Let's Reimagine Intellectual Property Rights Regime: the Australian Perspective

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Abstract. This paper discusses aspects of economic analysis of law developed as a result of the current status quo on the continuous development of the Internet, as well as the required evolution of legal theory on intellectual property rights (IPRs). The emergence and movement of law and economics has captured various segments of policymaking, including the discipline of IPRs in law. With the seminal work of Ronald Coase, Nobel Memorial Prize in Economic Sciences, this movement has evolved as a significant branch of legal theory (1960).

Keywords: intellectual property, commons, information, copyright

1. Copyrighted Works on The Internet

Recent years have seen a massive growth of interest in the law and economics of intellectual property.[1] Economics has a direct effect on IPRs, and law and economics discourse on IPRs has dominated policymaking, with a focus on IPRs' economic ramifications. This, in United States (US) legal doctrine, is considered the principal justification for the economic rationale of copyright. The Constitution of the United States authorizes Congress to legislate for the purpose of securing incentives to authors and inventors by stating, "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" (i.e., Article I, Section 8, Clause 8).[2] It has been observed, in respect to copyright, that 'In Europe, where copyright is viewed as protecting a set of natural entitlements of authors, economic arguments about copyright seem to play a less significant role compared with those in US legal doctrine'.[3] In Europe, the approach appears to have been a deontological one with emphasis on individual natural rights whereas the US approach is more utilitarian with emphasis on economic wel-

[1] Francesco Parisi, *The Oxford Handbook of Law and Economics: Volume 2: Private and Commercial L*aw (Oxford University Press, 2017) *('The Oxford Handbook of Law and Economic*s').

[2] *Constitution of the United States 1787.*

[3] Kenneth D Crews, *Copyright Law for Librarians and Educators: Creative Strategies and Practical Solution*s (American Library Association, 2020) *('Copyright Law for Librarians and Educators').*

fare (a public good) through incentivisation of individual talent and creativity.

During the last few years however, in both Europe and the US, the topic of law and economics regarding IPRs appears to have gained ground in public discourse.[4] A key reason for this is the rise of the global information economy, which is subject to international agreements and to a growing trend for the harmonization of intellectual property laws. It is argued that the European and US rationales on IPRs are coalescing.[5] The European Commission, through most of its directives on IPRs are mainly focused on facilitating an internal market and advancing the European Community's economic goals; thus, legislation produced by the European Commission and the legal discourse based upon it has brought in economic arguments concerning policy debates related to intellectual property at large.

Therefore, this paper focuses on the influence of information technology on the economics of IPRs protection because such economics are understood in the context of law and economics theory. The economics surrounding IPRs will very likely bring about change in IPRs legislation with the notions of traditional IPRs being called into question, particularly the nature of property underpinning IPRs law. The application of economic theory to IPRs in the information age demands us to rethink the IPRs legal edifice. The economic rationale for IPRs law is undeniable but, at the same time, it has a tense co-existence and co-evolution with technological and societal changes in the Internet networking environment. In the information age our dependency on information goods is significantly enhanced. Information goods have become essential for, and often indispensable, to the running of basic business, political function, and even to our daily lives.

Current economic theory rests upon the incentive paradigm for IPRs. This incentive paradigm aims at efficiency both in terms of wealth for the IPRs holder as well as wealth maximization for the IPRs holder and any subsequent IPRs power holders.[6] The incentive paradigm in IPRs makes two crucial assertions: first, that information goods are public goods and, without central intervention, investment in creative expression and the resulting cultural and technological progress will

[4] Marketa Trimble, 'U.S. State Copyright Laws: Challenge and Potential' (2017) 20(2*) Stanford Technology Law Revi*ew 66 ('U.S. State Copyright Laws').

[5] Thomas Margoni, 'The Harmonisation of EU Copyright Law: The Originality Standard' in Mark Perry (ed), *Global Governance of Intellectual Property in the 21st Century: Reflecting Policy Through Chan*ge (Springer International Publishing, 2016) 85 <https://doi.org/10.1007/978-3-319-31177-7_6> ('The Harmonisation of EU Copyright Law').

[6] Rochelle Cooper Dreyfuss and Justine Pila, *The Oxford Handbook of Intellectual Property L*aw (Oxford University Press, 2018).

be insufficient; and second, that furnishing property rights through the legal edifice of IPRs is the cheapest and most effective way for society to hold out the incentive for maximization of wealth via the IPRs regime.[7]

Additionally, the incentive paradigm in IPRs protection is far from an immutable principle guaranteeing social and economic welfare, particularly given the ease with which information goods can find their way through enhanced technology into the public domain. A different paradigm is needed, one also based on reconceptualization of the nature of the information environment. This is the focus of the latter stages of this paper.

