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DON'T PANIC!: an unhurried critique of copyright and the potential for alternatives.

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DON'T PANIC!: An Unhurried Critique of Copyright and the Potential
for Alternatives.

A thesis submitted in fulfillment of the
requirements for the award of the degree of

Doctor of Philosophy

from

University of Wollongong

by

Christopher L. Moore, BCA, BA (hons)

School of Social Sciences, Media and Communication

2007

CERTIFICATION

I, Christopher L. Moore, declare that this thesis, submitted in fulfillment of the requirements for the award of Doctor of Philosophy, in the department of the Art, School of Social Sciences, Media and Communication, University of Wollongong, is wholly my own work unless otherwise referenced or acknowledged. The document has not been submitted for qualification at any other academic institution.

Christopher L. Moore

29 March 2007

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Abbreviations & Acronyms

ACTN	Advisory Committee for Trade Negotiations (US)
AFC	Australian Film Commission
AI	Artificial Intelligence
AIC	Australian Institute of Criminology
AIR	Association of Independent Record Labels
ALAI	Association Littéraire et Artistique Internationale
AT&T	American Telephone and Telegraph
ARPANET	Advanced Research Projects Agency Network
AUSFTA	Australia and United States Free Trade Agreement
BIRPI	United International Bureau for the Protection of Intellectual Property
BSAA	Business Software Association of Australia
BSD	Berkeley Software Distribution
CC	Creative Commons
CIE	Centre for International Economics
CIS	Critical Information Studies
CSS	Content Scrambling System
CRS	Congressional Research Service
CTEA	Copyright Term Extensions Act (1998, US)
DeCSS	Decrypted Content Scrambling System
DFAT	Australian Department of Foreign Affairs and Trade
DMCA	Digital Millennium Copyright Act (1998, US)
DRM	Digital Rights Management
EFF	Electronic Frontier Foundation
EU	European Union
EULA	End-User Licence Agreements
FCC	Federal Communications Commission (US)
FSF	Free Software Foundation
FTA	Free Trade Agreements
FPS	First Person Shooter
GATT	General Agreement on Tariffs and Trade
GNU	GNU Not UNIX
GPL	General Public Licence
GSP	Generalised System of Preferences
GST	Goods and Services Tax
HDTV	High Density Television
IDC	International Data Corporation
IPCR	Intellectual Property and Competition Review (Australia)
ISP	Internet Service Provider
IT	Information Technology
ITO	International Trade Organisation
IP	Intellectual Property
JSCT	Joint Standing Committee on Treaties
MCA	Music Council of Australia
MEAA	Media Entertainment Arts Alliance
MIT	Massachusetts Institute of Technology
MMORPG	Massively Multiplayer Online Role Playing Games
MPAA	Motion Picture Association of America
MUDs	Multiple User Domains/Dungeon
NAFTA	North American Free Trade Agreement
OSD	Open Source Definition

OSI	Open Source Initiative
OSS	Open Source Software
P2P	Peer-to-peer
PC	Personal Computer
QUT	Queensland University of Technology
RIAA	Recording Industry Association of America
SCC	Static Control Components
SDMI	Secure Digital Music Initiative
TPM	Technical Protection Measures
TRIPS	Agreement on Trade Related Aspects of Intellectual Property
UN	United Nations
UK	United Kingdom
US	United States of America
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation
XML	Extensible Markup Language

Abstract

This study contributes to the field of critical copyright studies through an engagement with the legal and cultural history of copyright doctrine. This thesis considers the prominent philosophies employed to justify copyright and investigates the logic of the incentive argument, which holds that creativity will not occur unless regulatory systems of enforcement are in place. It explores the effects of trade liberalisation and the US Free Trade agenda on contemporary global, American and Australian copyright regimes. This inquiry maps the intersections of copyright law, politics, commerce and digital cultural activities, examining both the conflicts and sites of possible amity in regards to the rights of owners and users of copyright protected materials. This thesis employs three case studies to provide a critique of alternative and complimentary systems of copyright management, examining the potential for copyright licensing schemes to contribute to the expansion of knowledge, innovative behaviours and open content production in the digital environment.

