Copyright, Property and the Social Contract

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Editors

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The Reconceptualisation of Copyright

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Foreword[1]

This volume of carefully curated contributions from a diverse and distinguished range of people provides thoughtful, and groundbreaking, "top-down" overview perspectives which are nicely complemented by "bottom-up" country or specific-issue case studies that link the more exploratory and theoretical contributions to the observed realities and contemporary challenges faced by many smaller and less powerful or less developed countries. Examples of the former are provided by the incisive chapters contributed by Mark Perry, Brian Fitzgerald and Ben Atkinson, to name just those I found most compelling as highly original and seminal contributions to the global debate over the future of copyrights. The accompanying case studies amplify and "ground" the book's overall themes: the copyright in developing countries, the consequences of subsuming copyrights within the generally accepted understandings of property rights per se and the inadequacy and lack of fairness of the "social contract" now being institutionalised globally through the international harmonisation of copyright laws, which harmonisation is designed and imposed by the dominant IP players controlling the agenda. There is a constant interplay of these themes across each individual chapter, resulting in a cohesive and challenging counterpoint to the enormous opus of books, articles and digests devoted to the minutia of current IP practice.[2]

[1] Dr Terry Cutler is the Principal of Cutler & Company. He has had an active engagement with IP issues for decades, having sometime chaired Australia's Industry Research and Development Board; chaired the Australian Government's Information Policy Advisory Board which, inter alia, successfully advocated the creation of a National Office for the Information Economy; worked with the State Government of Victoria on adopting a policy of open, Creative Commons, status for works covered by Crown Copyright; served as a long-time member of the Board of Australia's premier public research agency, the Commonwealth Industry and Scientific Research Organisation, and latterly as deputy chairman; and in 2008 was commissioned by the Australian Government to chair a review of the National Innovation System. He has also advised on IP law and practice in countries in Southeast Asia and South America.

[2] I continue to be swamped with regular catalogues of new works on intellectual property from publishers who obviously see a strong market in the ever-growing army of IP lawyers and service providers in this domain, and by web bulletins such as Mondaq which weekly chronicle the most

The contributions from both Adebambo Adewopo and Kunle Ola highlight the importance and utility of open access to knowledge as an essential tool for development in less developed countries. This is an important reminder of the consequences of the extensive scope creep evident in copyright law, and the subsumption of traditional notions of authorship within the expanding domain of information management and control, with each element of copyright protected material being argued in terms generalised to the whole expanded field of "copyright industries" rather than examined in terms of their own specificities. There is a world of difference between a book, a film and the terabytes of data and accumulated knowledge sitting within proprietary information repositories and databanks.[3] We need, however, to note that development is not just an issue for low-income countries, but is central to policies for innovation and economic and social renewal in *all* countries, especially small country economies even if they are advanced materially. Trade imbalances in the flows of intellectual property are commonly linked to unfavourable terms of trade for all small country economies.[4] Knowledge builds on knowledge, and if the foundational knowledge on which we seek to build is hard to access, or overly costly and involves complex transactions, then less and poorer building will eventuate.

Anglo-American intellectual property law regimes now actively pursue the international harmonisation of IP law, unlike other areas of law where distinctive regimes have remained entrenched (such as the diffidence between Anglophone common law traditions and European codes tracing back to the Napoleonic Codes). Former colonies, like Australia and Indonesia and the countries of South America, began their colonial settlement within the legal frameworks and constraints of their respective imperial powers, whether Dutch, English, Spanish or French. These legacies persist. It is noteworthy that the greatest resistance to Anglo-American models has come from regions like Indonesia and South America in general; China in North Asia is now charting its own somewhat independent course with, of course, a widening sphere of influence in largely Southern hemisphere, less developed countries. China could, hopefully, become the counterpoint to the present global hegemony exercised principally by the United States.