2. Non-excludability and Non-rivalry of Copyrighted Works on The Internet

Non-excludability is one aspect that renders works of intellect, that are protected by IPRs, a public good from an economic point of view. The microeconomics of IPRs effectively demonstrate that information—any kind of information, including the content of protected works—becomes a public good when it is posted online and is characterized by concerns of underproduction and underutilization.[8] The problem of underproduction stems from the non-excludable nature of information goods such as protected works in the online environment. A good is non-excludable when, once it is produced online, it is impossible to exclude an individual from using that good, even if he or she does not contribute to the cost of producing it.[9] Non-excludability also occurs when the costs incurred by the creator of the work to exclude 'free riders', aka non-payers for the use of protected work available online, are so high that it would be inefficient to exclude them in practice.[10]

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[7] Peter Drahos, *A Philosophy of Intellectual Proper*ty (Routledge, 2016); Emrah Karakilic, 'Rethinking Intellectual Property Rights in the Cognitive and Digital Age of Capitalism: An Autonomist Marxist Reading' (2019) 147 *Technological Forecasting and Social Chan*ge 1 ('Rethinking Intellectual Property Rights in the Cognitive and Digital Age of Capitalism').

[8] Richard H Steckel and William J White, *Engines of Growth: Farm Tractors and Twentieth-Century U.S. Economic Welfa*re (Working Paper No 17879, National Bureau of Economic Research, March 2012) <http://www.nber.org/papers/w17879> *('Engines of Grow*th').

[9] E Kaufer, *The Economics of the Patent Syst*em (Routledge, 2012).

[10] Wenling Chen, 'International Copyright Law' (2020) 16(5*) Canadian Social Scienc*e 33; Peter S Menell, 'Economic Analysis of Copyright Notice: Tracing and Scope in the Digital Age Symposium: Notice and Notice Failure in Intellectual Property Law: Panel V' (2016) 96(3*) Boston University Law Revi*ew 967 ('Economic Analysis of Copyright Notice').

The non-excludable nature of information goods derives from their ingrained characteristics. Information per se has no physical boundaries, and its duplication, copying and distribution over information networks such as the Internet entail minimum costs. The marginal costs to the creator of the work of exclusion are often greater than the revenue that could have been recovered by them if it were not for the unauthorized use of information goods. Therefore, in terms of costs it becomes inefficient to expend resources with the aim of excluding non-payers from the use of protected works. A classic example derived from the analogue world is that of a publisher who cannot prevent the same book from being borrowed and read by several people who have not paid a penny to acquire it. It is not worth the publisher paying the costs to take measures (which would also be logistically very difficult or impossible to implement) to prevent people from borrowing the book from each other because of their reluctance to pay for it.

In the absence of impediments on free riding online, the prices of works that become available online in a competitive market could fall to near zero. A producer of an information work capable of IPRs' protection, who knows that the competitive market price for the work would equal the marginal cost to produce it and not suffice to cover the producer's fixed costs for production, could reasonably opt not to produce the work at all.[11] Therefore, non-excludability creates the risk that a creator of a work posted online will not have sufficient incentive to engage in creative invention and production.[12]

The fundamental paradox of information goods in the online environment (including protected works) rests on their dual nature: as economic entities, they are required to generate revenue but the implication of this is the exclusion of free usage via free access, redistribution, and derivatives of creative products. However, these works (as creative entities) necessarily build on the antecedent works of others and inspire further creative works. The implication here is that the law must enable and enhance an unbounded flow of creative works to ensure a continuous creative process in society. Works seen as information goods capable of IPRs protection are created with the intent to be published and released onto the highway of Internet markets. However, once they are published and, more critically, published online, they become part of general knowledge, naturally available for all to use, reproduce and modify, either for a fee or for free. Since society is intensely interested

[11] Robert D Anderson, Nancy Gallini and Nancy Gallini, *Competition Policy and Intellectual Property Rights in a Knowledge-Based Econo*my (Routledge, 2020) <https://www.taylorfrancis.com/books/9780367853839>.

[12] Bronwyn H Hall and Dietmar Harhoff, 'Recent Research on the Economics of Patents' (2012) 4(1*) Annual Review of Economi*cs 541.

in these creations and assumes that fewer would be produced if investments could not be recouped, a legal edifice of IPRs is created, granting through it—among other rights—temporary sales rights and privileges to authors. More importantly, exclusivity in IPRs is assigned to the creators of works in return for the publication of their works.

In traditional copyright law, a copyright holder is entitled to prevent access to information through an exclusionary right, namely, copyright – an exclusive legal power furnished to the author allowing for the power to exclude others from any use of his or her copyrighted work. The language of property rights over copyrighted works available online would seem to imply an exclusive possessory right in intangible bits of information. The language refers to the copyright holder's right to "exclude others" from using works protected as intellectual property, and by casting copyright infringement as "theft" of the "property" that resides in the holder's exclusive domain, the exclusionary power is achieved. This right would entitle the copyright holder to exclude the rest of the world from dealing with that work. There is no doubt that a copyrightable work is not just an aggregation of 'bits' of information. The digitization of copyright, undeniably, results in information aggregation however, it is still in the form of bits.

Unlike finite and scarce tangible resources, intangible information contained in copyrighted works, such as literary and artistic works becoming available online, is non-rivalrous in nature, in the sense that the use of the resource does not deplete it.[13] Scholars argue that non-rivalry could be considered the opposite of congestion. For example, the enjoyment of watching a football game is not diminished by the presence of many other viewers around the world. In other words, the marginal cost of serving an additional user of a creator's work is zero when the work is available online. Consequently, when an author or other right holder charges for access to the work that becomes available in the market, consumption of the good is needlessly rationed. Users who are unwilling to pay the going price are excluded from using the work, although they would have benefited from it at no cost to anyone. As a result, social and economic welfare is not maximized.

