Does copyright have a digital future?

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20,000,000 users, 800,000 titles, 1,000,000,000 transfers: the numbers are astounding! These are industry "guesstimates" of the sorts of volumes that the *Napster* mp3 transfer system had dealt with in just over one year.[2]

And yet, they are hardly surprising. The evidence about what promotes the use of new communications technologies has been clear for some time. New products and systems are likely to succeed if they:

1. are relevant to daily activities and meet an existing need;
2. locate access where users want to use the product or service;
3. are very easy to use;
4. can be trusted;
5. allow users choice of delivery mechanism; and,
6. provide financial, social or lifestyle incentives for use.[3]

Napster was always likely to succeed on just about every criterion. However, the system of person to person file transfer on which it relies creates new dilemmas for traditional copyright law. While recent US court decisions have clearly shown a preparedness to pursue commercial exploitation of the technologies, one has only to visit the various chatrooms on the Net, IRC (Internet Relay Chat), ICQ and the like to find music files being freely traded by individuals. The mass connectedness that the Internet provides coupled with the ability to digitize and compress information that previously required extensive resources for its physical distribution are at the heart of the so called communications revolution. What this will mean for the evolution of copyright is likely to impact most on copyright's role in protecting established distribution networks.

The discussion about the future of copyright in a digital age is sometimes cast as a balancing once more of the rights formally acknowledged in the United Nations Universal Declaration of Human Rights at

> ***Article 27.***
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> (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

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[2] Provided by Peter Moon, Special Counsel – IT, at Jerrard and Stuk, addressing a seminar at CIRCIT@RMIT University in October 2000.

[3] *Understanding User Perspectives on Government Electronic Service Delivery,* CIRCIT Research Paper, November 2000 (cf: http://www.circit.rmit.edu.au)

> (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

However, this author's rights/cultural advancement dialectic fails to give any account of a key feature of copyright system since it gained formal acceptance in common law jurisdictions. Copyright, from the beginning, has served a prime function of protecting the physical production, warehousing and distribution networks for the works of creative people. It is this third role that copyright plays that is most under threat in the digital age.

From the time Caxton founded his press at Westminster in 1476, the state took a strong interest in book publishing, licensing and giving patents for the exclusive publishing of certain works or types of work, partly as a revenue stream, but partly as a control mechanism on a new craft perceived as being dangerous.[4]

The use of the licensing system for censorship became its major objective in the social and religious turmoil at the time of the Act of Supremacy (1534). This system was developed and refined through the reign of Queen Mary and in Tudor times through the use of the system of patents, the prescription of authorized presses, licensing before publication and use of the Stationers' Company to enter details of patents and licences issued in its register. Among the members of the company, this 'entry' became the title to ownership of that 'copy' of the work, that is, the right to print and publish it. This right of copy was the stationer's not the author's. Much printing at the time was of old books from manuscript. Where new works were printed, authors were paid in lump sum for their manuscript, their interests almost evaporating upon 'entry' of the book in the register.

The licensing system was confirmed during the time of the Restoration Parliament (the *Printing Act* 1662) but lapsed through a refusal of the Parliament to renew it in 1695. Parliament was concerned about the high price of books created by the stationers' monopoly, and wanted then to use the courts of common law as their remedy.

The absence of any statutory regime to protect their interests (and rampant literary piracy) led to the stationers lobbying extensively for what would become what is generally considered the first copyright legislation, the *Act of Anne* (1709). (Or, as its full title has it, *An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors and Purchasers of such Copies, during the Times therein mentioned* – the art of euphemism was alive and well then too!)

It is also fair to note that throughout this period the system of private patronage which had often supported authors was in decline. There was an

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[4] What follows is a very abridged summary of the detailed treatment of the licensing system given by Kaplan, B: *An Unhurried View of Copyright*, New York: Columbia University Press (1967)

increasing audience for books, and the removal of 'the censorship' with the lapse of the licensing laws led to a flourishing of publication. Authors, too, lobbied for protection of their livelihoods. And so, the Act contains the first express reference to the rights of authors in the 150 or so years from the beginning of printing:

> … the Author of any Book or Books already printed, who has not transferred to any other the Copy or Copies of such Book or Books, Share or Shares thereof … shall have the sole right and liberty of printing such Book or Books for the Term of one and twenty Years …

The law of copyright has developed since the days of licensing to see copyright as a form of private property giving the owner exclusive control over this intellectual property and an ability to deal with it similar to any other personal property. It is not a chattel (a *chose in possession*) that can be physically had, but a *chose in action* (a right or entitlement) that can be assigned, bequeathed, licensed and the like. You own a physical book; you are allowed to use its contents only in certain ways. You can burn it (if that is your wont) but you cannot copy it.