Keywords: Copyright, Australia and United States Free Trade Agreement (AUSFTA), Open Source, Creative Commons, Remix, Online Games.

One of the major selling points of that wholly remarkable book, *The Hitchhikers Guide to the Galaxy*, apart from its relative cheapness and the fact that it has the words “Don’t Panic!” written in large friendly letters on the cover, is its compendious and occasionally accurate glossary. For instance, the statistics relating to the geo-social nature of the universe are all deftly set out between pages 576,324 and 576,326. The simplistic style is partly explained by the fact that its editors, having to meet a publishing deadline, copied the information off the back of a pack of breakfast cereal, hastily embroidering it with a few footnotes in order to avoid prosecution under the incomprehensibly torturous galactic copyright laws. It is interesting to note that a later and wiliier editor sent the book backwards in time through a temporal warp and then successfully sued the breakfast company for infringement of the same laws.

- *The Hitchhiker’s Guide to the Galaxy* (radio series), Douglas Adams

Preface

The inclusion of non-academic texts in the following research, ranging from blog posts to online news sources, accompanies the critical examination of primary sources and more traditional works of academic critique and theory. The occasional citation of a *Wikipedia* article, for example, is intended only as a general source of information and is not provided uncritically or unverified. It is a practice that becomes part of the discussion in Chapter Six. Also, given that this is not a legal dissertation and yet deals significantly with the law, much of the legal discussion focuses on secondary analytical sources rather than primary materials; although significant primary legal materials are examined in Chapter Four and Chapter Six when dealing with prominent sources, judicial decisions and relevant legislation.

A non-standard *Harvard* referencing system has been applied with attention to detail and internal consistency. Page numbers for non-scholarly works such as websites, internet forums and blogs, as well as for scholarly works sourced through online databases, are often unavailable. Page numbers are only provided for works directly cited from physical sources or digital scans of physical publications in PDF format. In text references to works by authors with the same surname and year of publication are prefixed with a first name initial e.g. (J Martin, 2002).

Certain products of this research have been published in peer-reviewed academic journals, however, the material included here is not a verbatim copy of those works and varies significantly. The analysis of the Australia and United States Free Trade Agreement in Chapter Four is a revised version of material that appears in Moore (2005a) and an extended discussion of several components of Chapter Seven appears in Moore (2005b).

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To Harriet, because you beat me to it.

Introduction

Los Angeles Boy Scouts are the latest conscripts in Hollywood's global battle against 'digital piracy'. These Scouts are instructed on the legally responsible attitude towards acts of unauthorised copying, taught the perils of peer-to-peer (P2P) software use and warned against black-market operations distributing illicit copies of movies and music "on the streets" (MPAA, 2006). Earning the Respect Copyrights badge is achieved by visiting the Hollywood studios, often the workplaces of these Scouts' parents and families. According to the Motion Picture Association of America's (MPAA) guidelines Scouts in other states can earn the Respect Copyright badge by creating public service announcements to inform others about the copyright-infringing online distribution of movies and other media that is damaging the American content industries (Associated Press, 2006).

Respecting copyright is an affirmative policy, one that this thesis strongly supports, but it is the expanding and often extreme preoccupation with copyright, to the point where organisations like the Scouts are conscripted to deliver the message, that is the subject of this study. Copyright is undeniably economically advantageous for authors, photographers, artists and other creators of cultural materials, but the tone of current copyright enforcement is not one of respect for the individual's right to access these works. The version of respect for copyright promoted by the MPAA is one of fear of prosecution, where the downloading of unauthorised copies of media files is the equivalent of stealing a car.¹

The popular media has reported on these kinds of copyright inspired public interest stories ever since Napster captured the imagination of millions of internet users in 1999. Napster, and its file-sharing software, provided users with access to an immense

¹ The "You Wouldn't Steal A Car" advertising campaign seen in movie theatres, included on commercially available DVDs and broadcast by commercial television stations was funded in Australia by the Australian Federation Against Copyright Theft (Timson, 2006).