In particular, the term "non-rivalry" characterizes information goods or services as intangibles of which the consumption by one person does not detract from the ability of others to consume. Information goods are non-rivalrous because they cannot be exhausted by consump-

[13] Mario Garcia, 'Cautious Openness: The Spanish Constitutional Court's Approach to EU Law in Recent National Case Law', *European Law Blog - New and comments on EU l*aw (June 2017) <http://europeanlawblog.eu/2017/06/07/cautious-openness-the-spanish-constitutional-courts-approach-to-eu-law-in-recent-national-case-law/>.

tion. In contrast, tangible goods are consumptible and exhaustible, in that their usage by one person precludes others from using them. Tangible and scarce resources that are traded in a market are put to their highest-valued use by those who have a legal right to them. For physical resources, in the absence of transaction costs, bargains in the free market will guarantee efficient allocation due to the user with the highest-valued usage being able to offer the highest bid for them.

However, this is not the case with information goods that are intangible and non-rivalrous. Information goods do not raise similar allocation problems such as tangible resources in the market.[14] The non-rivalrous nature of information goods means that there seems to be no social cost associated with their usage since no one else is deprived of that usage when one uses an information work. Therefore, there is no need to allocate information work to the most efficient user leverage the IPR legal edifice with the aim of allocating protected works only to those users who pay for said works' usage.[15]

While the non-rivalrous nature of information goods exists, the consumption of a copyrighted work through the internet by one person does not detract from the consumption of the same work by others. The non-excludable nature of that work also exists, in the sense that the use of the work can hardly be limited once made available for consumption through the Internet. For example, the fact that one person is reading Lawrence Lessig's *Code and Other Laws of Cyberspace* does not diminish another person's ability to read the same book and understand its meanings and analysis. Further, no person is excluded from enjoying the insightfulness of that book just because one or many persons, simultaneously or not, are reading it.[16] A public good that, once made available via the Internet, may be consumed by an infinite number of people - namely, society. The mode of consumption is non-rivalrous and non-excludable and at almost zero marginal cost to the creator of the work for such consumption. Therefore, information contained in creative works, such as the aforesaid book available in the Internet environment, is, much like the light from a lighthouse, a public good.

Moreover, like the light from the lighthouse, the use of knowledge and information contained in information works by people creates positive externalities. For instance, once information works are created and made available online, there is a benefit to society. The widest

[14] Niva Elkin-Koren and Eli Salzberger, *The Law and Economics of Intellectual Property in the Digital Age - The Limits of Analys*is (2013) 45.

[15] Ibid 59–62.

[16] Lawrence Lessig, *Code: And Other Laws of Cyberspace, Version 2*.0 (Lawrence Lessig, 2006) *('Co*de').

possible consumption of the information works results in the maximization of social and economic welfare, and furthers innovation based on the knowledge and information contained in the information goods and protected work. The use of information contained in a protected work that is available online nurtures the human capital that could subsequently contribute to the production of more information goods and protected works.

Without private rights (through IPRs law's provisions) over public goods (being information goods according to microeconomic theory), producers of inventive or creative works understood as public goods, once available online, will lose their incentive both in producing them and ensuring that they are available to society even if there is no way to recover the investment made in producing them. This lurking loss of interest in their production and the under-availability of information goods such as protected works can be overcome by leveraging IPRs' legal edifice by creating the artificial notion of excludability (scarcity) in protected works.[17] Therefore, IPRs law seeks, among other things, to strike a balance between the incentive to create and innovate and the diffusion of the results obtained.[18]

This contradiction between the producer's incentive to create or invent from and the unobstructed and beneficial use to society for a user translates, in economic parlance, into a trade-off between dynamic and static efficiency.[19] Here, dynamic efficiency refers to the improvement and renewal of production techniques and goods over time. It is the result of investment in research and development as well as in design and creation.[20] Additionally, the concept of dynamic efficiency refers to an economy that appropriately balances short-term concerns (static efficiency) with long-term concerns (focusing on encouraging research and development). Through dynamic efficiency, an economy can further improve efficiency over time. Investments in education, research and innovation are important in this process. Dynamic efficiency also refers to the ability to adapt quickly and at low cost to changed economic conditions, and thereby maintain output and productivity performance despite economic 'shocks'.[21]

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[17] Ruth L Okediji, *Copyright Law in an Age of Limitations and Exception*s (Cambridge University Press, 2017).

[18] Simon Stokes, *Digital Copyright: Law and Practice* (Bloomsbury Publishing, 2019) *('Digital Copyright')*.

[19] Jesús Huerta de Soto, *The Theory of Dynamic Efficienc*y (Taylor & Francis, 2009).

[20] Ling Huang and Martin D Smith, 'The Dynamic Efficiency Costs of Common-Pool Resource Exploitation' (2014) 104(12) *American Economic Review* 4071.

