



Limitless Information – The Challenge for Copyright: A Panel Presentation at the CCI Symposium

Brian Fitzgerald, John Gilchrist, Anne Fitzgerald, Kylie Pappalardo,
Kunle Ola, Ezieddin Elmahjub, Benedict Atkinson
*Australian Catholic University, Australia*¹

Commentary by Ian Hargreaves

Cardiff University, Wales

Introduction

*Brian Fitzgerald and John Gilchrist*²

This CCI funded research explores the underlying tension under the current copyright law between freedom and control, market and monopoly and free use and ownership rights.

We are interested in investigating how copyright law and networked technology can work together to better service social, economic and cultural needs.

This can be done by:

- 1) Reforming copyright law (for example should Australia introduce a fair use provision, as the Australian Law Reform Commission has recently suggested).
- 2) Creating new arguments of law that shape copyright law (like those based on the Australian Constitution)
- 3) Looking at new ways of using the current copyright system to achieve better synergy with networked technology (for example the Creative Commons project).

¹ See biographical details for each contributor at the end of this paper.

² The name(s) of the author(s) of each section are given at the head of that section.

The first two paths are hard fought. The process of law reform in the area of copyright law is gridlocked due to established interests on all sides. The prospect of new arguments - for example those based on the Australian Constitution - being accepted in the shorter term is low. The only viable option with the potential of immediate impact is the third path.

A tremendous example of this third path and one which our research group has been leaders in achieving is the application of Creative Commons licenses to Government or Public Sector Information (PSI). There is ample evidence in many reports here and overseas such as the UK, USA and the European Union, that the release of PSI is beneficial to society and the economy as a whole in that it promotes accountability of government, better engagement with citizens and helps spark social and economic activity.

Here are six short perspectives which commence with Anne Fitzgerald describing the revolutionary role that Creative Commons licensing has had in the management of copyright to better fit the digital age. In subsequent papers John Gilchrist provides a critique of two aspects of the recently released report of the Australian Law Reform Commission (ALRC) entitled *Copyright and the Digital Economy* in the light of the wider values inherent in the release of public sector information, and the needs of government, Kylie Pappalardo considers how Australian intermediary liability law governing ISPs can be amended and interpreted to better account for user interests, Kunle Ola explains the fundamental importance of the Open Access movement to social, health and economic development in Nigeria, Ezieddin Elmahjub provides an Islamic perspective on introducing an open information policy in the Middle East and North Africa and Ben Atkinson critically explores the embedded values in copyright as a private property right.

All these papers in one dimension or another explore how the law and management of copyright can better encourage access to knowledge and the promotion of creativity in the digital age and foster the common good.

The Creative Commons Experience from an Australian Perspective

Anne Fitzgerald

Copyright – in common with other forms of intellectual property protection – evolves over time as new means of generating, capturing and distributing creative and informational works are invented and adopted by businesses and the community. This kind of transformation has been ongoing since the emergence of digital technologies and networks over the last 30 years.

In shaping copyright law and practice in the face of the challenges of the information age we need to adopt a broad perspective if we are to achieve workable, pragmatic outcomes. At the outset it is essential to understand that copyright law consists of much more than the text of the Copyright Act and Copyright Regulations. When we consider copyright law we also need to take into account the interpretation of the legislation by the courts; unwritten or uncodified understandings about copyright (such as the theoretical bases for the recognition of copyright interests); how copyright is transacted through contracts and licensing; and the technologies that are increasingly used to manage copyright.

Consequently, as we engage in the task of shaping copyright for the digital, networked environment we should not restrict the focus of our attention to the legislative dimension of copyright law, but we also need to take into account how copyright works and is managed in practice. Reform of copyright law and practice can be achieved at various levels and the starting point is not necessarily the statutory text. Changes in culture and practice may in fact be more relevant than changes to the legislation and the solution may involve technological implementation.

When we approach copyright reform from this perspective, we can see how Creative Commons – a standardised, technologically enabled, international system of copyright licensing designed for use on digital content – fits into the picture. The Creative Commons (CC) licences emerged as a direct response to the central problem that had been identified through the 1990s as the internet was opened to the community at large and digital content was increasingly being distributed online. The issue which arose was how can internet users create, find and share copyright materials – for remix and reuse – without encountering the risk of copyright infringement (and the increasingly onerous civil and criminal penalties it attracts).

After some years of exploring various models, the CC founders in 2002 launched the first suite of licences, at the heart of which is the principle that copyright can and should be exercised and managed to forge open access to content and enable it to be reused. The CC licences were born digital – from their inception they were conceptualised primarily as a legal tool applicable to digital content distributed online. While recognising and asserting copyright, the CC licences clearly signal that most of the extensive bundle of rights held by the copyright owner will not be exercised to prevent use by others while, importantly, retaining the content creator's right to be attributed and for information about the work and its origins to be retained. We are now on version 3.0 of the ported (country-specific) CC licences and a new international version (version 4.0) was launched in November 2013.

