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The Balancing Act of Copyright: The Copyright Laws of Australia and the United States in the Digital Era

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**The Balancing Act of Copyright: The Copyright Laws
of Australia and the United States in the Digital Era.
Fair Use, Fair Dealing and Digital Rights Management.
An Uneasy Case for Restoring the Balance of Interests
Between Copyright Users and Owners?**

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The Balancing Act of Copyright: The Copyright Laws of Australia and the United States in the Digital Era. Fair Use, Fair Dealing and Digital Rights Management. An Uneasy Case for Restoring the Balance of Interests Between Copyright Users and Owners?

By Dilan Thampapillai

I. Introduction

All of the common law statutes on copyright law have their genesis in the Statute of Anne 1710 of the United Kingdom.¹ The Statute of Anne was the culmination of the lobbying

¹ See further J. Cohen, L. Loren, R. Okediji and M. O'Rourke, *Copyright in a Global Information Economy*, Aspen Law & Business Publishers, New York, 2002 at pp26-27. See also P. Goldstein, *Copyright's Highway*, Stanford Law and Politics, Stanford, revised edition 2003 at pp34-35 and pp39-40.

of the Stationer's Company of London, a publishers guild, to have their economic interests in the publishing of manuscripts recognized by the UK parliament. The Statute of Anne also advanced the public interest by promoting a greater public access to books by creating limited economic rights in literary works. The title of the Statute of Anne stated that it was to be, "an Act for the encouragement of learning."² Furthermore the statute granted a limited duration of rights whereas those rights had previously been granted in perpetuity.³ Thus from the beginning of the first real statute on copyright the common law has had a tradition of balancing the interests between the users and owners of copyright. At the heart of this balancing act is a utilitarian concern with extracting the maximum social and economic benefit from the use of intellectual materials.

This balancing act has encountered difficulties during the digital era. The information industries have lobbied hard for changes to copyright laws that will best protect their interests. In an almost perfect example of public choice theory, those with the most at stake, the owners of copyright materials, have used their strength to push for such laws whilst the general public has been insufficiently mobilized to ensure that their interests in the intellectual commons are not overlooked.⁴

This essay examines how common law jurisdictions of Australia and the United States have reacted to the digital era. In particular, fair use, fair dealing and digital rights management as seen in the context of the balance of interests between the users and owners of copyright.

Australia and the United States

Australia and the United States are suitable subjects for a comparative analysis. Both nations belong to the same Western legal tradition, both nations are liberal-conservative societies and both are more or less capitalist nations. Furthermore both nations are now

² Ibid. Statute of Anne, 8 Anne, c.19 (1710).

³ Ibid. The statute granted two 14-year terms.

⁴ See for example J. Ginsburg, "How Copyright Got a Bad Name for Itself", 26 *Columbia Journal of Law & Arts* 61 (2002).

engaged in the process of negotiating a free trade agreement, of which copyright is a central part. Both nations have recognized that digital technology poses a significant challenge to the enforcement and protection of copyrights.⁵

Traditionally the United States was a copyright pirate.⁶ The United States justified its behavior on the grounds that it was a net importer of intellectual property and that it needed the inflow of ideas in order to develop. The Europeans tried repeatedly to get the United States to be a signatory to the Berne Convention, the main copyright treaty. The United States has only recently become a defender of copyright in the international sphere. It is worth noting that many of the current developing nations have used arguments similar to those of the United States to justify lesser standards for intellectual property agreements when negotiating at the Stockholm conference and during the TRIPS Agreement.⁷

Australia inherited its copyright laws, along with much of its other laws, from the United Kingdom when it became a nation upon federation in 1901.⁸ Indeed until the *Copyright Act 1968 (Cth)* entered into force, Australia even still maintained an old copyright statute from the United Kingdom which had been repealed in the latter nation many years previously.⁹ Australia is a net importer of intellectual property.¹⁰ However copyright based industries are important to Australia's economy. It is a widely held view by both

⁵ See further for the United States, Report of the Working Group on Intellectual Property Rights, *Intellectual Property and the National Information Infrastructure (The White Paper)*, September 1995. See also for Australia, Department of Foreign Affairs and Trade, *Intellectual Property – A vital asset for Australia*, November 1999.

