

## Innovation Perspectives

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### **COPYRIGHT IN THE DIGITAL ENVIRONMENT**

I note the ALRC's preference for submissions to be written against the questions raised in their issues paper. However I find that this format would not allow me to address important issues around customers of digital material. *Unless and until these customer concerns are addressed through a proper regime of consumer protection, there will be unnecessary constraints on growth of the digital economy.*

This submission briefly reviews the dearth of empirical evidence that copyright policy is either effective or efficient. It then focuses on consumer rights, how these are unnecessarily undermined by copyright policy, and how this lack of balance between producer and consumer rights is radically worsened in a digital environment with legislated monopoly privileges. A poor consumer environment will impede the development of a flourishing digital sector. A range of specific issues are discussed briefly: double-dipping through technological protection measures (TPMs), the right for communities to access cultural material sold using copyright privileges, the excessive strength of copyright privileges, compliance costs and the proportionality of penalties.

### **Background**

Copyright commenced as a pragmatic exchange of outsourced censorship services in exchange for a royal monopoly privilege. Since then it has grown radically as business interests seek and gain extended monopolies to ensure their profitability. But it remains, as Lord Templeton said just before his elevation to the House of Lords, a restraint on trade. He went on to say that such a restriction could only be justified to the extent it was necessary for public benefit.<sup>1</sup>

### **Objectives and guiding principles**

The ALRC rightly notes in the issues paper that the objectives of copyright have been subject to some debate. The **character** of copyright policy is less controversial. It is a government intervention in (regulation of) a market, whereby the government grants applicants quite strong monopoly privileges. What is it that the government (community) gets in exchange for these monopoly restrictions on competition? This should be a greater quantum of creative output.

If a greater creative output is the goal, is copyright an efficient and effective means of achieving this?

### **Economic impacts**

First one must address the issue of the extension of copyright privileges to forms of output which contain no creativity. Why should such business activities be sheltered from competition? I realise this issue is outside the terms of reference for this enquiry, but I raise it here as it is an important, but as yet unaddressed, concern in copyright policy. This concern has some relevance to data mining issues.

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Setting aside the extension of copyright to non-creative products,<sup>2</sup> what is the evidence that copyright policy leads to greater creative output in Australia? With respect to the US market, from which so much of the change to Australia's copyright policy derives, Hunt and Schuchman, considering books and periodicals, find that there is limited evidence that *some* creative works are induced by the copyright privilege. Many are not affected by copyright and would be produced absent copyright privileges.<sup>3</sup> Hunt and Schuchman go on to consider the important economic question as to whether the activity induced by copyrights has greater value than the activity displaced by this market intervention. Any such benefits are very dependent on the *assumption* that the private returns from publishing books are less than the returns to the community. This assumption seems to rest on a view that books have greater merit than other goods and services, but this is a very primitive value judgement. Any such benefits would in any event need to be offset by the administrative and static efficiency losses of the market intervention. This analysis can be extended to other forms of 'creative' output covered by copyright privileges.<sup>4</sup>

Overall it is clear that there is very limited evidence that copyright policy is effective – many copyrighted works would be created and published absent the copyright privilege. There are also issues as to whether copyright policy is efficient – as privileges are granted whether or not the work is induced, there are substantial costs which are not offset by accompanying benefits. The evidence that there are spillover benefits from all forms of copyrighted work is absent.

Clearly there is a need for greater economic discipline in respect to economic policy. Many recent changes are the result of lobbying by sectional interests – many from overseas – and in some cases (such as the copyright term extension agreed in the AUSFTA "free" trade package) these changes clearly involve a net loss to Australia. Those who paid for this negotiated loss have never been compensated. It is moot whether the small export gains in the meat and livestock industry sufficiently offset these losses at the national level.<sup>5</sup>

Australia has a deficit on the copyright trade account. Every change which extends the privileges granted to holders of copyright means a loss to Australia as most of these monopoly benefits flow directly overseas.