The success of the CC licensing approach in just over 10 years has been little short of revolutionary. The licences are being extensively used, in all sectors and worldwide. A conservative estimate is that there are more than 500 million CC-licensed works already

in circulation and the uptake of CC licences has been boosted since content platforms (such as Flickr, YouTube, SoundCloud) introduced licensing/marking functionality which enables users to choose and attach a CC licence at the point of uploading their content to the platform. The numbers are staggering: the whole of Wikipedia and Wikimedia Commons are licensed under the CC Attribution or CC Attribution Share Alike licences (some 30 to 50 million items); around 380 million images on Flickr are licensed under one of the 6 CC licences; more than a quarter of a million peer-reviewed academic journal articles have been published in open access journals under CC licences.

However, perhaps the most stunning success of CC worldwide has been its rapid adoption by governments and in the education and research sectors. This part of the story has its origins in the work done by QUT legal academics and Queensland government lawyers and information managers. Within 2 years of the CC Australian licence suite being launched in 2005, government was already actively investigating the potential for CC licences to be used to open up the vast stocks of government copyright material for access and reuse. The appropriateness of this approach in managing the wealth of public sector and publicly funded information and research output was confirmed by the 2008 *Venturous Australia – Building Strength in Innovation* report of the innovation inquiry headed by Dr Terry Cutler, which recommended the adoption of CC licences for government copyright materials, followed by the 2009 *Engage: Getting on with Government 2.0* report of the taskforce chaired by Dr Nicholas Gruen which took a further step and recommended that the least restrictive CC licence – the CC Attribution licence – should be the default licensing position for public sector copyright materials.

The widespread adoption of CC licensing by the creative, government, research and education sectors around the world in just over a decade since the licences were first launched has fundamentally changed the management of copyright in the online environment. The CC experience demonstrates that the process of adapting copyright to better suit the digital context cannot be approached solely through legislative reform but requires a broader perspective based on the management of copyright in practice.

Government, Copyright and the Digital Economy

John Gilchrist

Access to Government information and the ALRC Report

Sydney University Press will later this year publish a book which I have finalised as part of a post-doctoral fellowship with CCI. The book is entitled *The Government and Copyright* and it is the first publication in Australia which looks at all three roles of government under the *Copyright Act 1968* (Cth) - the role of government as copyright owner, the preserver of copyright material and the user of copyright material. It contains a number of law reform and policy recommendations in each of these roles.

What I propose is not to canvass the book, but to look at two aspects of the recently released report of the Australian Law Reform Commission (ALRC) entitled *Copyright and the Digital Economy* (Report 122) and to contrast that with some of my views expressed in *The Government and Copyright*.

First, the ALRC recommended the adoption of a fair use concept as a defence to copyright infringement. This defence can apply to any situation provided it falls within certain principles that in essence do not conflict with a normal commercial exploitation with the copyright work. This recommendation frees up the existing law of fair dealing which is limited to certain categories of application, but in essence the recommendation still represents a default – the law is the default. One weakness in relying on fair use and the principles applicable to it is the overall lack of certainty in its application. Seeking to rely on US case law, which may or may not be persuasive, or industry guidelines, is not enough. Users need to have some certainty in the application of the law and it is the proper role of the law to provide that certainty. This is something that the Franki Committee (*Report of the Copyright Law Committee on Reprographic Reproduction*) faced in its 1976 recommendations on fair dealing for research or study. Nor do I think the law - applicable across all copyright material - is the answer to public interest considerations in accessing government information. The ultimate answer to the public interest considerations in accessing and re-using government information lies in policy and not the law.

The ultimate answer is policy which is consistent with freedom of information, policy to promote the accountability of government, policy to better engage with citizens, policy in preserving national culture and heritage and policy to open access to government information to spark cultural, social and economic activity in all sectors of society

The public interest in accessing and re-using government copyright material is in most areas of copyright material produced by government overwhelmingly strong when viewed in the light of these policy values. It goes beyond the normative balance presently applied by the law.

Open content licensing offers much more than fair use and has been adopted by the federal government and some State Governments and government instrumentalities. The pioneering work in Australia in this movement was done here within the Queensland Government led by the Fitzgeralds and Neale Hooper.

In this area at least, law reform of itself is encouraging but not sufficient. It is also constrained by the provisions of the Berne Convention to which most countries of the world, including Australia, are party. Not only government, but all institutions and individual creators should face decisions about whether access to use and re-use their

works should be limited by the law or be the subject of accepted licensing norms such as Creative Commons licensing which offer various forms of certainty.

Government use of copyright information

The second aspect of the ALRC report deals with the Government use of copyright material owned by others. While the ALRC Report encouragingly accepts the government's right to rely on fair use, it leaves any wider needs of government too much to private licensing arrangements between copyright owners and government, 'so that more commercial and efficient agreements can be made between the parties'. The ALRC Report did warn that the criticism will be that this comes at a cost – namely, uncertainty and litigation. The needs of government - which cover civil and military emergencies - are varied and may be substantial - and should not be trammelled by uncertainty. The law should reflect the capacity to government to do any act for its services subject to appropriate compensation, just as the copyright law and the patent law do now. It is in the public interest to do so. The practice of the Commonwealth Government at least has been to use the crown use provision as a default – and to enter into licence arrangements where practical and I think this should continue. I have argued this view in more detail in my forthcoming book *The Government and Copyright*.