[21] David Teece, Margaret Peteraf and Sohvi Leih, 'Dynamic Capabilities and Organizational Agility: Risk, Uncertainty, and Strategy in the Innovation Econ-

To achieve static efficiency, allocation of resources should aim to maximize surplus. Surplus in the case of copyrighted works consists not only of a creator's or subsequent right holder's profit, but also of a user's gain. Profit is measured by the area between the work's price and the marginal cost (i.e., the cost of serving one additional user by making the work available to him or her) whereas a user's gain is measured by the area between the demand curve for the work and the price of the work. Static efficiency refers to the consequences of today's decisions with regards to creator's, or subsequent right holder's, profits are limited to short-term gains without considering the interests of the public for the work. Thus, static efficiency does not consider the social benefit in the decision-making process regarding the creator's or other right holder's profit and short-term concerns.

While solving the problem of underproduction, excludability therefore imposed by copyright law addresses another problem of information goods, also known as the problem of underutilisation, which is caused by the efforts of right holders to cope profitably with the non-rivalry nature of information goods.[22] As noted earlier, an information good is non-rivalrous when its consumption by an individual does not reduce the quantity of the same good available to others. Non-rivalry of information goods implies that the marginal cost of serving them to an additional consumer is zero or close to zero.[23]

In economics and finance, marginal cost is the change in total cost that arises when the quantity produced changes by one unit, which is also the cost of producing one more unit of a good.[24] If the marginal cost is assumed to be zero for non-rival information goods (e.g., copyrighted works available online), then property rights set by copyright law permitting royalties to be charged to additional consumers of information goods leads to an inevitable deadweight loss to society.[25]

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omy' (2016) 58(4) *California Management Review* 13 ('Dynamic Capabilities and Organizational Agility').

[22] Kelefa Mwantimwa and Emmanuel Elia, 'Utilisation of E-Resources to Support Teaching and Research in Higher Learning Institutions, Tanzania' (2017) 12(2) *University of Dar es Salaam Library Journal* 98, 110.

[23] Bas Jacobs, 'The Marginal Cost of Public Funds Is One at the Optimal Tax System' (2018) 25(4) *International Tax and Public Finance* 883, 890.

[24] Bethany A Frew et al, *Revenue Sufficiency and Reliability in a Zero Marginal Cost Future: Preprint* (No NREL/CP-6A20-66935, National Renewable Energy Lab. (NREL), Golden, CO (United States), 1 December 2016) <https://www.osti.gov/biblio/1335800> *('Revenue Sufficiency and Reliability in a Zero Marginal Cost Future').*

[25] Levent Kutlu, 'Misspecification in Allocative Inefficiency: A Simulation Study' (2013) 118(1) *Economics Letters* 151, 152 ('Misspecification in Allocative Inefficiency').

If the protected information good be available at a price that is higher than the marginal cost of serving an additional consumer, then only consumers who are willing to pay the price set by right holders are permitted and expected to benefit from the work. Further, ff this number of consumers who are permitted to use the protected information good is diminished dramatically because of the difference between the marginal cost of serving an additional consumer and the price set by right holders for the use of copyrighted work, then underutilization of the copyrighted work as well as deadweight loss are the outcomes.[26]

Classic economic analyses of IPRs seek a measurable optimal protection point at which the creation and dissemination of new works is not negated by deadweight losses.[27] The aim of legislation in IPRs should be to achieve, at least approximately, the maximum benefits from creating additional works minus both the losses from limiting access to protected works plus the costs of administering IPRs protection.[28]

The underutilization problem is easier to understand in the light of works for which there are no substitutes in the market. IPRs' monopolistic price-setting operation for a work that becomes available in the market is not particularly rigid in cases where there are other works available in the (same) market that could substitute for it. In the presence of substitutes, the right holders of works will, most likely, be forced to sell them at a competitive market price; with IPR's protection not making much of a difference regarding price setting. However, for works without any substitute in the market, IPRs' monopolistic power will drive monopolistic pricing of the work, too.

3. New Paradigm – Information Environmentalism

3.1. The Need to Reconceptualize the Traditional Public Domain

The public domain is considered as a "wasteland of underserving detritus" and should not "worry about 'threats' to this domain any more than [it] would worry about scavengers who go to garbage dumps to look for abandoned property".[29] Other scholars reconstrued that notion

[26] Elkin-Koren and Salzberger (n 14) 88.

[27] Kate Darling, 'Occupy Copyright: A Law & Economic Analysis of U.S. Author Termination Rights' (2015) 63(1*) Buffalo Law Revi*ew 147, 166 ('Occupy Copyright').

[28] Ruth Towse, 'The Quest for Evidence on the Economic Effects of Copyright Law' (2013) 37(5) *Cambridge Journal of Economics* 1187, 1192.

[29] Communia International Association, 'Public Domain Manifesto' <https://publicdomainmanifesto.org/manifesto/>; Giancarlo Frosio, *The*

by speaking of a "positively defined public domain" due to an adverse 'taste' given to the concept through the lenses of intellectual property legal frameworks.[30]

The public domain, as we define it, is a wealth of information that is free of the barriers to access or reuse that are typically associated with copyright protection, either because it is free of any copyright protection or because the right holders have decided to remove these barriers. It is the foundation of our self-awareness, as expressed by our shared knowledge and culture. It is the raw material from which new knowledge and cultural works are derived. The public domain serves as a safeguard, ensuring that this raw material is available at a low cost of reproduction and that all members of society can build on it. A healthy and thriving public domain is critical to our societies' social and economic well-being.[31]

The digital networked information society has pushed the public domain issue to the forefront of copyright debates. A solid and up-to-date understanding of the nature and role of the public domain to preserve and strengthen it should be re-introduced.[32] In addition, he public domain should be reconsidered in view of the new features associated with creative efforts and works with copyright protection. Furthermore, the necessary principles and guidelines for a healthy public domain at the start of the twenty-first century should recapture the concept of information commons spread online and through the internet, as discussed below.