catalogue of unauthorised digital audio recordings linked through a network of personal computers. The briefly in vogue term 'Napsterisation' represented a fascinating cultural moment, in which copyright owners were forced to respond to previously unrealised paradigms of content distribution. As a result of the Napster case, and other more recent P2P courtroom battles, copyright issues are no longer purely legal or economic topics, if they ever were; they suffuse our online activities, our working lives, even our social lives with such a pervasive force that their consideration has finally become mainstream. The uptake has been slow compared to the academic coverage and pace of legislative change, but copyright issues are currently front page stories.²

It has been observed by copyright scholar Pamela Samuelson (1999a, 1999b, 2003a) that recent changes to copyright laws are designed to limit the individual's right to access, rather than protect an individual's monopoly right to sell copies. This is largely because copyright doctrine traditionally regulated a physical copying process; owning a copyright literally means owning the right, the sole privilege, of making copies of the text for the purpose of their sale. This system is logical for printing presses and even photocopying technologies, but in the digital environment, where the text is reduced to software code, anyone can make quick and easy copies with minimal cost.³ One of the features of the research presented in this study is the examination of the repercussions involved in the revision of copyright laws in Europe, the United States and Australia that have introduced technology related access provisions to copyright doctrine to combat unauthorised digital copying practices without fully accounting for their cultural components.

The outcomes of these revisions are made apparent by the ongoing legal cases against individuals who trade in unauthorised digital copies, via peer-to-peer software, which are treated in the same manner as the black-marketers who trade in cheap physical copies. Napster may have been considered as massive piracy within the capitalist order of the content industries, due to the intolerable level of unauthorised and therefore unpaid access to copyright protected materials, but to others it revealed a surprising side of internet users. These users, and current fans of peer-to-peer

² The recording of a U2 concert at the Sydney Telstra Stadium in November 2006 by fans with mobile phones was front page news in the *Sydney Morning Herald*, which also covered the introduction of copyright legislation that may result in new police powers and the issuing of on-the-spot copyright 'fines' to infringing revelers (Murray, 2006).

³ The phrase 'digital environment' is employed in this thesis to encapsulate a broad range of activities, practices, and phenomena made possible by digital technologies. The choice of term is influenced by James Boyle's (2003b: 52) suggestion that intellectual property issues require the equivalent of the environmentalist movement in order to counter the unrestricted privatisation of knowledge and information. The digital environment is regarded in the thesis, not in terms of a virtual or physical space, but instead in terms of access, communication, activity and identity.

software, were not simply downloading music but also volunteering their own computers and internet bandwidth to provide the same materials to others and share their personal record collections. Napster and other P2P software titles are technologies that operate on the simple premise that internet users are capable of sharing successfully. With file-sharing technologies occupying a proportion of internet traffic somewhere between pornography and email spam, it confirmed that online content distribution was not only a contentious, if viable and potentially profitable, venture but also revealed that the Pandora's Box of unrestricted online sharing of popular cultural materials was well and truly ajar.

As a music fan I understood the passion for sharing music with others in an unrestrained fashion, but as someone who worked previously as a journalist and received a number of annual copyright payments I also appreciated the nature of the incentive argument which, as this thesis will show, underpins the economic justification for the global expansion of copyright protection and enforcement. This is not simply a have-your-cake-and-eat-it-too position, or a return to John Perry Barlow's (1994) "information wants to be free" cyberutopian prediction of the death of copyright, but a desire to understand if it is possible to reduce the exclusivity of access in copyright enforcement and at the same time promote alternative methods for providing economic incentive to create. This dichotomy was not being completely addressed in the scholarly arguments and too frequently polarised in the considerations of copyright critics during the initial stages of this research. The central motivation for this inquiry is concerned with determining whether these are two diametrically opposed interests or whether there are options for some kind of practical common ground that these two competing desires can occupy amicably, even productively.