Rethinking Intermediary Copyright Liability

Kylie Pappalardo

Copyright laws contribute to struggles over who gets to create and control cultural meaning.³ To a very real extent, they control our ability to participate in the world around us. For copyright users, experiencing, discussing (sometimes by sharing), experimenting and tinkering with cultural products offers opportunities for self-fulfilment; it is a kind of “antidote to the poison” of an empty life.⁴ Users have legitimate interests in making their own choices about when, where, how and under what conditions they will engage with creative works. They have legitimate interests in using cultural products for self-expression, self-determination and open-ended play. These activities can contribute to personal growth, social cohesion and new forms of creativity.

These points are not new, particularly for the creative industries. But they *are* new for intermediary liability law, which persistently excludes users from legal consideration, obscures their role in the Internet economy, and ignores the impact that case law holdings can have on the way that users interact and engage online.

³ Madhavi Sunder, “Intellectual Property and Identity Politics: Playing with Fire” (2000) 4 *Journal of Gender, Race & Justice* 69, 70.

⁴ William W. Fisher, “The Implications for the Law of User Innovation” (2010) 94 *Minnesota Law Review* 1417, 1469-1471.

Intermediary liability law considers whether intermediaries, like ISPs, should be held liable for acts of copyright infringement committed by users on their networks. My doctoral research considers how Australian intermediary liability law can be amended and interpreted to better account for users' interests.

In intermediary liability cases, rights holders seek remedies that are ultimately targeted at users, not, in fact, intermediaries. They seek orders that require ISPs to disconnect users from the Internet, block certain websites from access by users, or prevent users being able to use technology in particular ways. Yet users' interests are very rarely represented in intermediary liability cases. Instead, we treat these as disputes concerning only two parties: copyright holders and technology intermediaries. The questions we ask focus only on protecting copyrighted content from unlicensed use, on the one hand, and, on the other, not overwhelming intermediaries with exorbitant costs for altering their systems to constrain what users can do.

An example: in 2005, the Federal Court of Australia decided the case of *Universal Music v Sharman*.⁵ Sharman Holdings distributed music file-sharing software similar to Napster. On the evidence, Sharman clearly distributed this software with the intent that it be used for copyright infringement; it was clearly a 'bad actor'. But for technical reasons to do with the construction of our copyright laws, the case was argued on the basis that Sharman could exercise some control over the users of its software.

Copyright owners argued that Sharman could exercise control because it could install a filter that prevented users from accessing particular musical works. This filter could operate at a broad level, such as by filtering all content with an .mp3 file extension, or it could operate on a metadata level, for example by filtering any content that included band names like the word 'Powderfinger' in its metadata. In order to implement this filter, users would need to upgrade their software. The problem was that users were unlikely to upgrade if it would stop them accessing the content they wanted. The plaintiffs argued that Sharman could force users to upgrade by driving them mad with pop-up boxes so that the existing version of their software was rendered virtually unusable.

The *Sharman* court accepted these arguments and found for the copyright owners. The court considered it perfectly acceptable to harass users with pop-up notifications to force a software upgrade and to thwart users' search attempts by filtering out desired content. It was of little concern to the court that users might be prevented from accessing content for fair dealing purposes or that a filter was likely to accidentally block licensed content, such as emerging artists voluntarily distributing their own music. The court was also untroubled that broad keyword-based filters might prevent the sharing of content that users had themselves created, such as parodies or covers of existing works. Importantly,

⁵ *Universal Music Australia Pty Ltd v Sharman Licence Holdings Ltd* [2005] FCA 1242.

the court gave no consideration to why users might have legitimate interests in accessing and sharing copyrighted works.

It is not my argument that users should be permitted to do whatever they want with creative works to the detriment of the copyright owner. Nor that intermediary liability laws should not condemn bad actors like Sharman in order that users not suffer. But intermediary liability laws do need to get a lot better at accommodating users' interests, because users matter.

So how can the laws do this? The most obvious and effective way is for legislators and judges to recognise that users are real people, living in a culturally contingent world. Intermediary liability cases tend to treat users in the aggregate, as thieves or pirates who succumb to their baser instincts to infringe copyright at any opportunity, unless they are somehow prevented in doing so by intermediaries. But this is not a realistic – or fair – view of how users interact online.

Another way that the law can better accommodate users is by paying closer attention to exceptions to copyright infringement. Where possible, these exceptions should be interpreted broadly in order to recognise users' interests in autonomy, self-expression and play. The recent ALRC review made recommendations to this effect – that Australia adopt a fair use exception or more expansive fair dealing exceptions. What this would mean for intermediaries is that they should not take absolute actions, such as disconnecting people from the internet, when less drastic actions are available that would better preserve fair dealing uses and respect user interests.