The continuing lack of proper economic evaluation of copyright policy is disturbing. For example, in relation to the critical issue of the relative benefit flowing to authors of creative works compared to retailers of creative works, there is continuing ignorance. While the general view appears to be that, except for established creators, the major benefits flow to the retailers, greater empirical evidence on this issue is essential for good policy-making. In the academic field, the regular very high profit margins achieved by academic publishers point to excess profits and therefore failure in the market.<sup>6</sup> The regular excess profits point to excessive copyright privileges as the source of this market failure. The consequence is a higher than necessary cost burden on educational institutions and thus on students and their parents.

**There is a dearth of evidence that copyright policy is either *effective* in inducing additional work or *efficient* in delivering this a minimum cost.**

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### Consumer rights

Against this background how are the rights of consumers balanced against those of copyright holders.

The simple answer is that mostly they are not.

When a consumer purchases a good or service, s/he generally acquires full property rights, including the right to quiet enjoyment of their property. Use of some categories of goods or services is subject to general laws designed to minimise negative impacts on other parties. For example on-road use of a car is subject to general road rules. But in such examples it is clear that there is a general community benefit from these limited restrictions on how the property is used.

However in the case of any product covered by copyright laws, monopoly-holders have managed to persuade governments to intervene and remove the consumer's property rights. These interventions are designed to maximise retailers' profits. They serve no community purpose – indeed they impede the community goal of the dissemination of cultural products. As Boldrin and Levine have pointed out:

"from the point of view of economics, there are two ingredients in the law: the right to buy and sell copies of ideas, and the right to control how other people make use of their copies. The first right is not controversial. In copyright law, when applied to the creator this right is sometimes called the "right of first sale." However, it extends also to the legitimate rights of others to sell their copies. *It is the second right, enabling the owner to control the use of intellectual property after sale, that is controversial.* This right produces a monopoly – enforced by the obligation of the government to act against individuals or organizations that use the idea in ways prohibited by the copyright or patent holder."<sup>7</sup>

In the pre-digital age this intrusion of monopolists into the ownership right of their customers was limited by both technology and doctrines of fair use. It was technologically impractical to prevent customers from lending their books to friends, bringing their records to parties, and so on. Because it was uneconomic for sellers to radically enforce the privileges gained under copyright policy, there was little consumer revolt against the inequitable provisions of copyright law.

In the digital age there is a very much greater intrusion of retailers into the property rights of their customers. This has led to massive consumer resistance to the unreasonable limitations on the use of their property which governments actively sanction through copyright laws that have not been subject to proper economic analysis.

### The Digital environment

In the digital world there are a wide range of technological measures used to control access to and use of the copy of the work that has been sold. In total these technological features have converted the sale to a rental – but the consumer is not clearly advised of this. Consumers of digital material – whether this be e-books, music or film – consider they have bought a product. After all, when they complete the transaction on the net, the button says "BUY". But the sellers take a different view and use fine print – the key terms of which are never specified during the sale transaction – to define the purchase as a rental.

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Consider the example of Kindle books. While the act of creating a work achieves a global copyright privilege, sellers do not face a requirement to sell a global use right. Kindle does not advertise on its web-site that use of purchased e-books is restricted to the country of purchase. Should the owner of a Kindle move to another country, Amazon will "lock" all the books the owner has purchased. This is theft.

But it is sanctioned by unbalanced copyright laws that do not require those who gain a global privilege to sell rights allowing global use. In a non-digital world sellers cannot prevent the sold copies being transferred to another country or bequeathed to one's heirs. But in the digital world, sellers take both these actions.<sup>8</sup>

The sale of these copies is covered by the word BUY, not the word RENT. The underlying business model is iniquitous and creates substantial discontent among consumers. This unfair dealing is facilitated by law because:

- there is inadequate protection for consumers of digital products in either consumer protection law or copyright law
- contracts are allowed to over-ride consumer protections provided in copyright law
- domestic remedies to this theft are not readily available.

Digital operators working with such models are fair set to spoil the emerging digital market. If the government wants to encourage strong growth in Australia's digital economy it needs to put in place a sensible and accessible regime for consumer protection. This must include the right to keep, retain and use purchased copies in any way except for commercial uses. Unless the sale is clearly stated as a rental sale,<sup>9</sup> the seller should have no right to take back the product. If such events occur, consumers need streamlined fast processes to sue for recompense or restoration in domestic small claims courts.