Mark Perry notes that it is "extremely hard, or pointless, for (small) nations to attempt to change the course of global harmonisation when such policy directions in intellectual property are driven by economic juggernauts". Hence, many small nations feel left with little choice but to see how they can create local variations

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recent regulatory and case law developments: the bulletins are exhaustingly comprehensive and could have been curated by robotics. Nonetheless, I confess to reading them for the occasional grain of wheat amongst the chaff.

[3] This can create a tension between the rival claims for open access to knowledge as an essential tool for economic development and national well-being (such as in access to advances in health and education), and a proper regard for empowering and protecting local cultural expression and traditional art forms and practices from expropriation.

[4] For Australia's trade imbalances, see Australia Government, *Trade in Services Australia, 2015–2016*, Department of Foreign Affairs and Trade, March 2017.

within the constraints of a dominant and hegemonic framework. Where good principles and outcomes are subverted by the self-interest of others, however, thoughtful and well-articulated collective action can hopefully effect change.

The debates, and the options for change and reform, have become bifurcated between the so-called creative industries (an industrial development policy focus now much in vogue) and those who adopt the term "copyright industries" to focus on the ever-growing dominance of such "noncreative" works as information and data industries within the IP agenda, and the stakes here are even higher for less developed or small country economies in terms of "access to knowledge".

It is one thing to focus on legal harmonisation, but the corollary is to look at how this translates into the underlying realities of the terms of trade between countries where there is an embedded structural imbalance in trade flows and in the ability of small country economies to achieve even slightly favourable terms of trade. This affects small, advanced, economies like Australia as much as less developed countries. For example, if countries like Australia contribute some 2% of the world's advances in knowledge and innovation, how best can they access and apply efficiently and economically the 80% or more of IP generated elsewhere? Australia has almost always been a net importer of copyright material and, moreover, of the reproduction of communications general-purpose technologies which underpin access to, and use of, copyright materials.

John Gilchrist reminds us that before the mid-twentieth century, the United States remained a net importer of copyright goods; since then, it has become the dominant copyright exporter. As Gilchrist comments, the United States "is the world's largest and wealthiest economy and is presently a self-interested guardian of the international copyright establishment". Over history, the United States moved from being a free rider to hegemony over IP. The implied social contract has shifted from a focus on the local dissemination of and access to creative works and knowledge to one of "making America great" and powerful on the world stage for the economic benefit of its own people and the competitiveness of US industries in a digital information age.

One of the great ironies in the role of the United States in instituting an internationalised legal straight jacket under the mantra of the global harmonisation of IP law lies in the anomaly that within the United States itself, there is a wide and expanding set of limitations and exceptions to black letter IP law which have been neither encouraged or supported elsewhere in the world. It is their open-ended and adaptable judicial approach to "fair use" and "safe harbours" which have enabled the emergence of new business models for knowledge and information dissemination, classically represented by the rise of Google as an access-based business model for knowledge flows. Brian Fitzgerald's chapter highlights the turning point that this transformation of business models may represent.

Fitzgerald identifies the innovative and remunerative new business models of a digital era which can be facilitated and expanded through forward-looking judicial interpretations of copyright law. He anticipates a shift from traditional licencing models to a business model which monetises the value of public access to works through sharing the revenues of the new "access provider"—like Google—and the

copyright owner. This would be a disruptive shift in copyright markets and a transformational change for users in terms of access to information. Like all disruptive innovation, the main obstructionists will be the entrenched service industry of IP lawyers for hire. Nonetheless, the new "access-based" business models Fitzgerald analyses are the future marketplace in a digital world and, for the first time, put users and their interests at the centre rather than the sidelines.

It is somewhat ironic that it is commercial interests like Google which have emerged as a powerful and countervailing voice to the traditional "Hollywood" lobbies in the copyright debate. Ubiquitous digital communications shifts our focus from "reproduction" to access. (Background reproduction remains nonetheless fundamental to the business model of a Google and its digital counterparts.) The user protections for copyright users in the United States—its flexible and open-ended fair use provisions and the principle of safe harbour for online intermediaries—have enabled companies like Google to establish viable business models without becoming entangled in the thickets of copyright licencing. In the United States, Courts have legitimised the business models of companies like Google; regrettably, this is one aspect of an emerging copyright revolution that has not yet been replicated elsewhere in the world despite the valuable and ongoing work of Google in proselyting the need for change.