Ultimately, however, this is a point of principle: that intermediary liability laws should not pretend to apply to only two parties, when in fact they affect three.

Open Access in Nigeria

Kunle Ola

Open access is a powerful solution to the barriers that researchers in developing and transition countries face⁶. In turn, it aids the development of those countries. It may surprise many in the global north to know that scholars and researchers in Nigeria and other developing countries are unable to access most journal articles required for their research due in most part to the high cost of journal subscriptions and to copyright restrictions⁷.

⁶ Kuchma Iryna, *Making research more relevant to the world*, EIFL(2014), available at http://www.eifl.net/news/making-research-more-relevant-world?utm_source=EIFLall&utm_medium=email&utm_campaign=newsletter68.

⁷ Olukunle OLA, *Fundamentals of Open Access*, 36 E.I.P.R 112(2014).

Open Access is about free, immediate, unrestricted, online access to peer-reviewed literature. It is not about the total freedom of all materials, although some may wish it extends that far, but rather the focus is on peer-reviewed literature. This focus is important because peer-reviewed literature contains the products of research and form the building blocks with which further research is conducted⁸.

Developing a policy framework for Open Access to knowledge in Nigeria is imperative to Nigeria's development. Nigeria like other developing countries face several developmental challenges from poor education, to high infant and maternal mortality rates, to poverty, starvation and corruption and there are researchers within and outside Nigeria investigating the many developmental questions in Nigeria with a view to getting answers and proffering solutions to these problems. The over 130 universities in Nigeria⁹, the many research institutes of agriculture¹⁰, health research institutes¹¹ as well as the innovation related research institutes¹² abound with researchers working on answering different developmental question but they lack the requisite tools.¹³ They lack access to peer-reviewed literature.

In the knowledge based economy, the transacting currency is access and access is the key to knowledge and knowledge is indispensable if there will be development. The challenge this generation faces is not one of a lack of knowledge, (if anything, there is an explosion of knowledge¹⁴) rather it is a lack of access to available knowledge. The Internet with its ability for instantaneous distribution of information coupled with the aged long disposition of academic authors to freely share their research was acknowledged by the Budapest Open Access Initiative as the bedrock of open access¹⁵.

⁸ Isaac Newton, *From a letter written by Isaac Newton to Robert Hooke, 5 Feb. 1676, (1676).*

Where he noted that if I have seen further it was by standing on the shoulder of giants.

⁹ National Universities Commission, *List of Approved Universities in Nigeria*, National Universities Commission. 7 (2014), available at

<http://www.nuc.edu.ng/nucsite/File/Monday%20Bulletin%20MB%202014/MONDAY%20Bulletin%2003-02-2014.pdf>.

¹⁰ FMARD, *Federal Ministry of Agriculture and Rural Development*, available at

<http://www.fmard.gov.ng/About-us-new>.

¹¹ National Institute for Medical Research, *Research for National Health*, available at

<http://www.nimr-ng.org/>.

¹² Federal Republic of Nigeria FMST, Science, Technology and Innovation (STI) Policy, available at

<http://workspace.unpan.org/sites/internet/Documents/UNPAN048879.pdf> (Federal Ministry of Science and Technology ed., Federal Government of Nigeria 2011).

¹³ LESLIE CHAN, et al., *OPEN ACCESS AND DEVELOPMENT: JOURNALS AND BEYOND* (Institute of Development Studies (IDS). 2012).

¹⁴ John. Moravec, *Infoxication 2.0*, Education Futures(2008), available at

<http://www.educationfutures.com/2008/10/24/infoxication-20/>.

¹⁵ Mellisa Hagemann, *Ten Years on, Researchers Embrace Open Access*, available at

<http://www.opensocietyfoundations.org/voices/ten-years-on-researchers-embrace-open-access>.

To achieve open access in Nigeria, the two models suggested at the Budapest Open Access Initiative, namely, Self-Archiving and Open Access Journals are the way to go. Adopting these open access strategies in Nigeria promises several advantages, some are immediate while others may take some time, but overall, open access will provide the platform for both local and international sharing by enabling Nigerians the opportunity to share locally generated knowledge amongst themselves and with the international community as well as affording them the opportunity to share from globally accessible knowledge.¹⁶

Open access when adopted and implemented become a multi-faceted tool that affords the unique opportunity for **accessibility, visibility, impact and utility** to peer-reviewed research generated by Nigerians and others in different parts of the world and has the potential of aiding the social, health, educational, economic, environmental, and virtually all developmental related sectors in Nigeria.

An Islamic Perspective on Introducing Open Information Policy in the Middle East and North Africa

Ezieddin Elmahjub

Countries in the Middle East and North Africa (MENA) are all developing countries, and development strategies have dominated official and public discourse for decades. In the arena of the management and regulation of knowledge and cultural information, this development discourse has led to an uncritical acceptance of the role of strong intellectual property (IP) regimes in supporting growth.