3.2. Information Commons/Intellectual Commons

The commons on the Internet, known as the information commons, is very different to the physical commons. It is a bit like being on another planet where all the natural conditions governing daily life are different, or even a parallel universe where the rules of physics as we understand them no longer apply. For a start, information goods do not break down, diminish, or become less over time as physical goods do *a la* the laws of entropy dictated by Second Law of Thermodynamics. Rather, they proliferate and replicate on the Internet as users share, 're-tweet'

Road to Propertization and Enclosure (Edward Elgar Publishing, 2018) <https://www.elgaronline.com/view/9781788114172/15_chapter5.xhtml>.

[30] Dusollier Séverine, *Scoping Study on Copyright and Related Rights and the Public Domain* (WIPO, 2016).

[31] Communia International Association (n 29).

[32] Melanie Dulong de Rosnay and Juan Carlos De Martin, 'The Public Domain Manifesto' *in The Digital Public Domain: Foundations for an Open Culture* (Open Book Publishers, 2013) xix <http://books.openedition.org/obp/532>.

or post on sites such as *YouTube* the information goods, the continued enjoyment of which is in no way diminished by doing so.

How should information be conceived of, in legal terms, to effect IPR protection for its creator? But, then at the same time make such information available to the public for its use and benefit?

The first task is to define and understand the environment in which these laws operate, namely the information commons or, more particularly, intellectual commons. Cunningham describes the intellectual commons and how it differs from the physical commons as follows:

> Intellectual commons derives its meaning from the concept of the commons, as it relates to the physical environment. Within the physical world, footpaths, roads, and highways provide obvious and explicit examples of the commons. The intellectual commons is a subtler concept, at least in terms of presence, yet it is just as important as the physical commons, particularly with the contemporary information age. Twenty first century would grind to a halt without a robust physical commons and intellectual commons. The latter include virtually all pre-twentieth century knowledge and culture, a majority of scientific knowledge from the first half of the twentieth century, and the lion's share of contemporary science and academic learning. Einstein's theory of relativity sits alongside the local beach, park, or nearest footpath since the (relevant) community can access these resources without the permission of anyone else.[33]

Before the advent of property rights as the Western world knows them, as has been noted above, a system of sharing common physical resources prevailed ('the physical commons'), but when it reached a point where it was untenable due to free riding, a new way of thinking was required, hence the concept of property ownership. However, on the information commons, because of the non-rivalrous and non-excludable nature of information goods, a new way of thinking is required to protect IPRs. The main problem with free riding in the information space is not depletion, deterioration, or devaluation of creative works from excessive reproduction or continued use as with tangible goods, but the fact that it deters anyone creating and putting anything out there in the first place - with no way to properly recoup the costs and derive any decent profits therefrom.

[33] Cunningham n(46) 73.

3.3. Experience from Recent Case Law in the Current Copyright Regime

The *Universal Music Publishing Pty Ltd v Clive Parmer (Palmer)* case has served to highlight some of the shortcomings of the current approach to copyright protection in this new reality of non-rivalrous and non-excludable goods that form part of the information commons.

3.3.1. *Inadequacy of Damages*

Courts can find it difficult to quantify the loss sustained from the damage caused by a blatant infringement of copyright on a wide scale on the information commons. Are copyright protections just about compensating the individual creator or recognising some form of public harm caused by infringing behaviour and punishing offenders accordingly? Australia's copyright scheme ostensibly sets out to do both. This was recently illustrated in *Universal Music Publishing Pty Ltd v Clive Parmer* (*Palmer*).[34]

In *Palmer,* billionaire Australian businessman Clive Palmer helped himself to the melody from rock group *Twisted Sister's* 1984 hit song 'We're not gonna take it' (WNGTI) to create a thinly disguised version of that song entitled 'Australia Aint Gonna Cop It (AAGCI),' which was played ad nauseum on the Internet, on TV and on the radio to promote Palmer's United Australia Party's failed 2019 Australian federal election campaign. Palmer disingenuously claimed in his defence to Universal's suit, inter alia, that WNGTI was copied from a publicly available Christmas Carol, 'Come all ye faithful.'[35] However, Katzmann J did not have very much trouble in finding that AAGCI was an obvious knock-off of WNGTI which would come as no surprise to anyone who has heard both songs.

In assessing damages, His Honour relied on s115(2) and s115(4) of the *Copyright Act 1968* (Cth). Section 115(2) provides that 'Subject to this Act, the relief that a court may grant in an action for an infringement of copyright includes an injunction (subject to such terms, if any, as the court thinks fit) and either damages or an account of profits.'[36] In applying that provision, His Honour deferred to the 'user principle' and calculated what would have been the licence fee for use

[34] *Universal Music Publishing Pty Ltd v Palmer (No 2)* [2021] FCA 434.