**The government needs to put in place a sensible and accessible regime for consumer protection in the digital economy.**

Under general consumer law, sales contracts are not allowed to remove consumer protection rights granted by legislation. Government action to protect consumers from the rapacious behaviour of many sellers of digital goods is long overdue.

### *Double-dipping*

One has to ask why sellers of digital goods have any need for a legislated intervention in the market to ensure they have a period of market exclusivity during which they can recoup their investment costs. Digital goods sellers have a range of technical measures which achieve this end. Providing them with copyright monopolies in addition to the legal interventions with respect to encryption measures is double-dipping.

**Goods using TPMs should be ineligible for copyright privileges.**

Any goods which are encrypted or have attached digital rights management measures should be ineligible for copyright privileges. A first-best solution would be to require the producer or seller of digital goods to choose between forms of limiting competition – either technological protection measures or copyright. But not both.

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### **Other consumer and community issues**

There are a range of other issues that need to be considered if one is to move towards a balanced copyright policy which has general acceptance by consumers and citizens as well as buy those who seek these monopoly interventions. The most important of these are the right of community access to cultural material that has been publicly sold with copyright privileges; the strength of copyright privileges; the right not to have excessive compliance costs imposed as part of the copyright regime; and the issue of the proportionality of penalties for breach of this economic policy.

#### ***Community access to cultural material***

With the advent of moral rights for authors, the issue of whether an author has the right to remove material from public access becomes germane. Given that the copyright privilege is offered for the purpose of generating a higher level of creative output, this raises the issue of whether creators of such output have the right to prevent access except through a price mechanism. Clearly, if there are substantial errors in a work, an author will need to rectify these. But in other circumstances, if a creator has sold works under copyright provisions, these need to continue to be available to the community. This is an essential part of the **quid pro quo** of the grant of monopoly privileges.

This community right of access needs to be the driving force informing the design of access to works which are no longer readily available (so-called orphan works). A first-best solution to this problem would be to address the excessive strength of the current privileges granted to copyright holders.

It also needs to inform policy as to the interaction of copyright monopolies and the role of museums and art galleries in preserving cultural materials and providing community access to this. At present copyright policy actively undermines the role of these institutions in undertaking this important cultural role.<sup>10</sup>

Material that has never been publicly provided or marketed should not be eligible for a copyright privilege. Material that is not creative (for example sub-division plans or photographs made for the factual purpose of recording artefacts) should not be eligible for copyright privileges. In neither case is there any evidence that the copyright incentive produces additional creative output for the benefit of the public.

A long-standing provision in trade mark law is that when a trademark enters normal use as a word – for example escalator, vacuum – then it ceases to be allowable as a trade mark. There needs to be a parallel in copyright law. When particular parts of copyrighted works become common usage – so common that there is almost no realisation that they are part of a specific work – then they should cease to have the same degree of monopoly privilege. This should be part of an expanded role for fair use exceptions to monopoly pricing. These exceptions are part of the **quid pro quo** to compensate consumers broadly for the loss they suffer through the extensive grant of these monopolies.

#### ***The strength of copyright privileges***

The extraordinarily long length of the copyright privilege is an active impediment to access to orphan works. In considering the book market, Plant long ago argued for a



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maximum copyright term of 5 years.<sup>11</sup> It is well known that the very long monopolies now provided benefit only the major corporate players who have lobbied for them.<sup>12</sup>

Actions such as these – where democratically elected governments act in the interests of a few corporate players and against the interests of the public – are a major factor in explaining citizen disengagement and the increased lack of trust in politicians. Politicians can re-build this trust if they start acting in the public interest rather than in the interests of a small part of the business community. Where the beneficiaries are largely foreign corporations – as in the case of Australia's copyright policy – this overriding of the public interest is particularly hard to take.

There is no evidence that the Australian public would have less access to cultural material with a much shorter copyright term. Producers of most copyrighted works gain most of their economic return in the early years. It is time Australia started negotiating for a reduction in the term of copyright monopolies to five years.

