

THE PUBLIC DOMAIN

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As only an occasional visitor to copyright law, I am rather awed by the company that Professor Fitzgerald has put me in today. He asked me to talk about how we should move ahead with the public's side in copyright. What I'm looking at is some aspects of what institutional arrangements we might need to protect, as Professor Fitzgerald put it, Australia's public domain in the future.

The question I will start with, is "What rights do the public have to use works or other forms of creativity". I think we have to identify four categories of rights.

First is the uses of works which are outside the exclusive rights of the copyright owner, including those that fall short of being a substantial part of the work, and other matters like that. Second is uses of works where there is no copyright owner. In Australia that primarily means works in which copyright has expired. This is because our Copyright Act doesn't exclude from copyright protection things that are often excluded in other laws like Government documents and legislation. Thirdly, and the part on which copyright practitioners concentrate, are the many different types of statutory rights that are given to members of the public to use works in different ways. These may be fair dealing exemptions or under Statutory Licences or other situations where there is a copyright owner but the uses that are allowed would otherwise be part of the exclusive rights of the copyright owner. Finally, we need to also recognise those *de facto* uses of the owner's exclusive rights which, as a matter of practice, go unchallenged. This is what I've described in other contexts as sometimes constituting

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“a commons by friendly appropriation” or some US scholars have referred to as “tolerated use”.

Of course there has been a great deal of discussion about the theoretical aspects of all this, particularly from American academics such as Professors Boyle, Lessig, Cohen and Benkler to name but a few. They debate whether we should collectively refer to this bundle of rights that the public have as “the public domain” in a more extended usage, or perhaps simply use the expression “the commons” to describe all these things. I’m not going to do either, because I think those usages are ambiguous in their scope. I understand the motivation for wanting to use them: to try to appropriate some of the rhetorical value of the terms “public domain” or “commons” to describe this whole area. I do that myself, but I’ll stick to the more prosaic expression, “public rights in copyright” to encompass all of one to four, that whole range of rights.

A slightly more technical definition is that that “public rights” are all those aspects of copyright law and practice that provide the ability of the public to use works without obtaining a licence on terms that are set and changeable (even if only at the end of the licence term) by the copyright owner. The corollary is that private or proprietary rights are the rights that owners of copyright in a work can effectively exercise to refuse to allow another person to use their work except on terms set or changeable by them. There’s a lot of value in recognising the commonality in these four categories.

There is another distinction that we need to make before leaving any theoretical discussion and that is that the origins of the public rights that I am talking about are found in both global and national matters. I think it’s reasonable to talk about global public rights, those elements of public rights that are common to most jurisdictions, for two main reasons. First, the formal elements of the global public domain are essentially the constraints that are placed on what public rights can exist because of the near universal adoption of the Berne Convention and TRIPs. We have heard the details from other speakers this morning. These constraints include the fact that no registration formalities can be required. In the USA when re-registration of copyrights was required 90% of works were not re-registered after the initial statutory term expired. Our public domain would be vast in comparison to what it is now if re-registration was allowed by Berne to be required (even though initial registration was still not required). Berne’s minimum term for copyrights is another reason: would we seriously think that the term of copyright for software would have been set at the life of the author plus 50 years if nations around the world had been given a free hand? Of course there are other constraints like the “three step test”, too complex to address here.

Berne is by and large on the negative side. On the far more positive side of the global equation are the informal elements, arising mainly from the global effects of some aspects of the Internet. Of particular importance is viral licensing and the way in

which it has created certain content specific commons such as open source software and the commons of text (found most notably in Wikipedia). Also, search engines have created a commons for searching text which would otherwise involve infringements of exclusive rights in many jurisdictions in the world. These are matters that Australian policy alone can't change much, as Adrian Sterling was noting earlier in relation to the formal constraints.

We then have a long list of national influences which affect, in our particular case, Australia's public rights in copyright. I won't go through all of those there, but as you can see (from the list below) there are many aspects which have a significant effect on what public rights we have. None of them are unique to this country. Some of them are unusual, like our long history of legal deposit requirements. In combination, Australian law is relatively inhospitable to the creation of public rights.