When I began planning this project in 2003, the study of intellectual property and copyright was emerging from the relatively separate legal, economic and philosophical fields. A growing number of academics, the majority being legal scholars, had begun to turn their attention to the ways in which the copyright doctrine interacts with certain cultural activities on a daily basis. Rosemary Coombe (1998), a legal scholar and anthropologist had examined the 'cultural life' of intellectual properties including patents and trademarks in 1998. Lawrence Lessig's first work on the legal treatment of software, *Code* (1999), served as a signal bell for concern about the legislative approach to the control of public and proprietary rights to information, knowledge and

ideas in the digital environment. Questions about the competing economic and political motivations behind amendments to US copyright legislation and their potential consequences were raised by Jessica Litman in 2001. Lessig's involvement in the *Eldred et al. v. Ashcroft* (2003) before the US Supreme Court, a case that represented a choice between limited and a virtually perpetual copyright duration, led to widespread critical examination of US copyright policies and the emergence of the interdisciplinary nature of contemporary critical copyright studies. Lessig's most recent book *Free Culture* in 2004, along with Siva Vaidhyanathan's (2004) *Anarchist in the Library* and Kembrew McLeod's (2005) *Freedom of Expression: Overzealous Copyright Bozos and Other Enemies of Creativity*, all survey the different costs of the allowing economic concerns of major intellectual property owners to dictate copyright law. Following his defeat in the Eldred case, Lessig together with James Boyle and other intellectual property scholars began the Creative Commons movement in late 2002 as a practical response to the limitations of the law, attempting to build "a layer of reasonable copyrights" into the current system (CreativeCommons.org, 2006a). The embrace of the Creative Commons' alternative copyright licences by millions of musicians, authors, web designers, bloggers and other inhabitants of the digital environment has indicated that these scholars were not alone in their concerns about the future of copyright.

Australia has not been without its contributors to the copyright debate. Matthew Rimmer's (2001) consideration of Napster and the alliance between the band Metallica and the major record companies to prosecute their own music fans proved to be an intriguing introduction to the study of the clashes between copyright and culture, technology and the market (Rimmer, 2001: 27). More recently Rimmer, with critical legal scholar Kathy Bowrey, argues that academics need to move beyond their current concern with the legal politics of the situation and to direct more critical attention to the chosen jurisprudence of the courts (Bowrey & Rimmer, 2005). Their methodology is concerned with the politics of copyright disputes that moves beyond framing the arguments in oppositional terms of copyright users vs. owners or "New Economy vs. Status Quo", while maintaining a sympathetic approach to analyses that are concerned with the social costs of recent developments in copyright law (Bowrey & Rimmer, 2005). Bowrey and Rimmer (2005) criticise the historicising of copyright which compresses the historical context of copyright's foundational principles and reduces them to distillate compounds, devoid of the original political and social context, useful only in railing against the "corruption" of copyright law or the "superiority of common

law over the legislature” (Bowrey & Rimmer, 2005). Bowrey and Rimmer (2005) regard the critique of copyright as too readily employing the origins of intellectual property laws to put aside any questioning of the particular contemporary interpretation of the politics of the law.

There are, however, serious advantages for beginning this thesis with a detailed investigation of copyright history. The analysis in Chapter One and Chapter Two focuses on the regulation of culture and information, and the economics of trade as expressed through the foundations of copyright doctrine. The intention is not to “endorse one contemporary interpretation of copyright law and to disempower those with contrary views about its direction” (Bowrey & Rimmer, 2005) but to reexamine the cultural context of the legislative and courtroom proceedings, as well as the wider cultural shifts, politics, philosophical considerations and economic forces that brought their influences to bear on the doctrine. Chapter One first looks at origins of copyright in the English Legislature, and examines two major legal battles over the concept of a limited copyright duration. It considers the European contributions to the doctrine in terms of cultural movements, philosophies of ownership and the influence of concepts like the ‘author’ and ‘originality’. Chapter One expands the frame of reference from the national scale to examine the early internationalisation of copyright doctrine through the Berne Convention for the Protection of Literary and Artistic works in 1886 and compares the different ideologies at work between copyright and patent doctrine as two separate approaches to the regulation of intellectual property.

Chapter Two continues this approach by closely examining the process of global trade liberalisation following World War II and its influence on international copyright regimes. This chapter is designed to identify the social, economic, political and cultural considerations included as part of the emergence of a global intellectual property regime. Chapter Two examines the processes and institutional dialogues of key international organisations, specifically the World Intellectual Property Organisation (WIPO), and explores the degree of influence exerted by the United States in the Uruguay Round (1986-1996) of the General Agreement on Tariffs and Trade (GATT), from which emerged a ‘trade-related’ regime for the increased global enforcement of intellectual property rights.

