_08_e.htm#art67.

129 http://portal.unesco.org/culture/en/ev.php-URL_ID=28581&URL_DO=DO_TOPIC&URL_SECTION=201.html.

130 *Id.*

131 See Section III(C)(iv).

132 See T. Cowen, *In Praise of Commercial Culture* (1998).

133 TRIPS compliance merely sets minimum standards, largely focused on

treatment of foreign IP owners. It does not require a special effort with respect to IPRs—as Article 41(5) of TRIPS makes clear, countries are not required to prioritize IPR enforcement when allocating judicial and enforcement resources. Article 41(5) states:

It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.

TRIPS, Article 41, available at http://www.wto.org/english/tratop_e/trips_e/t_agm4_e.htm.

134 *Id.*

135 Penna, Thorman & Finger, *supra* note 37, at 97.