This 'limited private monopoly' that copyright gives to a creator is not over an idea, or information, but only over the way it is expressed. As Chief Justice Latham put it in a 1937 judgement, if you are the first person to announce that a man fell from a bus, the law of copyright will not stop other people broadcasting the same thing. But it will stop them broadcasting your account of the event.[5]

A good recent definition of the current Australian law on copyright defined it as:

> Copyright is a type of property that is founded on a person's creative skill and labour. It is designed to prevent the unauthorized use by others of a work, that is, the original form in which an idea or information has been expressed by the creator. ... It is a bundle of exclusive economic rights to do certain acts with an original work or subject matter. These rights include the right to copy, publish, broadcast and publicly perform the copyright material.[6]

Modern copyright regimes, however, are often combined with an economic regime of risk distribution that itself obfuscates the balance between the rights of creators, the need for the free flow of speech and ideas and the demands of the production and distribution network.

Let's take the example of a still life painting of some fruit in a bowl and apply the copyright system as briefly described above to it. No-one can own the idea or function of such a painting. Indeed, every op-shop in town probably has one for sale. I can "put clothes on" the idea by doing an extremely good representational painting in which I own the copyright. I sell my painting to a

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[5] *Victoria Park and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 498.

[6] Attorney-General's Legal Practice: *Copyright Law in Australia: A Short Guide*, Canberra: Office of Legal Information and Publishing, 1996.

gallery which, in turn, sells it to you, the collector. In ordinary circumstances, you do not own the copyright in the painting, so you cannot make numerous copies of it to sell in turn to others.

But neither is there a system of 'residual value' in place, such that when you hang it in your hair dressing salon, a central collection agency will demand a fee for the enjoyment of the work by your customers. Nor do you have to buy a collection of 10 paintings of mixed quality from the gallery to get the one you want with the subsequent cost overlays. In most publishing regimes, only somewhere between ten and twenty per cent of the final retail price of a work returns to the creator.

The argument is sometimes made that the system of 'residual value' allows publishers to take greater risks in the materials they publish: if publishers had to buy copyright in works they distribute they would be far more selective in what they would publish. This flies in the face of the common experience of new entrants to literature and the creative arts who tell consistently of the difficulty they have in gaining access to the established publication system. Indeed, they are among the most ready users of the new technology for distribution[7].

Their argument, in turn, is that the current copyright/risk assignment system leads publishers to shy away from innovation preferring 'established stars', and that this leads to an enormous concentration of wealth in the hands of a few rather than the use of resources for the socially desirable proliferation of new forms of expression.

Protecting authors' and creators' rights so that they can make a fair income from their work accords to well with our basic ethical sense that it is unlikely that there will be political difficulty with regimes that aim to do so.

An example of this occurred when the Commonwealth Parliament late last year passed changes to the *Copyright Act* to protect further some of the traditional "moral rights" of authors or creators in their work, specifically:

- **the right of attribution**: the author's right to be known to the public as the creator of the work. of The legislation deals extensively in Division 3 and 4 with an author or creator's right to be known as the originator of their work, and not to have works falsely attributed to them.
- **the right of integrity**: the right to object to distortions and mutilations of the author's work in such a way that would prejudicially affect the author's honour or reputation;
  Section 195AK of the *Copyright Act 1968* gives as examples of these deleterious changes:

  > "(a) the doing, in relation to the work, of anything that results in a material distortion of, the destruction or mutilation of, or a material alteration to, the work that is prejudicial to the author's honour or reputation; or

[7] e.g. http://nav.webring.yahoo.com/hub?ring=northc&list as a collaborative publishing effort; a "Google" search on "my music" returned over quarter of a million sites.

(b) an exhibition in public of the work that is prejudicial to the author's honour or reputation because of the manner or place in which the exhibition occurs; or

(c) the doing of anything else in relation to the work that is prejudicial to the author's honour or reputation."

The Act had already protected the right of journalists to protect the integrity of their work which was used for 'secondary purposes' (e.g. photocopying of articles they write for their employer - Section 35(4)) but the new section now generalises this protection.