⁶ See generally Barbara Ringer, *The Role of the United States in International Copyright--Past, Present, and Future*, 56 *Georgetown Law Journal* 1050 (1968). See further J. Cohen, L. Loren, R. Okediji and M. O'Rourke, *Copyright in a Global Information Economy*, Aspen Law & Business Publishers, New York, 2002. See also P. Goldstein, *Copyright's Highway*, Stanford Law and Politics, Stanford, revised edition 2003. See also R. Okediji, "Copyright and Public Welfare in a Global Perspective," 7 *Indiana Journal of Global Legal Studies* 117 (1999).

⁷ *Ibid.* See also Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy*, London, September 2002.

⁸ See further J. McKeough, K. Bowery & P.Griffith, *Intellectual Property: Commentary and Materials*, Law Book Co., Sydney 2002. See also R.Reynolds & N. Stoianoff, *Intellectual Property: Text and Essential Cases*, Federation Press, Sydney, 2003.

⁹ R.Reynolds & N. Stoianoff, *Intellectual Property: Text and Essential Cases*, Federation Press, Sydney, 2003 at pp15-16. In the United Kingdom the *Copyright Act 1958* repealed the earlier *Copyright Act 1911*.

¹⁰ The Allen Consulting Group, "The Economic Contribution of Australia's Copyright Industries," *Australian Copyright Council Discussion Paper*, 2001.

sides of Australian politics that intellectual property symbolizes the key to maintaining and increasing Australia's wealth in the future.¹¹

Australia and the United States successfully concluded negotiations on a free trade agreement in May 2004.¹² In the absence of a genuine international consensus on trade issues, including intellectual property, free trade agreements have become a de facto way of safeguarding national interest with trading partners. Whilst it is beyond the scope of this paper to explore the Australia-United States Free Trade Agreement in detail it is worth noting that the fact that copyright laws was a significant issue in the negotiations demonstrates the degree to which intellectual property is important to both nations.¹³ In October 2004 Australia implemented its obligations under the Australia-United States Free Trade Agreement (AUSFTA) when the Commonwealth Parliament passed the *US Free Trade Agreement Implementation Act 2004* (the USFTAI Act).

The concept of copyright

The balance of interests approach that has prevailed in common law copyright derives from a trade-off between the rights of authors and the greater public good. The intellectual foundations for this approach are evident in the writings of John Locke in *Two Treatises on Government*:

Man has a *Property* in his own *Person*. ... The *Labour* of his Body, and the *Works* of his Hands, ... are properly his. Whatsoever he then removes out of the State that Nature hath provided, ... he hath mixed his *Labour* with, ...and thereby makes it his *Property*. ...It hath by his *labour* something annexed to it, that excludes the common right of other Men. ...no Man but he can have a right to what that is once joined to, at least where there is enough, and as good as left in common for others.¹⁴

¹¹ Ibid. See also Department of Foreign Affairs and Trade, *Intellectual Property – A vital asset for Australia*, November 1999.

¹²For the text of the Australia-United States Free Trade Agreement please see the website of Australia's Department of Foreign Affairs and Trade at <http://www.dfat.gov.au/trade/negotiations/us.html>. See further for comments regarding the negotiations and related issues; M. Vaile, "Trade: Multilateral and Bilateral," *Sydney Papers*, Spring 2002. See also J. Kunkel, "Free Trade Hypocrisy in America and Europe," *Sydney Papers*, Spring 2002. See also *Australian Financial Review*, "Free Trade Has Its Price," Tuesday, May 27, 2003. *Australian Financial Review*, "Even if its Not Free US Trade Deal will have some Benefits," Saturday, May 31, 2003.