Leading scholars in development economics, such as (Sen 2000) and (Nussbaum 2011), argue that promoting development requires essentially enhancing people's capabilities and essential freedoms.¹⁷ Linking this to the management and the regulation of knowledge and cultural production means that it is not enough to introduce strong IP laws to incentivise and increase knowledge and cultural production. It is equally important to consider the design of policies and institutions that lead to the wide availability and access to knowledge and cultural resources, as this has a great potential to increase people's capabilities and freedoms to learn, think, imagine, live healthy lives, and participate in the cultural and economic development of their nations. Alternative modalities to IP based on openness, sharing and collaboration (e.g. A2K, Creative Commons, Wikipedia, open source projects.) can equip people with the opportunities to enhance their capabilities to contribute to the overall development of their societies.

¹⁶ Budapest Open Access Initiative, *Ten years on from the Budapest Open Access Initiative: Setting the default to open*, available at <http://www.opensocietyfoundations.org/openaccess/boai-10-recommendations>.

¹⁷ Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard University Press, 2011); Amartya Sen, *Development as Freedom* (Anchor Books, 2000).

This research is the first of its kind. Although there is a small handful of papers addressing IP within the region, (Azmi 1996; Carrol 2001; Cullen 2010; Jamar 1992; Khory 2003; Price 2007; Raslan 2007), and one work, (Rizk & Shaver 2010) which considers A2K in Egypt, there has been no sustained attempt to use Islamic sources to further development interests using open IP models. The religious-based cultural approach increases the probabilities for wide acceptance of open information policies as part of the public policy framework in the region in relation to the management of knowledge and cultural production and dissemination.

I examine the degree to which the local and cultural contexts in the MENA region, which are informed by the sources of Islamic Shari'a—namely the Qur'an and the teachings of the Prophet Muhammed—can support introducing openness, sharing and collaboration as modalities for knowledge and cultural production and management.¹⁸ My preliminary research suggests introduces two findings:

First, Islamic sources mandate the pursuance of collective development strategies. Islamic legal philosophy, which determines the objectives of lawmaking in Islamic societies, instructs lawmakers to ensure that laws promote the public interest of societies by securing, among other things, promoting health, intellect and living standards. I find that the general framework of Islamic legal philosophy aligns with modern trends in human development as manifested in the research of Sen, Nussbaum and as reflected in Human Development Report introduced under the auspices of the United Nations.

Secondly, there are at least four principles derived from the Qur'an and the teachings of the Prophet that can be read to support openness as a modality for managing knowledge and cultural production. These principles are: Stewardship (*khilafah*), non-concentration of wealth (*tadawul*), cooperation and sharing (*takaful*) and dissemination of knowledge (*nashr al-ma'rifa*). These principles support public ownership of knowledge and culture as supplementary mechanism to proprietary regimes and encourage wide diffusion, sharing and collaboration in accessing and creating knowledge and cultural products.

Policy makers in the Islamic world and particularly in the MENA region should not only invest in creating the infrastructure for strong IP laws, but also consider the design of institutions that capitalise on openness, sharing and collaboration as modalities of producing and managing knowledge and culture. Drawing upon Islamic principles in relation to the ownership and dissemination of knowledge as well as the Islamic traditions in relation to collaboration, which support collective action to knowledge and cultural

¹⁸ Ezieddin Elmahjub, *The Protection of Intellectual Property in Islamic Shari'a and the Development of the Libyan Intellectual Property System* (PhD dissertation submitted to Queensland University of Technology, 2014).

production, this research will develop the elements of the *Takaful Project*. “Takaful,” the Arabic term for “cooperation”, provides a similar reference point which, in the global North is understood as openness, collaboration and sharing, and which is a feature of open IP regimes.

The goals of the *Takaful Project* include:

1. Establishing networks among the public, universities and research centres to raise awareness of the importance and efficacy of sharing and cooperation as modalities of knowledge and cultural production in the digital age;
2. Helping individuals and organisations to start up new collaborative projects or participate in the development of existing ones by providing culturally sensitive guidelines for sharing of information resources;
3. Providing culturally-relevant bases for establishing A2K projects in the MENA;
4. Drawing people’s attention within the MENA (especially those in educational sector) to the importance of using the internet to upload and access OA materials and capitalise on them;
5. Proposing guidelines for the adoption of OA policies with regard to public sector information and publicly funded research within the MENA;
6. Developing funding models for the establishment of OA repositories and support initiatives which might increase their number.

History, Myth and Information Dissemination

Benedict Atkinson

I propose discussing information dissemination from the perspectives of history, myth and aspects of the lives of two people born about 100 years apart, Franz Kafka and Aaron Swartz.

I begin with the Bronze Age, when two civilisations appeared in the Middle East. The first civilisation is that of Mesopotamia. The second is that of Egypt which emerges in about 3000 BC. About 2100 BC, organised civic society appears in China, beginning dynastic government that continued for 4000 years.

These societies have common characteristics. All were distinguished by invention of writing scripts and recognition of numbering systems. They developed justice and eschatological systems, and performed extraordinary feats of civil engineering and architecture. None departed from monarchy, the rule of one. By contrast, ancient

Athenian society developed a democracy and Roman society a republic. Each existed for a considerable period.