[35] Heath Parkes-Hupton, 'Clive Palmer to Use Christmas Carol Lawsuit Against Universal Law Suit,' *The Australian*, (Newscorp, Sydney), 27 July 2021; https://www.theaustralian.com.au/breaking-news/clive-palmer-to-use-christmas-carol-defence-against-universal-music-lawsuit/news-story/7eb9398e7ff71b5056eb1f1df9bd2fb9.

[36] *Copyright Act 1968* (Cth) s115(2).

of WNGTI had the band agreed to license it[37] (even though of course, they didn't). In employing the 'user principle,' His Honour cited and relied on the test espoused by Yates J in the *Winnebago* case that 'The plaintiff may not have suffered actual loss from the use, and the wrongdoer may not have derived actual benefit. Nevertheless, under the principle, the defendant is obliged to pay a reasonable sum for the wrongful use.' [38]

The user principle is an attempt to compensate individuals for loss sustained by them for breach of their copyright. The court also has a discretion, however, to impose 'additional damages' under s115(4) of the Act taking matters into account such as flagrancy of the breach and deterrence which have a public interest aspect to them for the purpose of preventing of public harm and punishment for such harm caused by copyright breach.[39]

The *Palmer* case is actually a refreshing exception to what has generally been a reluctance to hold perpetrators of this sort of behaviour to account in court (witness Donald Trump's numerous instances of flagrant trampling on artist's rights using well known and loved popular songs to promote his political campaigns in the 2016 and 2020 US elections and at his many rallies outside the election cycle, even including at one stage WNGTI,[40] notwithstanding the protests of dozens of the artists involved).[41]

In cases like this, it is not just the artist who is injured, but rather the information commons itself as music beloved by the public becomes forever connected in the public psyche to these tasteless endeavours. It is the same principle when a popular piece of music is used in an advertisement and is forever associated with the product being sold, but at least in those cases the individual artist is probably being duly compensated with royalty fees. But one might ask, however, if even that is enough. The artist might be desperate for the income from selling his or her work to an advertiser but if it means the work will be permanently degraded in the public's mind's eye, is it really the artist's right to make that call? Perhaps it is because artists are so poorly

[37] Ibid [368].

[38] *Winnebago Industries Inc v Knott Investments Pty Ltd (No 4)* (2015) 241 FCR 271 [13] (Yates J).

[39] *Copyright Act 1968* (Cth) s115(4).

[40] Ibid [149]. Palmer's counsel mentioned this figure as the quantum of an undertaking of damages that would have to be given if an interlocutory injunction was sought.

[41] Creative commons, 'Musicians Who Oppose Donald Trump Use of their Music', *Wikipedia Encyclopaedia* last edited 15 June 2021 (accessed 26 September 2021) (web page) (https://en.wikipedia.org/wiki/Musicians_who_oppose_Donald_Trump%27s_use_of_their_music.

compensated for their artistic endeavours generally that they even dare to think about selling their art to advertisers. Later, we will discuss the possibility of remunerating artists to disincentivize them from having to take such measures if it means preserving the integrity of such a work and the information commons, even if the trade-off is perhaps less (but not loss of) individual control of an artist's work. Other initiatives will also be discussed to focus on adequate compensation of not only the individual harm caused by copyright but also what is necessary to deter and address the issue of public harm to the information commons.

3.4. A Model of Information Governance

To come up with a meaningful model of information governance to regulate IPRs in a manner that ensures dynamic efficiency, several factors need to be considered. Cunningham identifies four factors based on the work of James Boyle, namely: welfare economics, information commons, ecology, and public choice theory. James Boyle wrote:

> A successful political movement needs a set of (popularizable) analytical tools which reveal common interests around which political coalitions can be built. Just as 'the environment' literally disappeared as a concept in the analytical structure of private property claims, simplistic 'cause and effect' science, and markets characterized by negative externalities, so too the 'public domain' is disappearing, both conceptually and literally, in an intellectual property system built around the interests of the current stakeholders and notion of the original author. In one very real sense, the environmental movement invented the environment so that farmer, consumers, hunters and birdwatchers could all discover themselves as environmentalists. Perhaps we need to invent the public domain in order to call into being the coalition that might protect it.[42]

Cunningham explains that the four factors referred to above are implicit in Boyle's passage. As he explains:

> The four environmental analytical frameworks inherent within this passage are implicit rather than explicit. To elaborate, the analytical structure of private property claims relate indirectly to the commons to the extent that the commons can be dichotomized with private property. The discipline of ecology that emerged during the nineteenth century can be thought of as a counter-reaction to the reductionist, Baconian-inspired ecological science. Reference to 'markets characterized by negative externalities' relates to the broader discipline of welfare economics, which ultimately seeks to

[42] Ibid 4.

include social and private costs within its analysis when seeking to determine the overall costs and benefits associated with economic activity. And finally, the idea that there is a need to 'reveal common interests around which political coalitions can be built, along with the notion that IPR's are 'built around the interests of the current stakeholders' infers the applicability of public choice theory. This theory is traditionally concerned with how private interests trump the interests of the public at large and, more contemporaneously, how fragmented interests can respond to this tendency.