### *Compliance costs*

In determining the nature of the granted copyright privilege there has been no consideration given to administrative costs imposed on other parties. This is particularly evident in the unthinking extension of the ban on making electronic copies for use in an electronic environment. For example, there is no reasonable argument why libraries have to remove electronic documents from cache after each download. All the prohibitions which operate to increase costs for third parties in the digital environment need active re-consideration. Such provisions do nothing to increase the returns to the copyright holder – they simply make lift more difficult for third parties. They actively impede the growth of new industries such as cloud computing.

### *Proportionality in penalties*

A final extremely important issue is the proportionality of penalties for copyright infringement. Copyright is a policy designed to achieve economic and cultural goals. Penalties should therefore be civil penalties. The introduction of criminal penalties as a response to copyright infringement seeks to be an accident of history,<sup>13</sup> then spread globally through negotiations which did not adequately consider public and consumer issues.

This is fundamentally bad policy and a very disproportionate response to contravention of a policy designed simply to increase creators' profits. The appropriate penalty for unauthorised use of material protected by these legislated monopolies is financial – reimbursement of the loss to the creator, with perhaps a fine for the contravention if it is serious enough. Should an offender disobey a court order then other penalties could be considered. But a simple offence against of government's market regulation system does not merit criminal penalties. Above all it does not merit extradition to face charges of such economic offences in overseas jurisdictions.<sup>14</sup> These extradition incidents have all been with respect to digital content and often involve individual citizens rather than large-scale commercial use.

As a matter of urgency Australia should review its extradition treaties to ensure residents and citizens cannot be extradited for offences against overseas copyright laws.

Australia should also commence lobbying for the removal of criminal sanctions from international copyright treaties.

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The recipients of the government's copyright monopolies have also been lobbying for penalties that remove rights of internet access when they accuse a person of transgressing copyright privileges. Again this is a disproportionate response. The issues are well discussed by Bonadio so are not repeated here.<sup>15</sup> The issues include whether internet access is now a fundamental human right.

Australia should take a stand of principle that internet access is a fundamental human right and should actively oppose inclusion of any such provisions in any so-called trade or other international negotiations.

### Recommendations

To the extent possible within the terms of national sovereignty, I recommend that the government take action to achieve the outcomes listed below. Where the government has given away national sovereignty, then it should immediately take action to negotiate to achieve these outcomes in international instruments.

- provide legislated consumer protection for buyers of digital material;
- make it unlawful for contracts to override legislated and common law consumer rights with regard to copyright or digital material;
- provide for cheap and simple domestic remedies where sellers of digital material steal from their customers (perhaps via a collecting society?);
- provide that proprietors using technological protection measures shall not also be eligible for copyright monopolies;
- require that if a global copyright is taken then buyers must always be provided with global rights of use;
- actively review copyright policy to ensure it does not impede museums and art galleries in their roles of protecting and disseminating cultural artefacts;
- actively review copyright provisions which simply add costs to third parties without providing a financial incentive to creators;
- remove copyright from materials that do not involve creativity;
- actively lobby to reduce the term of copyright monopolies to 5 years;
- actively lobby to remove criminal penalties from this economic policy intervention;
- take a stand of principle that internet access is a human right and cannot be removed as a punishment; and
- immediately review extradition treaties to ensure that Australian residents and citizens cannot be extradited for offences against legislated monopoly statutes.

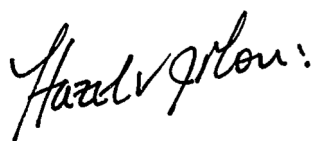
### Conclusion

In concluding I would just like to make a small comment on the language used in the issues paper. Copyright, like patents and trademarks, is an area where government intervention can create very significant profits for selected parties. As a consequence there is extensive lobbying in these areas. A standard technique is selling a particular viewpoint is the use of language to "frame" a perspective, loading this with particular values. This technique is rife through these monopoly spaces. The beneficiaries of these

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government granted monopolies regularly refers to themselves as "rights-holders". But there is no right to a monopoly privilege. They also refer to those making unauthorised use of copyright as "pirates". Yet the evidence, particularly in the digital world, is that it is the copyright holders that indulge in theft.