¹³ Ibid.

¹⁴ J. Locke, *Two Treatises on Government*, (1690) 13.

There is a natural rights theory that exists in the common law but it is constrained by notions of moral duty and the common good. That is, Locke's actor deserves the fruits of his labor but it is derived from the physical commons and he has a duty to share any surplus with others.¹⁵ This translates well into the concept of copyright and in particular the concept of the intellectual commons.

There is also sound economic justification for granting quasi-property rights to intellectual property. In general intellectual goods are social goods and are non-excludable.¹⁶ It is not possible for an owner of copyright to determine at all times who has access to his or her work. Unlike real property, intellectual property cannot be protected by a fence or other types of physical barriers. This reality is more profound in cyberspace given the ease with which information can be copied and distributed. Indeed this is what has given rise to the demand for more digital rights management tools.

In a competitive market a good is available at the marginal cost of its production. With regards to copyright works that would mean the cost of copying and distribution. However this would not reflect the real cost of production in the form of effort expended creating the work in the first place. Copyright law recognizes this dilemma and by granting temporary monopoly rights to the owners of creative work it seeks to provide adequate incentive for creators to invest their time and energy in making original works.

Copyright in the Digital Era

Copyright law is presently in a heightened period of change. One of the main reasons why this is occurring is because copyright based industries are increasingly important in the world economy. In 1999 copyright based industries contributed \$460 billion to the

¹⁵ See further W. Gordon, "A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property," 102 *Yale Law Journal* 1533 (1993).

¹⁶ See further for an economic analysis of intellectual property, R. Posner, *Economic Analysis of Law*, 2nd edition, 1977. See also W. Gordon, "Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors," 82 *Columbia Law Review* 1600 (1982).

economy of the United States, including \$80 billion in exports.¹⁷ In 1999-2000 the copyright industries of Australia contributed \$19 billion to Gross Domestic Product (GDP).¹⁸ There is a lot at stake economically for both Governments and industries in the effective protection of copyright. As UNESCO stated:

The creation and ownership of knowledge products are of increasing importance because of the centrality of information and knowledge to post-industrial economies. The concept of copyright, originally intended to protect authors and publishers of books, has broadened to include other knowledge products such as computer programs and films ... Copyright has emerged as one of the most important means of regulating the international flow of ideas and knowledge based products, and will be a central instrument for the knowledge industries of the twenty-first century. Those who control copyright have a significant advantage in the emerging, knowledge-based global economy.¹⁹

However the digital era has posed new challenges to copyright law. The ability to make vast amounts of near-perfect copies and to distribute them with ease, has meant that digital technology has challenged the effectiveness of copyright laws. Technology has always acted as a spur for change in copyright law.²⁰ The rapid advances in technology and the emergence of the internet have been the driving forces of these changes to date.

The internet has been remarkable in its capacity to remove boundaries between people and nations. But it has also been described as a “global copying machine, with millions of irresponsible and anonymous pirates pushing the buttons.”²¹ As the *Napster*²² case illustrates the potential for users to acquire perfect copies of copyright-protected material on the internet for little or no cost is a genuine threat to the owners of copyright.

The International Environment

The Berne Convention set the general international standards for copyright law for over one hundred years.²³ However with the continued advance of the digital era it became

¹⁷ Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy*, London, September 2002.

¹⁸ *Ibid* note 9.

¹⁹ UNESCO (1998), *World Information Report 1997/98*, UNESCO, Paris at p320.

²⁰ *Ibid* note 1.

²¹ P. Hugenholtz, “Software as a Commodity: International Licensing of Intellectual Property: Commentary: Copyright, Contract, and Code: What Will Remain of the Public Domain?” 26 *Brooklyn Journal of International Law* 77, 78 (2000) at p83.

²² *A & M Records, Inc. v Napster, Inc.*, 239 F.3d 1004 (9th Circuit 2001).