Two other categories of "moral right" found in the so called 'code' jurisdictions[8] are not dealt with in any great detail in the amended Act:

- **the right of disclosure**: the author's right to determine if and when a work is to be divulged to the public. The Australian Act gives no general protection of this right.
- **the right of withdrawal**: the right to withdraw a work from the public, if the author wishes. This is not provided for in any great detail in the present legislation, although a commissioned artist is accorded protection by the Act in certain circumstances where their work can only be used for the purpose for which it was commissioned (Section 35(5)).

The amended Act provides broad discretionary remedies to Australian Courts where they find moral rights have been infringed by allowing as relief:

"(a) an injunction (subject to any terms that the court thinks fit);
(b) damages for loss resulting from the infringement;
(c) a declaration that a moral right of the author has been infringed;
(d) an order that the defendant make a public apology for the infringement;
(e) an order that any false attribution of authorship, or derogatory treatment, of the work be removed or reversed." (Section 195AZA(1))

To some extent, it is the evolution of new digital communication technologies (e.g. photo and audio editing software available on desktop PCs) coupled with the corporatization of creative endeavour that has focussed attention even more sharply on the need to protect authors and artists in these ways. It would not be surprising in this context to see further moves to protect the rights to withdrawal and disclosure as the damage that can be done to status, reputation, provenance or economic value quickly and globally is heightened by the new information and communications technologies. After five hundred and fifty odd years of mass publication, authors' rights seem to be in the ascendancy!

The Internet, characterized as it is by its unique addressing system and its routing of packaged, digitized information, has changed the very nature of global connectedness and communication. Its protocols allow wide and yet simple choice of information communication channels:

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[8] e.g. France (pre-eminently), Italy, Spain.

- email: a ‘store and forward’ multimedia (through the use of attachments) communication system allowing one to one or one to many communication
- newsgroups (news): effectively email to a ‘bulletin board’ for public broadcast
- the web (html): an on-demand multimedia broadcast system
- the file transfer protocol (ftp): allows direct, authorized access to multimedia material stored around the globe
- chat groups (dcc): real time one to one or one to many communication of multimedia information.

This diversity of channels is, of itself, likely to enhance participation and the free flow of communication. Repeated attempts to commercialize exclusively or privatize the Internet[9] have proved unsuccessful because of consumer resistance and regulatory intervention.

So, the question remains as to how much should be done to protect current production and distribution systems as we move into a digital communications environment.

Recent Australian legislative interventions have attempted to enshrine the general principles underlying the protection of physical distribution systems in the regimes applying to digital communication. The Attorney-General explained the Government's policy in his Second Reading Speech to the *Copyright Amendment (Digital Agenda) Act* 2000 by saying that:

> “As far as possible, the proposed exceptions replicate the balance that has been struck in the print environment between the rights of owners of copyright and the rights of users. The extension of this balance into the digital environment was one of the fundamental principles underlying the 1996 WIPO treaties.[10]”

To this end, for example, the Act introduced a new definition of 'communicate' meaning to:

> make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject-matter[11].

The explanatory memorandum to the Bill explained that this covered:

- making material available online through the Internet, and
- electronically transmitting material, whether through material substances (for example, telephone cables and optical fibres) or otherwise (for example, via electromagnetic waves - 'wireless telegraphy')[12].

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[9] e.g. the MSN (Microsoft Network) and AOL (America Online) strategies of the mid nineties.

[10] House of Representatives, *Debates*, p. 9748-9.

[11] Section 10.

[12] Item 6.

Whether this approach is sustainable in more than the immediate term is problematic. As described above, what the Internet makes available is a radically new, timely, popularly and cheap communication and information interchange system. The impact that this is likely to have on traditional production and distribution networks is more likely to be of the sea change proportions of the introduction of printing than any incremental creep.

Legislatures are traditionally conservative in the face of structural change of this nature, and it is reasonable for them to act to provide stability until broader social structures change.

However, what is likely to emerge is a new economic paradigm for the production and distribution of intellectual property whatever media are used to convey it. A similar fate, I suspect, awaits the ‘advertising industry’ where the real cost of conveying information to an individual purchaser, and the link between marketing and sales should become more lucid.

These types of change will require the development of micro-payment systems in the online environment, where the costs of added value in the production and distribution chain are identifiable, transparent and recoverable.

Established publication and production houses unwilling or unable to transform their businesses will find this type of future threatening. Legislators will come under pressure from the ‘twenty first century stationers’ to protect these established interests. Hopefully, if they are be brave enough to resist this lobby, we will see creative people benefiting more from the fruits of their work, and freer participatory access to valuable social, cultural and scientific information in our communities.