In formal government deliberations of policy in this area it would be preferable not to use of the type of loaded language developed by rent-seekers. It indicates a prejudice which I am sure the ALRC would wish to avoid. The recipient of a copyright monopoly has received a privilege – and should not be referred to as a "rights-holder".



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16 November 2012

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Note: all URLs checked and accessible as at 16 November 2012.

<sup>1</sup> Templeman, S., 1998, "Intellectual property" *Journal of International Economic Law* 1(4) : 604.

<sup>2</sup> Though it would be very interesting to know why this major judicial change in innovation policy has not been seriously reviewed and assessed by executive government and the legislative chambers.

<sup>3</sup> Hurt, R.M. and R.M. Schuchman, 1966, "The Economic Rationale of Copyright" *The American Economic Review* 56(1-2):421-432.

<sup>4</sup> See Cole, J.H., 2001, "Patents and copyrights: do the benefits exceed the costs?" *Journal of Libertarian Studies* 15(4):79–105 for a general consideration of copyright costs and benefits.

<sup>5</sup> See, for example, Dee, P., 2005, *The Australia-US Free Trade Agreement: An Assessment*, Pacific Economic Papers No. 345 and Weiss, L. and E. Thurbon, 2004, *Submission to the Senate Select Committee into the Free Trade Agreement between Australia and the United States of America* .

<sup>6</sup> Excess profits are profits in excess of the risk-adjusted return on capital invested. The recent boycott on Elsevier has produced data on the regularity with which Elsevier achieves excess profits. But in this respect it is unlikely to be any different from other publishing houses. Indeed, given its focus on the high-priced legal market, Butterworths may well have greater excess profits. Useful information on Elsevier is provided in Gowers, T. and 33 others, 2012, *The Cost of Knowledge* (<http://gowers.files.wordpress.com/2012/02/elsevierstatementfinal.pdf>) and Morrison, H., 2010, "Elsevier 2009 \$2 billion profits could fund worldwide OA at \$1,383 per article" *The Imaginary Journal of Poetic Economics*

<sup>7</sup> Boldrin, M. and D.K. Levine, 2008, *Against Intellectual Monopoly*, Cambridge: Cambridge University Press, p. 8, emphasis added.

<sup>8</sup> See, for example, Gilmore, J., 2001, *What's wrong with copy protection* (<http://www.toad.com/gnu/whatswrong.html>) (accessed 16 November 2012) for a discussion of the shift to a pay-per-use model.

<sup>9</sup> Given relative prices it is clear to consumers that these are sales not rentals.

<sup>10</sup> Corbett, S., 2011, *Archiving our culture in a digital environment: copyright law and digitisation practices in cultural heritage institutions*, New Zealand Law Foundation Report.

<sup>11</sup> Plant, A., 1934, "The Economic Aspects of Copyright in Books" *Economica, New Series* 1(2):167-195 and Plant, A., 1949, "Patent and Copyright Reform" *The Three Banks Review*(3):3-21.

<sup>12</sup> Landes, W.M. and R.A. Posner, 2004, *The Political Economy of Intellectual Property Law*, Washington, D.C.: AEI-Brookings Joint Center for Regulatory Studies.

<sup>13</sup> Boldrin and Levine (op. cit, note 8, p.22-23) attribute this to the "a systematic and illegal "hit and destroy" private war" against unauthorised production of sheet music in 1902 in the USA. This led to a change in US law making copyright violation a matter for the US penal code.

<sup>14</sup> Some years ago Australia agreed to the extradition of a young man to face copyright offence charges in the USA. In the UK 22-year old Richard O'Dwyer currently faces extradition for providing links to download sites on his webpage (see Guardian Weekly, 13 July 2012, pp28-29). This case is discussed by Australian Patent Attorney Mark Summerfield at <http://www.cla.asn.au/0805/index.php/articles/articles/extradition-to-us-is-doubly>

<sup>15</sup> Bonadio, E., 2011, "File sharing, copyright and freedom of speech" *European Intellectual Property Review* 33(10):619-631.