In contemplating the four analytical frameworks of environmentalism, relevant regulatory and governance structures struggle to fully consider:

i. The true costs associated with production and consumption (welfare economics);

ii. Historically diverse interactions between human beings and land (the commons);

iii. The complex relationship between living ecosystems (ecology); and

iv. The rent seeking effect of concentrated interests on regulatory frameworks (public choice theory).[43]

Ultimately, employing such a model involves a re-think about property ownership and how that applies to information goods. Cunningham suggests there are two identifiable global viewpoints that characterize information ownership. As he explains:

> The first concentrates on private ownership (and thus private control) of information in frameworks drawn primarily from property theory. The second viewpoint gives attention to common ownership (and thus common control) of information. For the most part, the two viewpoints are presented as a contra-distinction, where private use exists at the expense of common use and vice-versa.[44]

The first viewpoint is representative of the current paradigm of IPRs. Turning to the four components of a model for information governance referred to above, arguably the biggest critique of the current paradigm is that it ignores the first component (welfare economics) in its obsession with the financial bottom line. Arthur Pigou refers to the 'social net product' as the appropriate measure of the true economic cost of something, namely "the total net product of physical things or objective

[43] Ibid 5.
[44] Cunningham (n48) 26.

services due to the marginal increment of resources in any given place, no matter to whom any part of this product may accrue."[45]

Cunningham suggests this measure is inherently useful since it takes into account public costs and benefits and as well as private costs and benefits which is at the heart of welfare economics.[46] Cunningham also refers to the 'information paradox' that results from the propertisation of information – on the one hand, the marketplace relies on the free flow of information to be efficient, but on the other hand, propertisation of information is an efficiency cost as there is a conflict between market efficiency of freely available information and the incentives to produce that information.[47] Measuring the utility of the free flow of information is arguably within the purview of welfare economics.

The second component of the model mentioned above, the interaction between humans and the commons, has been commented on elsewhere in this paper discussing the 'Tragedy of the Commons'. Suffice it to say at this point, the current incentive paradigm of IPR would appear to encompass the negative community approach. This would appear to be a reversal of how the commons were perceived before the development of IPRs, namely positive community, which saw the public commons as belonging and being open to all. The information commons today appear to have something in common with the physical commons of yesteryear in the sense that just as one's ability to make the freely available resources scarce were limited then (at least initially), so they are today.

Of course, the potential for, and the fact of, competition for increasingly scarce resources on the physical commons eventually led to the current property regime. That cannot happen in today's information commons where information goods are non-excludable and non-rivalrous. This is a reality we should be familiar with rather ignoring. Faced with the fact that the orthodox model is dying, or even now all but dead, struggling artists are finding it almost impossible to make a living once their works are disseminated on the internet. Perhaps it is time to accept that the information commons are a public space that can no longer be tamed. We are all able to access it and take what we want from it (like physical commons of old). Is it now time we all paid for it, in the same way we pay for universal healthcare by payment or an annual medicare levy? This would work a bit like the lighthouse principle – those having access to the port pay as part of their docking fees a lighthouse levy.

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[45] Cited in Cunningham (n46) 46.
[46] Ibid.
[47] Ibid 29.

As part of our general tax commitments, we pay an information levy. On the other side of the coin, people who show they are making positive contributions to the information commons can receive tax rebates or even funding in a similar way to the Australian film industry operates.

The third component of the above model, an information common, the complex relationship between living ecosystems, sees us having to reconceptualize our reality in yet other ways. As mentioned earlier in this paper, the information space is like an alternate reality. What is also important is how it reacts with other aspects of our reality. Just as the environmental movement, developed an empirically based science, 'ecology' is the physical environment, Cunningham suggests there should be an empirically based 'information ecology' in the information environment.[48] He also suggests, regarding information governance, a similar principle should apply as the 'precautionary principle' in the information environment as it does in governance of the physical environment.

The notion here is that, in the face of threats of serious and irreversible damage, lack of scientific certainty should not be a bar to cost effective measures to prevent degradation to the environment.[49] Perhaps the precautionary principle's greatest influence on information is, as Cunningham suggests, its effect on the onus of proof of environmental harm – that is, reversing the onus. That instead of the rest of us having to show that what developers are doing harms the environment, developers themselves must prove that their actions will not harm the environment (which in practical terms means submitting Environmental Impact Statements (EIS)).

4. Conclusion

This paper clarifies the debate regarding the prominence of copyright in the context of policymaking focused on copyright's economic ramifications. In addition, the paper considers the increasing dependency, albeit gradual, on information goods and the significance of associated costs implied by the existing copyright regime. Furthermore, economic theory that considers the status quo, and especially the public good nature that copyrighted works acquire when they become available online, provides the basis for a ground-breaking reconsideration of copyright law.