Not only is IP explicitly carved out from general competition law in countries like Australia but also, by default, from consumer protection law. Pappalardo and Brough note that traditionally the interests of users, the public, have been relegated to the sidelines in IP law. This point is amplified in the chapter by Cheryl Foong addressing a "making available right", and the vexed question of just who is "the public" for whom copyright works should be available, apart from the distinct and specialised "IP Markets".

The term "hegemony" occurs frequently in this volume. In a seminal contribution, Ben Atkinson sidesteps the possible knee-jerk aversions to the use of this term (given its association with the radical political theories of people like Gramsci), by addressing the themes of this book through a critique of what others have described as "information feudalism".[5] Atkinson imports a new term from biology for information feudalism: paratrophic systems. New terminology is always useful as a way of discarding the blinkers that form accretions around conventional terms like "property" and "property rights". The use of the term property in the context of classes of intellectual capital quickly absorbs the general presumptions about property rights in tangible thing like land, water, and so on[6] and that the owner is entitled to not only exercise control over use but also to demand remuneration for use: a new "right of remuneration". Property presumes ownership, not a time-limited privilege of a temporary monopoly licence over something. Hence, one author, whose work I admire a great deal, recently gave a speech in which she asserted her perpetual

[5] Peter Drahos and John Braithwaite, *Information Feudalism: Who Controls the Knowledge Economy?*, Earthscan, 2002.

[6] Atkinson notes that "concepts of property are derived concepts of possessive language".

rights in copyrights, and for her children and their children, and equated her claims to rights to investments in real estate. To quote her:

> Another proposal has been floated by the Productivity Commission to gut the copyright of authors. This would take away my **ownership** of my work of my work after just fifteen years. Copyright currently endures for my lifetime plus 70 years, for my children and theirs. The government's proposal would mean that *Stasiland* …**would from next year no longer be mine, nor a property of my children**…. If I borrowed money to buy and build a block of apartments, I would expect to own them until I sold them, to get a return from rent, and to be able, if I wished, to bequeath them to my children. The only beneficiary of the proposed copyright change is the Googlesphere, to which would be delivered "free" content – that is to say, my and all other Australian authors' **expropriated property.**[7] (Emphasis added in bold)

Atkinson notes that a property system is paratrophic, or parasitic to use a closely related term, "to the extent that entry into bargains for rent or other obligations is compulsory or non-voluntary". He later draws out the uncanny resemblances with the operation of feudal economies in medieval times. What Atkinson's chapter highlights are the serious consequences of such "information feudalism" in terms of social equity, in rising inequality, representing a very poor social contract imposed by the powerful. To cite his concluding remarks:

> …paratrophic action is the harbinger of social inequality, wherever it is found in the world and in whatever form. The paratrophic actor seeks to control and the instrument of control is possession. The more that possession is concentrated the more that are excluded. By defining and accumulating more proprietary rights paratrophic actors disinherit those without proprietary rights. Paratrophic process is immanent in every property system. The [copyright] royalty system is the product of that process. By looking at larger property systems we can identify how the process of concentration and exclusion creates social inequality.

Nor can the impact of intellectual property law on innovation and competition policy be ignored. In a thoughtful conference paper,[8] Leonardo Burlamaqui rightly notes that the crucial issues concerning the relationship among innovation, competition (including competition policies) and intellectual property has been largely unaddressed. This includes the use of IPRs as strategic weapons to create competitive advantage, either through IP swap trades (mutual licensing) or, more insidiously, through a non-licensing policy (or "unproductive entrepreneurship", to use that phrase coined by Baumol).