²³ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 223 U.N.T.S. 11850.

apparent that a new consensus was required. The TRIPS Agreement was created as part of the GATT²⁴. TRIPS takes the general standards of the Berne Convention and adds enforcement provisions. The TRIPS Agreement and other international conferences on copyright law have been marked by a divergence of interests between developed and developing nations.²⁵

At a regional level the European Union has been active in attempting to harmonize the copyright laws of its member-states. Traditionally the continental Europeans, and in particular France, have followed the approach of author's rights or *droit moral*.²⁶ In contrast the approach in common law countries such as the United Kingdom, the United States, Australia, Canada, New Zealand and South Africa has been that of balancing the interests between copyright owners and copyright users.

WIPO Copyright treaty

Formed in 1974 the World Intellectual Property Organization (WIPO) is one of the 16 specialized agencies under the aegis of the United Nations. The mission of WIPO is “to promote through international cooperation the creation, dissemination, use, and protection of works of the human spirit for the economic, cultural and social progress of all mankind.”²⁷ WIPO currently has 179 member states, including the United States, Australia and the vast majority of the European Union. One of the main goals of WIPO is to protect and promote the rights of the creators and owners of intellectual property.²⁸ As WIPO states, the emphasis on the protection of the rights of creators and owners of intellectual property, “acts as a spur to human creativity, pushing forward the boundaries of science and technology and enriching the world of literature and the arts.”²⁹ This focus on owners and creators is evident in the WIPO Copyright Treaty. The United States has

²⁴ The Agreement on Trade-Related Aspects of Intellectual Property Rights 1994.

²⁵ Ibid note 17.

²⁶ Ibid note 1.

²⁷ World Intellectual Property Organization (WIPO), General Information, at http://www.wipo.int/about-wipo/en/index.html?wipo_content_frame=/about-wipo/en/gib.htm.

²⁸ Ibid.

²⁹ Ibid.

acceded to the treaty. However Australia, whilst substantially in compliance, has yet to formally accede to the treaty.

The WIPO Copyright Treaty specifically provides for the copyright protection of computer programs and data compilations.³⁰ It is beyond the scope of this paper to deal substantively with the database debate. Article 11 deals with contracting parties obligations regarding technological protection measures. The WIPO Copyright treaty also recognizes the rights of authors by; (i) the right of distribution,³¹ (ii) the right of rental³² and (iii) the right of communication to the public.³³

Article 11 of the WIPO Copyright Treaty provides for the obligations of nation-states with respect to technological measures. Article 11 states:

Contract Parties shall provide adequate legal protection and adequate legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

The WIPO Copyright treaty is an attempt to update the main international copyright agreement, the Berne Convention, into the digital era.³⁴ The WIPO Copyright Treaty is also extremely significant because it creates much of the international environment in which Australian and American copyright law now operates.

II. Australian Copyright Law

Copyright law in Australia is covered by the *Copyright Act 1968 (Cth)*. The *Copyright Act* covers two basic types of subject matter. The first are artistic, literary, musical and dramatics work.³⁵ As in the United States computer programs are regarded as literary

³⁰ Article 4 and Article 5.

³¹ Article 6.

³² Article 7.

³³ Article 8.

³⁴ See further the Preamble to the WIPO Copyright Treaty and Article 1.

³⁵ Part III.

works.³⁶ The second type of subject matter concerns broadcasts (sound and television), films, sound recording, performer's rights and published editions of works.³⁷ The Copyright Act is intended to cover the field of copyright law in Australia. Pursuant to the USFTAI Act copyright in works exists for the life of the author plus 70 years.³⁸ The duration for copyright in sound recordings and cinematographic films is 70 years after the end of the calendar year of first publication.³⁹ In order to qualify for copyright protection a work must be original, in material form and have some connection to Australia.⁴⁰

As a statutory regime the Copyright Act applies to an extremely diverse range of subject matter. The range of works now protected by the Copyright Act has increased due to technological advances. In Australia the main Government body involved in policy review and research on copyright law has been the Copyright Law Review Committee. The Copyright Law Review Committee falls in part under the aegis of the Commonwealth Attorney-General and the Attorney-General's Department.