Since information in literary, scientific, and artistic works is infinite, authors require state-established and enforced property rights to enable

[48] Ibid 104.
[49] Ibid 106.

them to prevent non-paying members of the public from using the protected works without paying royalties. Moreover, authors require government-established and enforced property rights that provide them with a solid legal background to provide protected works to paying members of society only. Copyright legislation establishes the creator's exclusive rights in information goods, such as a creator's works. Thus, copyright legislation propertises information materials that consist of a work and facilitates the private production of information materials by temporarily limiting public access to those works.[50]

Public access to copyrighted works, especially those available online, have in recent times become an issue of growing social concern since private incentives to recover financial investments from public uses of literary and artistic works appear to take precedence over the benefit of users at large. In the resonance of copyright's revolution, what seems to matter more are the private interests of those right holders, who rely on works produced based on the exercise of property rights, that are considered a kind of possessory right entailing a general right to exclude society from using these works.[51]

When the costs incurred for access to copyrighted works, which include transaction costs in the transfer of property rights, become prohibitively high - and are subject only to the uncontrolled intention of copyright holders for maximization of their private profits leveraging copyright laws - static efficiency prevails but with a significant cost. The cost is one of deterrence for the efficient public use of protected works aimed at garnering useful social knowledge and producing social and economic welfare. In that case, the use of copyrighted works to generate new research and produce new knowledge is hampered, and consequently, dynamic efficiency can hardly be achieved.

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[50] Marshall A Leaffer, *Understanding Copyright L*aw (LexisNexis, 2010); Ivan Paak Liang Png and Qiu-hong Wang, 'Copyright Law and the Supply of Creative Work: Evidence from the Movies' [2016*] Comparative Law and Economic*s. <https://www.elgaronline.com/view/edcoll/9780857932570/9780857932570.00025.xml> ('Copyright Law and the Supply of Creative Work').

[51] Peter Baldwin, *The Copyright Wars: Three Centuries of Trans-Atlantic Battl*e (Princeton University Press, 2016) *('The Copyright War*s'); Khanuengnit Khaosaeng, 'Online Re-Creation Culture in the [21]st Century: The Reconciliation between Copyright Holders, Online Re-Creators and the Public Interest' (Thesis, Queen Mary University of London, 2017). <https://qmro.qmul.ac.uk/xmlui/handle/123456789/24645> ('Online Re-Creation Culture in the 21st Century'); Tomasz Pietrzykowski, *Beyond Personhood: From Two Conceptions of Rights to Two Kinds of Right-Holde*rs (SSRN Scholarly Paper No ID 2597028, Social Science Research Network, 21 April 2015) <https://papers.ssrn.com/abstract=2597028> *('Beyond Personhoo*d').

The discussion then turned to the need for a paradigm shift away from the strict property-based incentive paradigm. This shift is characterised by the maximalist view of IPR, (but not completely abandoning the need for incentivisation to something that views public good and private rights as not purely dichotomous but rather, as something that reflects a dynamic interaction between the two. It was noted that this dichotomy was born of the two contrasting views of resources in the public domain: one which views a public resource as belonging to no one until claimed by someone who, in pursuit of their own private interests, may exclude others from its use (negative community); and the other where the resource is viewed as belonging to everyone with the exception of a limited number of users who may, if it benefits the public, exclude others from use (positive community).

It is submitted that a positive community approach should be taken so that information goods on the information commons are viewed as everyone's. The exception to this approach would be the exception of those works where an individual has created them at personal cost and expense and should thus be incentivised to create them to ensure the public continues to enjoy these goods. However, the incentive paradigm cannot be enforced in such a way to punish free riders as this is impracticable. Free riding is not preventing the information good from being enjoyed by others or diminishing its value or at least its utility. Moreover, if perfect implementation of strategic behaviour avoidance were possible, this may lead to underutilisation of some resources which are otherwise necessary for the public good (creating an anticommons).

To obtain the appropriate balance of incentivising individuals to create works in order to further the public good of having more information goods available rather than less, a governance model based on Cunningham's information environmentalism is suggested. With welfare economics employed to measure the true economic cost of IPRs, an ecological approach taken to measure IPR's interconnectivity with other aspects of society and bold concepts, such as the precautionary principle, now form part of the wallpaper of environmentalism. An information ethic and standing to the information commons is being considered, with public choice theory considered in the manner of countering powerful interest groups by use of social co-ordination, innovations such as FLOSS are now rising. The final factor in this model, the information commons, needs to be conceived as a semicommons for legal purposes where certain information works enjoy IPR protection, albeit through a minimalist lens. A positive community conception is that IPR's main purpose is to protect the public good by promoting the further production of information goods, rather than to protect

individual rights. Promoting the dynamic interaction between public use and private use of information is for the greater public good.

Jurisprudence, like many disciplines in the humanities and the social sciences, has long envied and tried to emulate their brethren in the hard sciences of the natural world with its immutable and unchangeable rules and fixed reality. Jurisprudence, the humanities, and social science disciplines operate in the social, political, and economic sphere where reality changes often, and nothing is fixed or immutable. Whereas the natural world is not much different today than it was 100 years ago (save for a certain degree of anthropogenic change), the social, political, and economic world is all but unrecognizable to how it was 'back then'. We cannot change an ever-changing world, nor can we arrest its development therefore we cannot keep seeing such a world through the same lens. We have to make laws that accept reality and be open to 'reimagining', as Cunningham suggests. Or perhaps put more simply, as the celebrated Greek author and namesake of one of the authors of this paper, Nikos Kazantzakis, once observed:

Since we cannot change reality, let us change the eyes which see reality.[52]

[52] Nikos Kazantzakis, *Report to Greco* (Simon and Schuster, 2012) 45.