This methodology has significant advantages; it provides a relevant approach vector for an audience that is unfamiliar with copyright as well as making an informed interdisciplinary contribution to the field of critical copyright studies by engaging with empirical, commercial, rhetorical, technical, political and institutional sources and meshing them with considerations of prominent critical contributors. Rather than producing a particular history of copyright, this approach is designed to contribute to the critique of copyright as part of an ongoing reformation of the regulation of rights of authors and publishers, creators and distributors, users and consumers. This also reminds us that the copyright conversation is not a new experience. As noted in Chapter One, copyright issues occupied the public's interest as the details of court proceedings of copyright cases in eighteenth century London were covered in the daily press.

In the post-Napster era copyright issues have become everyday considerations of activity within the digital environment. Copyright concerns are particularly relevant in the emerging discussions about the political, social, technical and economic potential of 'Web 2.0' internet sites and other online services. The term 'Web 2.0' was coined by Tim O'Reilly (2006) as a means to stimulate discussion of Tim Berners-Lee's original Web 1.0 design and the potential for the internet to serve as a network platform of alternative data and cultural creation, reflecting contemporary graphical design principles and featuring social and open contribution as well as innovative and decentralised management practices. O'Reilly's (2006) basic principle of Web 2.0 is "openness" and the idea is characterised by websites such as *Flickr*, *YouTube*, *Digg*, *MySpace* and *Wikipedia* where content is entirely user generated. There is a greater requirement for users to be aware of their own copyrights in this kind of digital environment. Users need to be competent in their dealings with appropriated materials in ways that do not generate endless potential copyright infringements.

Chapter Three is designed to contribute directly to the emerging field of copyright critique that is currently part of this latest invigoration of copyright issues. Its topic, the US Digital Millennium Copyright Act (DMCA) is the center of two parallel investigations: the first focuses on the economic, political, legal and social context of the DMCA's formulation, while the second examines the broader consequences of the law's provisions which prohibit the creation and distribution of software code designed to circumvent digital copyright controls. Chapter Three discusses the incorporation of anti-

circumvention provisions into Western copyright doctrine through the US and European Union (EU) legislation and WIPO treaties. It explores the effects of the transformation of copyright law into a regulator of technology and the criminalisation of the creation and use of technologies that permit unauthorised access and copying of copyright protected materials.

Chapter Four continues this critique through an investigation of the 2004 Australian and United States Free Trade Agreement (AUSFTA), which introduces the DMCA provisions and other copyright changes to Australian copyright law. The chapter examines what effect this has on the cultural relevance of the concept of 'fair use'; a term which refers to the legitimate exceptions to copyright infringements, in the US jurisdiction, for the purposes of review, scholarship, parody and satire.⁴ Chapter Four also investigates the future of the public domain, a term that refers to the collective body of material which has passed out of copyright protection after the legislatively specified duration. Chapter Four begins the examination of the 'enclosure' metaphor, first employed by James Boyle (2003a, 2003b). It considers the relevance of commons theory as a method for discussing the consequences of extending the duration of copyright protection, which is continued in the case study presented in Chapter Six on the Creative Commons movement.

The methodology of this thesis is closely aligned to the purposes of Vaidhyathan's (2006) Critical Information Studies (CIS), an emerging scholarly field which calls on contributions from economists, sociologists, linguists, anthropologists, ethnomusicologists, communication scholars, lawyers, computer scientists, philosophers, and librarians in asking questions about information, access, costs, and a range of phenomena from electronic voting machines to digital encryption, which involve issues of intellectual property and copyright. Although Vaidhyathan's (2006) work was published towards the end of this research, the CIS interdisciplinary approach reflects the intentions of this thesis at its outset. Vaidhyathan (2006) envisions an audience of scholars for CIS beyond the borders of cultural studies and encourages cultural studies scholars to engage critically with multiple disciplines, but calls for a "jargon-light prose" in order to facilitate broader dialogues. Vaidhyathan (2006) cites Yochai Benkler's article 'Coase's Penguin, or, Linux and The Nature of the Firm' (Benkler, 2002) as an ideal CIS publication. Benkler's (2002) analysis ranges

⁴ Australian law features a similar but further limited exception known as fair dealing, which is also discussed in Chapter Four.

from legal, cultural and economic history topics, to the discussion of the possible modes of production not limited by the traditional modes of corporate development. Benkler's article, according to Vaidhyathan (2006: 302), has been cited in more than 6,000 online sources and more than 40 scholarly works due to the article's approach, depth, diversity and "in part because he made it available in electronic form on his own open Website".