In recent years a number of policy reviews have taken place and amending Acts to the Copyright Act have been passed. The *Copyright (Computer Programs) Amendment Act 1999 (Cth)*, the *Copyright Amendment (Digital Agenda) Act 2000 (Cth)* and the *Copyright Amendment (Moral Rights) Act 2000 (Cth)* have all modified the *Copyright Act*. Chief amongst these has been the *Copyright Amendment (Digital Agenda) Act 2000* otherwise known as the Digital Agenda Reform Act. The significance of the Digital Agenda Reform Act is that it was the mairresponse of the Commonwealth Governm ent to the challenges facing Australian copyright law in the digital era.⁴¹ The USFTAI Act has built upon that response and has brought Australian copyright law closely into line with that of the United States.

³⁶ Section 10.

³⁷ Part IV.

³⁸ Section 33.

³⁹ Sections 93 and 94.

⁴⁰ Section 10.

⁴¹ Phillips Fox (Law Firm), "Digital Agenda Review: Technology and Rights Issues Paper," July 2003.

As part of its obligations under the AUSFTA Australia has acceded to the WIPO Copyright Treaty. This builds further upon the reforms of the Digital Reform Agenda Act which brought Australia into general compliance with emerging international standards. The Digital Agenda Reform Act was intended by Australia to implement its the standards developed in the WIPO Copyright Treaty. As such the Digital Agenda Reform Act reflected the need to protect owners of copyright from unfair and arbitrary interferences with their legal rights. Section 3 of the Digital Agenda Reform Act stated that the objective were to:

- ensure the efficient operation of relevant industries in the online environment by promoting the creation of copyright material and the exploitation of new online technologies by allowing financial reward for creators and investors; and
- promote certainty for industries that are investing in and providing online access to copyright material.

The Digital Agenda Reform Act made five key changes to the *Copyright Act*. Firstly the Act provided for a technologically neutral right of communication to the public.⁴² In essence this right was included to ensure that there was a broad right to make material available to the public online. However, as it was feared that if the right were expressed in particular technological terms, that the right might quickly become outdated it was decided to use a technology-neutral term.⁴³ Secondly the Act extended exceptions to the exclusive rights of copyright owners to the digital environment.⁴⁴

Thirdly anti-circumvention provisions were introduced.⁴⁵ However the Australian anti-circumvention provisions apply civil and criminal penalties only for making or commercially dealing in devices that are for the circumvention of technology protection measures.⁴⁶ There are no provisions for the use of anti-circumvention devices, though under the AUSFTA Australia will need to implement tougher laws dealing with anti-circumvention. Fourthly the Act introduced statutory licenses for the transmission of free

⁴² Section 31(1).

⁴³ L. Gamertsfelder, "Digitising Copyright Law – An Australian Perspective," 6 *Media & Arts Law Review* 2001.

⁴⁴ Sections 103A-103C.

⁴⁵ Section 116A.

⁴⁶ *Ibid.*

to air broadcasts.⁴⁷ Finally the Act limited and clarified the liability of carriers and carriage service providers for third party copyright infringements.⁴⁸ Under the USFTAI Act Australia's laws in relation to carriage service providers now closely resemble those of the safe harbour provisions in the Digital Millennium Copyright Act.

Section 116A of the Copyright prohibits certain dealings in circumvention devices. It is the rough equivalent of section 1201 of the Digital Millennium Copyright Act except that it does not explicitly proscribe the use of a circumvention device.⁴⁹ Section 116A sets a three part test for liability. Firstly a work or subject matter must be protected by a technological protection device.⁵⁰ Secondly, that a person makes available a circumvention device for use by others.⁵¹ With respect to this second requirement, section 116A(1) lists six different ways in which a person may make an circumvention device available, such as by sale, exhibition, distribution, import, promotion or by making it available online.⁵² Thirdly a person must know, or ought reasonably to know, that the device would be used to circumvent, or facilitate the circumvention of a technological protection measure.⁵³ With regard to the final element, the Copyright Act places the onus of proof upon the defendant to show that he or she did not have the requisite knowledge.