It is not surprising, therefore, that while Athens and Rome developed profuse literatures, those of Babylon and Egypt are negligible, while China's focused on religious and social exposition that did not usually challenge authority. In these monocratic societies, religion and literature performed a propaganda function: they justified the state (ie, the monarch or sovereign) and expressed its will. The sovereign disseminated information. The king, pharaoh, emperor decided what his subjects could know. His fiat determined their knowledge, and their non-literacy determined how they could know: by proclamations, stories, temple wall paintings and so on. Not surprisingly, the sovereign's subjects were ignorant and conformist.

In Athens and Rome public discourse was more sophisticated, but writers, poets and philosophers could not afford to offend authorities. The most famous victim of official censure is Socrates, who asked too many questions. Today, it is still possible to ask too many questions. A person might, like Julian Assange, be corralled in a willing embassy, or forced to find refuge in a foreign capital, like Edward Snowden.

Why the sovereign desires to punish?

I propose discussing two Greek myths, one concerning the Titan Prometheus, and the other the first woman, Pandora. Prometheus brought fire to mankind, and Pandora, of course, her box, or rather, jar. Prometheus, like Assange and Snowden, acted without authorisation. Covertly, he supplied fire to mankind. For this infraction, Zeus, chief god, caused him to be tied to a rock and an eagle to visit him daily to pluck out his liver, which instantly regenerated.

Zeus intended the punishment to take place daily for eternity. We are shocked at so cruel and inordinate a response. For what offence? Prometheus brought fire to mankind. What does fire do? It lights up darkness. Symbolically, fire represents knowledge. It lights what was previously unknown, and by so doing, enlighten us. Prometheus gave to mankind the means to enlightenment, knowledge. And for this act of public good, Zeus sought to punish him forever. Fortunately, Heracles, on one of his labours, freed Prometheus from his confinement. Why such inordinate response?

Perhaps the answer is that sovereignties, like bad parents, will not tolerate refusal. The Greek gods were not satisfied with Zeus's punishment of Prometheus. They wanted to punish mankind for its temerity in receiving the gift of fire, or symbolically, enlightenment.

As punishment, the gods sent Pandora, the first woman, to live among men. The idea that men are punished by coming into contact with women is ridiculous, but Pandora's inadvertent agency did effectuate the gods' intended punishment. She opened her jar out of curiosity and the evils that ever since have beset humans escaped. The gods punished humans, for the sin of receiving enlightenment, with the problems and afflictions of mortal life. For humans, the punishment is forever.

I want to conclude by talking of Franz Kafka and Aaron Swartz. Kafka was born in 1883 in Prague and Swartz in 1986 in Chicago. Kafka died 90 years ago. Swartz committed suicide in 2013. Kafka is known for dramatic works exploring human alienation from authority, a cause of self-alienation. Swartz was a gifted programmer, a 'kid genius' according to Professor Lawrence Lessig, and later, an activist for dissemination of information.

The link between the two is Kafka's most famous work, *The Trial*, published in 1925. The protagonist is Josef K, or K, arrested on his 30th birthday without charge. Charge and rules of process and trial are unknown. In a world of nightmare, authority and justice are unknowable. On eve of his 31st birthday, two men take K from his apartment to a quarry and one executes him with a butcher's knife.

Aaron Swartz read *The Trial* after indictment by the US Justice Department for wireless fraud and theft. In 2010, he hacked into MIT's library system to make download from JSTOR's academic publishing repository over 1 million articles, which he proposed to make public online. Swartz wanted to demonstrate that access to knowledge is something like a public right. The Justice Department informed Swartz that he faced a cumulative maximum penalty of \$1 million in fines, 35 years in prison, and asset forfeiture. The department offered a plea bargain, which Swartz refused. Pressured and depressed, he committed suicide in January 2013.

Months before he died, he wrote on his blog of *The Trial*: 'I read it and found that it was precisely accurate – every single detail perfectly mirrored my own experience.' Swartz committed a legal wrong for public good. However, the response of the sovereign to infraction, like that of Zeus to Prometheus, was inordinate. Authority treated him with implacable severity, and threat of punishment that would trail him for life.

Again the question arises, why does the sovereign inflict inordinate punishment on those concerned with doing public good? Rationally, the question is difficult to answer. It may be that a sovereign reacts endogenously, without thought, like a sea monster – or a Greek god. Even in the age of digital communication, regulation restricts, while the unthinking sovereign enforces. For real change to occur, Heracles must free Prometheus.

Commentary – Is Copyright Reform Impossible?

Ian Hargreaves

Is Copyright Reform Impossible? The short answer is: No. It can't be impossible, because it's occurring. If you look at the way that the treatment of copyright is framed in Canada today, versus where it was five years ago, it's quite a big change. You would certainly say the same about Israel. You would possibly say the same about Singapore and Korea. And who knows – maybe people will soon be able to say the same about the United Kingdom.