Given the impact of his work it is unsurprising that Benkler's article was also the independent inspiration for the decision to structure the latter half of this thesis across three separate case studies, each one examining the potential for 'open content production', a phrase which refers to an alternative regime of intellectual property creation and management. Each of the case studies investigates the development and use of alternative copyright licence systems designed to ensure freedom of access for users of intellectual properties and which articulate creators' rights beyond the limitations of current copyright legislation. The three case studies demonstrate the various ways in which alternative copyright licensing systems contribute to the minimisation of costs in the global transfer of information and knowledge.

The first case study, presented in Chapter Five, examines the ideologies expressed by prominent computer hacker, activist, and founder of the Free Software Foundation (FSF), Richard Stallman, who developed the first 'copyleft' software licence to protect the idea that software code should not be kept secret. The case study compares Stallman's and the FSF's work and philosophies with the practices of key Linux programmer Linus Torvalds and the Open Source Software (OSS) movement which takes a much less partisan approach to open content production. The study explores the use of concepts like 'free' and 'freedom' in both movements. It examines the anthropological and sociological research into the motivations of computer programmers engaged with both these software movements in order to ask questions about the participants' incentives to create software without direct financial compensation for their work. It asks under what circumstances copyright protected works can be successfully shared in ways that also supports commercial business models.

The second case study, presented in Chapter Six, discusses the origins of the Creative Commons movement; it explores the processes, philosophies and intentions of the

movement which has established a range of copyright licences enabling individual creators to express specific copyrights over their work. This study further explores the concept of the commons and draws together discussions about the potential of digital commons formations to contribute to open content production from economic, legal, sociological, political and cultural fields. This incorporates Garret Hardin's (1968) criticisms of the commons, and uses the online encyclopedia *Wikipedia* as an example of both the strengths and weaknesses of digital commons formations. The case study continues the analysis of the importance of the public domain and also explores examples of support for and resistance to the transposition of Creative Commons licences to the Australian legal jurisdiction. The central theme for this case study is the degree to which the principles and practical application of copyright can be included as part of the repertoire of digital tools available to individuals to appropriate, criticise, parody and recontribute to the cultural materials available to them.

This theme is continued in the final case study presented in Chapter Seven, which looks to developments in the personal computer (PC) games industry and the dynamic relationships forming between computer games companies, games fans and independent games programmers in the open production of meta-game content; materials that include game add-ons, animation created within a game, and player community organisations that operate both within and outside of the commercial products. This case study employs fandom studies in order to examine the concepts involved in the appropriation and use of privately owned and copyright protected materials for self expression, community formation and entirely new content generation. The case study also explores the implications of corporate copyright licences, called End-User Licence Agreements (EULA), in the production of unofficial computer game content, and the wider issues of participatory culture within the digital environment.

The title of the thesis, *Don't Panic*, refers to the intention behind the work presented here, that discourages an alarmist reaction in favour of recognition of the potential of proactive copyright alternatives. Traditional copyright law has been stretched thin, and augmented with technological provisions, in an attempt to counter the non-traditional possibilities of the digital environment and the non-physical properties of digitally stored information, knowledge and cultural materials. Copyright owners have, understandably, attempted to ensure the exclusivity and restrictions on access that the physical

monopoly right to copy has historically afforded them. This project recognises that the push for greater enforcement, longer durations of protection and harsher penalties against infringement, have been matched by the emergence of practical alternatives which attempt to preserve a balance between the rights of owners and users. This balance arises from a belief that art, culture, knowledge and information are not spontaneously arrived at but generated through the remixing and reformation of generations of previously contributed work. The future of copyright law, despite quite fervent protests from some legal critics, is in the hands of individuals finding ways to establish new paradigms for the creation, distribution and protection of their work and their rights, and this study intends to show how and why this is possible.