The rights created by the Digital Agenda Reform Act can be utilized if a person applies a technological protection measure to that person's work or subject matter. A 'technological protection measure' is defined in the Copyright Act as:

A device or product, or a component incorporated into a process, that is designed, in the ordinary course of its operation, to prevent or inhibit the infringement of copyright in a work or other subject matter by either or both of the following means:

(a) by ensuring that access to the work or other subject matter is available solely by use of an access code or process (including decryption, unscrambling or other transformation of the work or other subject matter) with the authority of the owner or licensee of the copyright;

⁴⁷ Section 135AL

⁴⁸ Section 22(6).

⁴⁹ Ibid note 42. See also S. McConnell, "The Napster case: which way would the balance of interests fall in Australia," 6 *Media & Arts Law Review* 2001.

⁵⁰ Section 116A(1)(c)

⁵¹ Section 116A(1)(b)

⁵² Ibid.

⁵³ Ibid note 49.

(b) through a copy control mechanism.⁵⁴

A section 10(1) technological protection measure is one whereby the user cannot access the content unless they use a code or a key supplied by the owner. A copy control measure is any device employed by the owner that would prevent a person copying a digital product.⁵⁵ At present this practice is widespread amongst content owners on the internet.

A 'circumvention device' is defined in section 10(1) as:

a device (including a computer program) having only a limited commercially significant purpose or use, other than the circumvention, or facilitating the circumvention, of an effective technological protection measure.

The question of what constitutes a circumvention device is not definitively answered by section 10(1). Clearly a computer program devised to hack into a work qualifies as a circumvention device. One Australian lawyer stated:

The Macquarie Dictionary defines 'device' as (amongst other things) '1) an invention or contrivance 2) a plan for effecting a purpose.' Accordingly, any invention, plan or contrivance may fall within the definition of a circumvention device. This means that books, articles, teaching notes and the like could fall within the definition. This may be true even if the relevant text was a student text designed for a computer science course which assisted students to learn the finer points of cryptography or cryptoanalysis. As a circumvention device needs only to facilitate circumvention, this interpretation of the statute is certainly open.⁵⁶

The broad scope of what constitutes a circumvention device is likely to be an attempt by Australian drafters to avoid choosing a technology-specific or narrow definition that would be likely to be outmoded by technological change. This approach to the statute is evident in the technology neutral right of broadcast to the public. However, by including the term 'facilitating' the test for whether a device qualifies as a circumvention device is possibly not stringent enough.⁵⁷

⁵⁴ Section 10(1)

⁵⁵ Ibid.

⁵⁶ Ibid note 42 at p.15

⁵⁷ Ibid.

The use of the phrase ‘limited commercially significant purpose’ is also problematic.⁵⁸ If educational material such as a textbook, scholarly article or lecture notes are found to be of ‘commercially significant purpose’ then the Copyright Act would frustrate one of its own underlying objectives in the form of the dissemination of knowledge.⁵⁹ However if educational material is outside the scope of the term then intuitively so too would be a book on hacking technology.⁶⁰ In other words, provided a device has another independent commercial purpose then it would avoid the proscription of the Copyright Act.⁶¹ In attempting to account for the myriad of possibilities for copyright infringement in the digital environment the Australian Parliament has drafted legislation that is vulnerable to a number of constructions that would not serve its purposes.