But we don't know yet – the UK reforms that I advocated, and which have been accepted in principle by the government, have been attached to three different legislative vehicles, which have still not all completed their political journeys. The reforms already agreed cover the treatment of orphan works, the regulation of collecting societies, and the rights of designers. But the really controversial bit concerns exceptions and limitations to copyright. Here, the UK – like any other member of the European Union – is able to have access to a slate of exceptions – but it has not taken advantage of those exceptions up to now. I recommended that the UK should take the maximum advantage of those exceptions – which cover things like research, copying for personal use, parody and some educational usages, along with copyright-based products and services for the disabled. I recommended that these things should be taken out of copyright.

Copyright reform is made significantly more likely by a lot of what was being talked about in the previous contributions, including the open access movement. The thing about open access and Crown copyright is that it is, by and large, a decision for the public sector; a set of decisions that governments can make, whether that concerns openness of access to the government's own data or to data over which government has serious leverage. Politicians of the Right tend to like it because they see it as weakening the bloated engines of government, and politicians of the Left – or liberal-minded politicians of the Left – see it as empowering the citizen and enriching democracy.

When it comes to open access to peer-reviewed academic publications, the argument gets more complicated because the private sector is heavily involved; the main scientific and academic publishers in the world are shareholder-owned businesses – they believe that they have the right to be part of any renegotiation of copyright terms. This is now happening and across the UK and Europe, there has been a significant move to more open access. That is a favourable piece of context for the reform of copyright.

Here's how I think copyright reform is going to proceed. Three things are happening: the first is this trend toward open access; the second is a very unsatisfactorily slow improvement in the licensing of material. One of the biggest problems in commercial copyright is that it is very often the case that users can find material illegally much more

easily than they can find it legally. There's a lot of research to support the proposition that if material is made available legally and easily through the technology platforms that people are using or want to use, that people are willing to pay, but that's been a point that is not sufficiently regarded by the rights holder community. This is part of a third phenomenon, which is an insufficient regard in general to the interests of users in a digital context.

The longer that the copyright holding community resists obviously needed change, the greater the danger that the system's illogical, incomprehensible and capricious features will bring it further into disrepute and so render it eventually ineffective.

So, the question is not whether copyright reform is possible, but whether it is going to occur to the extent needed to make copyright effective again as the thing that creators need it to be: namely, a way of enabling creative artists to achieve a fair return from the commercial market for their work, and therefore in the language of economics, to incentivize further production. That's what copyright is supposed to do and I think it's much more likely to be able to do that if it is reformed.

The biggest dilemma that the Internet has caused for copyright is that the Internet requires routine, massive copying in order to function. We need to be able to make a distinction in law – at the centre of law, not on the edge of it, by way of exceptions – between what is sometimes called the expressive purpose of a work and the kind of copying which is non-expressive, which is simply the accumulation of caching data or any other kind of non-expressive data – for example, the kind which is needed in the important and rapidly growing area of data analytics.

One of the things that the copyright industries in the media content domain have failed to understand, is that the game in which they consider themselves the dominant players in, is now a game that includes all scientific and medical research, and the huge emerging world of data analytics, which is going to underpin the next big wave of digital change – the provision of digitally afforded services. If you take that very large constituency of interests, it sits in tension with the views of traditional copyright owners. Governments cannot therefore avoid asking questions about the trade off between innovation and economic performance and the 'no-change' stance of rights holders with regard to copyright.

I hope that politicians will also be influenced by some of the other arguments made here today, such as the importance of access to knowledge in less developed economies and among the world's poorer people. Taken together, these things among to an irresistible force of argument for reform of copyright, whatever the Attorney-General of Australia may say. Change should happen and I think it will.

Contributors to this panel

Professor Brian Fitzgerald

BA (Griff) LLB (Hons) (QUT) BCL (Oxon) LLM (Harv) PhD (Griff)

Dean and Professor – Thomas More Law School, Australian Catholic University

Brian Fitzgerald studied Arts at Griffith University (with a focus on media, communications and film) and Law at the Queensland University of Technology graduating as University Medallist. He holds postgraduate degrees in law from Oxford University and Harvard University. Brian is an internationally respected Intellectual Property and Information Technology/Internet lawyer who has pioneered the teaching of Internet/Cyber Law in Australia and beyond. He has published articles on Intellectual Property and Internet Law in Australia, the United States, Europe, Nepal, India, Canada, and Japan and his recent co-edited/authored books include *Copyright, Digital Content and the Internet in the Asia Pacific* (2008); *Access to Public Sector Information: Law Technology and Policy* (2010); *Knowledge Policy for the 21st Century* (2011); *Internet and E Commerce Law* (2011); *Copyright 1709-2010* (2011); *A Short History of Copyright* (2013).

Dr John Gilchrist

BA, LLB, LLM (Mon), PhD (QUT) GCHE (UC)

Senior Research Fellow, ACU Academy of Law

John Gilchrist studied Arts and Law at Monash University and hold postgraduate degrees and qualifications from Monash University, the Queensland University of Technology, the Australian National University and the University of Canberra. He is also a Fellow of the Higher Education Research and Development Society of Australasia. As a young lawyer he was the Secretary of the Copyright Law Committee on Reprographic Reproduction (the Franki Committee) and more recently a member of the Copyright Law Review Committee on its Crown Copyright reference. He has published numerous articles on government copyright issues.