Linguistically, once we deploy the term "property rights", we pigeon hole creative works and information within the same conceptual framework applying to the traditional concepts associated with a right to own and control a property. Not surprisingly, therefore, "unlawful" intrusions into domains defined as property are as

[7] Address delivered by author Anna Funder on the announcement of the Miles Franklin Shortlist, at the Australian Booksellers' Association Conference, May 29, 2016, and subsequently submitted as a submission to the Australian Productivity Commission. This current volume provides excellent and compelling rejoinders to such arguments.

[8] Leonardo Burlamaqui, "Intellectual Property, Innovation and Competition: Towards a Schumpterian Perspective", Unpublished WIPO conference paper, 2006.

much a criminal act as a matter of civil disobedience, hence the criminalisation of copyright infringers.

Discussions about copyright and IP regimes in general are locked into crusty institutional frameworks which resist change and rethinking and are generally perpetuated through the ability of dominant incumbents to exercise the power of control mechanisms, principally the terms of access and asymmetrical pricing transactions. This is the world of paratrophic information feudalism as described by Ben Atkinson. In such circumstances, as with innovation policy in general, it is usually necessary to step back and reframe the terms of the discussion, including going back to first principles. In this context, I rather like the emergence of the term "knowledge governance"[9] as an overarching concept and framework; in the same way, we need to see intellectual property constructs within the much broader context of how we understand and nurture human capital, in all its multifaceted manifestations, as our primary point of focus and starting point. By approaching the dilemmas, and the undesirable consequences, of much contemporary IP law through the lens of goods and equitable governance, we may find our way towards a new social contract around the promotion and sharing of knowledge. This new social contract will be based on principles of fair dealing, access—including access to what have become "essential facilities" in an information age—and those models of interoperability from the world of telecommunications which underpin interconnection and global connectedness.

This book is a major and invaluable addition to the small, but seldom quoted or seriously considered, corpus of complementary critiques of contemporary copyright and IP regimes in general. Sadly the prevailing hegemonic nature of discourse on the topic has not encouraged widespread and informed public discussion and debate about the important socio-economic issues at stake. This underlines the importance and timeliness of this volume edited—nay curated and carefully peer reviewed—by John Gilchrist and Brian Fitzgerald.

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[9] Leonardo Burlamaqui, Anna Castro and Rainer Kattel (eds.), *Knowledge Governance: Reasserting the Public Interest*, Anthem Press, 2012.

Preface

This edited collection of papers on copyright law is intended for a worldwide audience and provides international perspectives in relation to the following three themes:

- Copyright and developing countries
- The government and copyright
- Technology and the future of copyright

The last theme includes an examination of how far technology will dictate the development of the law and a re-examination of the role of copyright in encouraging innovation and creativity. As a critique, one paper looks at the function that rights under the copyright royalty system play in the creation of social inequality.

Underlying these themes is the role the law of copyright has in encouraging, or impeding, human flourishing.

The contributors to the collection are based in various parts of the world—Scotland, United Arab Emirates, Nigeria and Australia. Four Australian-based contributors have roots (i.e. were brought up in and have had professional lives) in other countries—Germany, England, Nigeria, Japan and Palestine.

The needs of developing countries in accessing copyright material have been at the centre of an ongoing international debate since the Paris revisions of the then two major multilateral copyright conventions, the Berne Convention and the Universal Copyright Convention in 1971. The debate has since strengthened and created a division in the world copyright community. The focus of the debate is over the role of copyright in limiting access to informational material of importance to national development and the extent of limitations and exceptions to copyright recognized by the international conventions and national laws.

One overwhelming concern in the law, both internationally and nationally, is that the category of protected "works" embraces a wide field of literary works covering the scientific, medical, health, education, technical and other informational fields to which developing countries have less practical access because they cannot afford, or do not have the resources, to do so.

That in turn impedes their development.

This wide field of literary works covers informational (or knowledge-based) works as well as a host of creative works such as fiction and poetry and more mundane things such as manuals, instruction booklets and codes. The field has been expressly widened over the last three decades to include computer software. Similarly, over the last three decades, the term of copyright protection for literary works has increased under many national laws from life of the author plus 50 years to life plus 70 years.