NATIONAL ELEMENTS AFFECTING AUSTRALIA'S COPYRIGHT PUBLIC RIGHTS

- Lack of any constitutional limits on copyright (probably!)
- The long history of legal deposit requirements
- Crown copyright in legal/administrative documents
- No significant other limits on the scope of copyright subject-matter
- Protection of compilations perhaps even beyond the EU
- Narrow, specific, fair dealing exceptions: inflexibility
- Limited implied licences, broad authorisation doctrines
- More extensive compulsory licences than many other countries
- Highest international level of copyright duration, but no retrospectivity
- Moral rights, but only co-extensive with economic rights
- The need to accommodate indigenous rights

What do we need to do to try to more effectively protect this whole range of public rights? First, those who are interested in some of these aspects of copyright law need to recognise that they have a common interest in all these aspects of public rights. If there is a common thread, perhaps it's the recognition that all forms of creativity must draw on and rely upon previous creations, 'standing on the shoulders of giants', as it's often referred to. Once we recognise that common interest other things follow.

Second, we need to better articulate a set of principles on which the protection of public rights in copyright are based. Copyright laws clearly articulate many of the interests of authors and other creators simply by listing the exclusive rights of the different types of copyright owners in convenient sections in the Copyright Act, and

then having various other things flow on from that, like enforcement provisions. Public rights are rarely so clearly and neatly articulated.

They are usually implied. They're the things that Professor Larry Lessig talked about earlier today such as the fact that you don't have to have any exceptions in order to read a book or to lend a book to someone else. You can't find that public right clearly stated in the Copyright Act but it's essential to understanding what we're talking about. Alternatively, if they are written down, they're scattered all over the place, often in immensely complex legislative provisions. Those of us who are interested in this side of the fence need to try to articulate in an understandable fashion the set of rights that we are interested in defending.

In the interests of provoking discussion, I have made an initial attempt to set out 10 Principles for public rights in copyright (titles below, and detailed in the Appendix). After listening to both Professor Lessig and Adrian Sterling I suspect that I'm probably too conservative. The principles need to be general and kept separate from any short term strategic goals.

10 PRINCIPLES FOR PUBLIC RIGHTS IN AUSTRALIAN COPYRIGHT

1. Balance
2. Limits on exclusive rights
3. Minimum term
4. Preservation of Australian publications
5. Fair & flexible exceptions
6. Fair compulsory licences
7. Support for voluntary licensing
8. Protection from technology & contracts
9. Proportionality in enforcement
10. Free/open access to publicly-funded content

First we need to articulate the types of balance in copyright law that we need. Copyright law should be protecting our national interests and not the interests of other countries (unlike the Australia-US Free Trade Agreement). There's a place marker in the first principle for the interests of Indigenous people, but I don't know how to expand that and I'm interested in hearing the rest of the Conference on that question. Picking up from the Adelphi Charter, there's a principle that the proponents of any expansion of the scope of copyright protection should have the onus of proving the need for expansion.

In relation to national interest, I've missed something which Terry Cutler has prompted me to think should be added. In our role as the 2% copyright exporter 98% importer, we need to expressly recognise that Australia should contribute its share to the global pool of information that's available to be exercised with public rights by anyone in the world. This is our part of the global bargain from which we will benefit as an importing country.

Some of the other principles are fairly obvious: the need for limits on exclusive rights; the attempt to minimise as far as possible the duration of copyright and not to extend it any further; and the need to preserve works so that they can be later re-used in other creative works. This is to say, we need to preserve the content of Australian publications so that at the end of their copyright term others can use them. A strategic goal that follows is to ensure that that the current review of legal deposit extends it to digital and audio visual works.²

We need to obtain fair and flexible exceptions to copyright law that can adjust with changes in technology. In contrast, our existing law with its specified fair dealings does not allow such flexibility at present.