Dr Anne Fitzgerald

Barrister at Law

BSW (Qld) LLB (Hons) Grad Dip Welfare Law (Tas), LLM (Lond) LLM, JSD (Col)

Anne Fitzgerald is an intellectual property and e-commerce lawyer. She studied Law at the University of Tasmania and holds postgraduate qualifications from University College London and Columbia University (New York). Anne has served terms as a member of the

Advisory Council on Intellectual Property (ACIP) and the Copyright Law Review Committee's Expert Advisory Group, and was a consultant to the *Venturous Australia* review of Australia's innovation system. She led Creative Commons Australia's engagement with government, overseeing the adoption of CC licences as the default copyright licence for public sector materials by the Commonwealth and several State governments. Anne has published widely on intellectual property and internet law. Her latest major (co-authored) book is *Internet and E-commerce Law, Business and Policy*, Thomson Reuters, Sydney (2011). For other publications see <http://eprints.qut.edu.au/view/person/Fitzgerald,_Anne.html

Kylie Pappalardo

BCI, LLB (QUT), LLM (GULC)

PhD Candidate, Australian Catholic University

Kylie Pappalardo studied Creative Industries (majoring in creative writing) and Law at the Queensland University of Technology graduating with first class honours. She holds a postgraduate degree in law from Georgetown University in Washington D.C. Kylie is currently a doctoral candidate at the Australian Catholic University, where her thesis examines the role and regulation of copyright intermediaries in the online economy. Kylie has worked for the Arts Law Centre of Queensland and as a research officer for the Open Access to Knowledge (OAK) Law Project (at QUT) and Creative Commons Australia. She has published articles on open access, open standards and copyright regulation.

Kunle Ola

LLB (UNIBEN), BL (NLS), LLM (UNISA)

PhD Candidate, Australian Catholic University

Kunle is an Intellectual Property/Copyright administrator and a senior government officer with the Nigerian Copyright Commission. He holds bachelor law degrees from the University of Benin and the Nigerian Law School, a masters in law from the University of South Africa, a specialization qualification in Intellectual Property jointly awarded by the World Intellectual Property Organization (WIPO) Academy and the University of South Africa and several certifications from the WIPO Academy.

Kunle has represented Nigeria on the Committee for the Development of Intellectual Property (CDIP) and the Standing Committee for Copyright and Related Rights (SCCR) at WIPO, has been a member and secretary on several governmental committees on the review of the Nigerian Copyright Act and the harmonization of all Intellectual Property Laws in Nigeria. He is currently a PhD candidate at the Australian Catholic University.

Dr Ezieddin Elmahjub

LLB (valedictorian) Master of Civil Law (Tripoli University) LLM, PhD (QUT)

Dr Ezieddin Elmahjub has a PhD in Law from the Queensland University of Technology. He worked as a legal consultant at Zahaf and Partners law firm in Tripoli/ Libya advising multinational companies about the Libyan legal system. He has also worked as reader and then as a lecturer at the Faculty of Law/ Tripoli University. He is currently holding a research position at Queensland University of Technology researching on IP, Islamic Law and Development.

Benedict Atkinson

BA (Hons), LLM (Hons 1) (Syd)

Benedict Atkinson has worked for legal and policy agencies of Commonwealth and State governments, especially in the area of intellectual property. He helped implement the Commonwealth Government's digital agenda reform program and his recommendations led to reform of the NSW Government's administration of copyright policy. He is completing his PhD at Australian Catholic University and is author and co-author of several books on copyright law and history, including *A Short History of Copyright* (Springer, 2013) and *The True History of Copyright – The Australian Experience 1905-2005* (SUP, 2007).

Prof Ian Hargreaves

MA (Cantab)

Professor of Digital Economy, Cardiff University, Wales

Ian Hargreaves's interests include the impact of digital communications technology on journalism, media, intellectual property issues and the creative economy. In 2011, he led a review of intellectual property for the UK Government, published as [Digital Opportunity: a review of intellectual property and economic growth](#). The [recommendations of this review](#) have been adopted as the basis of Government policy. In 2010, he undertook a review of creative industries policy for the Welsh Assembly Government, [published in May 2010](#) and adopted as the basis for Welsh Government policy towards the creative sector. In 2011, the UK's Arts and Humanities Research Council awarded £4m to fund the development of a creative economy knowledge exchange hub, centred at the University of the West of England in Bristol. Hargreaves is a member of the management board of [REACT \(Research and Enterprise in Arts and Creative Technologies\)](#) and responsible for its engagement within Wales. He is also Principal Investigator in a £1.4m research project on Media, Community and the Creative Citizen, funded by the AHRC and the EPSRC under the Connected Communities programme. www.creativecitizens.co.uk.