There is no separate category of informational works recognized under the major international copyright conventions or under most national laws, and accordingly there is no separate treatment of these works under international and national laws. Several papers in this collection provide important perspectives on the need for greater access to information and knowledge and the importance of this to the broader development of countries. Should copyright protection be perceived to be a barrier to development, or as one contributor has put it, carry with it a fear that copyright will be used by foreign parties for purposes that are not conducive to development? At another level, as another contributor has stated, has the development of copyright become too preoccupied with "a property for who" rather than "a property for what"?

Another compelling reason for greater access to copyright material is the benefit to society through stronger encouragement to creativity and innovation. As the director-general of the World Intellectual Property Organisation has stated, "Copyright should be about promoting cultural dynamism, not preserving or promoting vested business interests… We need to speak less in terms of piracy and more in terms of the threat to the financial viability of culture in the twenty-first century, because it is this which is at risk if we do not have an effective, properly balanced copyright policy".

Much has been made of the fact that Google would not have prospered in many of its activities were it not for a flexible basis of defence to infringement under US federal law. The Australian Law Reform Commission (ALRC) has outlined what could be done legally under the fair use defence under the US *Copyright Act 1976* and which would at the same time be an infringement under the Australian *Copyright Act 1968* because it would be outside of the more restrictive fair dealing defences under that Act. One paper comments on the comparative inequity of this for Australian users of US copyright material. The ALRC recommended the adoption of the doctrine of fair use in Australian copyright law. Another paper in this collection discusses the merits and demerits of the adoption of the concept of fair use in the United Arab Emirates. Another paper specifically examines the influence of Google on copyright law and policy.

The encouragement of creativity and innovation is not a new factor lying behind the development of copyright. Today, in the information age where access to information, creative and other material and the exchange of information and ideas are communicated worldwide, this notion, expressed as cultural theory, has achieved prominence over other theories touted in support of copyright law. Access to copyright material stimulates creativity and lies at the heart of cultural theory. Various chapters examine access as a revenue model and access from the perspectives of

intermediaries and users. One chapter examines the legal consequences of the digitisation of cultural heritage institutions' archives and of access to those images.

Policy behind national copyright laws should clearly support the creative and innovative outputs of its own citizens and residents. At the same time, this policy is being undermined through the establishment of a direct contractual nexus between copyright owners and users of copyright material. For example, as a result of worldwide electronic communication, publishers can now directly impose rigorous contractual limitations internationally on access to copyright material which subvert copyright limitations and exceptions.

International convention countries are required to protect the works of authors of other countries as they do their own. As a corollary to this principle, there should be equity across boundaries in the light of the internationalization of the exploitation of copyright material. The Berne Convention and other international conventions in the broadest way seek to achieve this. A clearer way of achieving equity across boundaries and ameliorating some access issues would be to insert in national laws what has been termed the "Richardson's Beach" defence. That is, for example, under the copyright law of Australia, there should be a defence to infringement of a work if the act concerned was not an infringement in the country of origin of the work. This would also aid the flexibility of some national laws. Another measure which has been recommended in various national jurisdictions is to outlaw contractual attempts to limit defences under national copyright laws, that is, to determine the balance of interests under law between owners of copyright and users of copyright material solely through copyright policy. That balance should seek to advance each nation's wider social and economic well-being.

These are some of the ideas which are discussed in the papers of this collection.

The editors hope you will be stimulated and encouraged to contribute in the debate about the development of copyright. The editors are most grateful that Dr Terry Cutler, a distinguished Australian, has contributed the foreword to this collection. Dr Cutler has been the Chair of several Australian Government inquiries concerning, or relating to, access to public sector information and has been and is, a consultant to a number of foreign governments and government instrumentalities.

Melbourne, VIC, Australia — John Gilchrist
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30 May 2017

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