We need to ensure that compulsory licences and collecting societies operate in ways which give appropriate protection against potential anti-competitive conduct. Specific goals may include ensuring that collecting societies do not impede their members' use of voluntary licences and do not collect fees in relation to content on the Internet which is supposed to be available for free. But that, in a sense, is the negative side. We shouldn't forget the positive side of compulsory licensing.

As Professor Lessig points out, most notably in *Free Culture*, much of the entertainment industries of the 20th Century in the USA have been based around the conversion from what once was called "piracy" into something that's become a statutory licence and has produced revenue and benefits for both producers and consumers. Compulsory licences constitute a lot of the most important content of our public rights. As people interested in that side of the copyright picture, we should be actively trying to make those compulsory licences work better to give a better result to everyone, both the copyright owners and the users of the collectively licensed materials.

Another principle is that we should actively provide support for voluntary licensing. Creative Commons licences, open source licences and the other licences of the last 10 years or more, have given us enormous benefits and expanded the scope of public rights. We should be looking at what our copyright law needs to do to actively support those voluntary licences. One example in Australia may be that we need an amendment to the Copyright Act to clarify the means by which public domain

² Commonwealth *Review of Legal Deposit* 2008.

dedications can be made, because that's not at all clear under our law. And, while there are no obvious impediments to the enforceability in Australia of say, Creative Commons licences or the GPL,³ we should be looking at whether we need to strengthen our copyright law proactively to make sure we don't get a nasty surprise 15 years down the track.

I will skip over other obvious things like proportionality in enforcement and the “no brainer” of getting around Crown Copyright in Australia and opening content up in relation to both public sector information and the outputs of academic research in this country.

The last thing I wish to say is that public rights need a peak body in Australia. There are a lot of reasons why the public rights side is disorganised in comparison with copyright owners and authors who are very well organised. We need to establish a public rights peak body that represents all of the new types of interests and organisations who have an interest in the various types of public rights that I'd sketched out. One question that we in Australia need to ask is whether we already have the nucleus of such a public body in the Australian Digital Alliance. ADA does exceptionally good work, has a set of principles that are narrower than what I've sketched although containing many of the elements, and has a membership that is far narrower than the group of organisations that are relevant to all the issues I have canvassed in my “10 Principles”. There needs to be a conversation within and without ADA as to whether it should become a more general public rights body for Australia.

The conclusion of my Centre's submission to the Cutler Inquiry was that the third thing we needed was a thorough-going law reform review of the Copyright Act with its principal focus being the public rights side of copyright. A public rights focus is needed, rather than the little scattered bits of public rights reform always being an afterthought to some other law reform inquiry, usually one conducted by the Attorney General's Department. My suggestion is that the Australian Law Reform Commission would be the best body to do a research-based analysis on what we need with public rights in the Copyright Act, not one that's merely driven by submissions from the most well organised organisations in this field.

Finally, public rights need a good public image and perhaps a mascot. So I suggest, for the benefit of all the Australians in the room, that the best candidate is Norman Lindsay's Magic Pudding, an icon of Australian literature, created in 1918. Lindsay didn't die until 1969. Philip Pullman says, “It's the funniest children's book ever written” and it's on Wikipedia so it must be true. The hero for those of you who don't know, is Albert, the “Cut and Come Again Puddin”.

³ GNU General Public Licence, a free software licence written by Richard Stallman for the GNU Project, identified with the free software movement.

We've heard a lot about cakes today, and now I'm offering a puddin' as our mascot – the little guy on the right. Lindsay says, "There's nothing this puddin' enjoys more than offering slices of himself to strangers, the more you eats the more you gets, Cut and Come Again is his name and Cut and Come Again is his nature". He's the inexhaustible self replenishing resource, by analogy, similar to our public domain, on which further creativity can be built. He's non-rivalrous and inexhaustible. So I commend to you Albert as our potential mascot for public rights.

He also represents the difficulties faced by the public domain because although he's a national icon who's now approaching his Centenary, being born in 1918, his literary form will not be in the public domain until the year 2039 when young Albert is the grand old age of 120. So we should ask, "Is that the sort of public domain we want, or can we do better?"