The anti-circumvention provisions have been tested in *Kabushiki Kaisha Sony Computer Entertainment v Stevens*.⁶² In *Sony* the Full Federal Court the “mod-chipping” of PlayStation consoles infringed section 116A.⁶³ The defendant, Stevens, sold and installed modifying chips for consoles which allowed unauthorized copies of game CDs, and games from outside the regional coding, to be played on the consoles. This decision is likely to have an effect on DVD technology. To date sellers who sold technology designed to defeat regional coding for DVDs have not been caught by the copyright law.⁶⁴ With regards to lawfully purchased game CDs and DVDs, *Sony* represents a further curtailment of user rights. If the content industry starts to target the sellers of technology that defeats regional coding then Australian consumers will face a situation where they may be forced to pay twice to access content that they have already legally purchased. Intuitively this is an unfair result for consumers and displays little evident incentives for creativity other than rent-seeking behavior with regards to distribution. To this extent the Australian Competition and Consumer Commission (ACCC) has already

⁵⁸ Ibid note 53.

⁵⁹ Ibid note 56.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² [2003]FCAFC 157. Recently also Australia’s first prosecution under the Digital Agenda Reform Act has commenced. See further L. Lamont, “Pirates face the music,” *Sydney Morning Herald*, 10 November 2003 at <http://www.smh.com.au/articles/2003/11/10/1068329488834.html>.

⁶³ Ibid.

⁶⁴ *Australian Financial Review*, “US Can Trade on Sony’s Big Win,” Thursday, July 31, 2003.

expressed their disapproval of the decision, stating that, “consumers will suffer a loss of choice and pay more for their games.”⁶⁵

Fair dealing

Fair dealing is one of the traditional safeguards for defendants in Australian copyright law.⁶⁶ Sections 40-42 of the *Copyright Act* deal with fair dealing. Sections 40-42 provide that conduct that would otherwise be regarded as a breach of copyright is a fair dealing provided it is done for the purposes of research or study, criticism or review or reporting the news. The fair dealing exceptions are intended to remove copyright laws as a barrier to education, public discussion and the dissemination of information. The Copyright Law Review Committee considered the fair dealing exceptions during its Report on Simplification of the Copyright Act, Part 1: Exceptions to the Exclusive Rights of Copyright Owners. The Committee recommended:

- Consolidation of the current fair dealing provisions – ss. 40, 103C, 41, 103A, 42, 103B and 43(2) – in a single provision;
- Expansion of fair dealing to an open-ended model that specifically refers to the current exclusive set of purposes – research or study (ss. 40 and 103C), criticism or review (ss. 41 and 103A), reporting news (ss.42 and 103B) and professional advice (s. 43(2)) – but is not confined to these purposes;
- General application of the non-exclusive set of factors provided for in s. 40(2) to all fair dealings.⁶⁷

The Committee was of the view that much of the complexity that currently surrounds the fair dealing provisions could be avoided by creating a single provision that would be “sufficiently flexible to accommodate the challenges posed by technological developments.”⁶⁸ The Committee advanced two main criticisms of the current fair dealing provisions. Firstly the exceptions as they stand are not flexible enough because they attach only to specific uses and do not account for new uses which may arise as

⁶⁵ “Consumers Lose in Playstation Decision,” Media release of the ACCC 31 July 2003.
<http://www.accc.gov.au/media/mediar.htm>

⁶⁶ See further W. Van Caenegem, *Intellectual Property*, Butterworths, Sydney, 2001.

⁶⁷ Copyright Law Review Committee, *Simplification of the Copyright Act*, 1999 at Chapter 6 at part 6.10

⁶⁸ *Ibid.*

technology develops.⁶⁹ Second, each new specific exception that is put into the Copyright Act increases the complexity of the legislation.⁷⁰

The Committee intended that Australian copyright law adopt a position that would be more akin to the US fair use exception.⁷¹ Such a doctrine would have to be developed by the judiciary on a case by case basis as it has been in the United States. However the Committee's proposal has yet to be adopted. The lack of flexibility in Australia's fair dealing laws mean that it will be ill-equipped to safeguard socially desirable uses of copyright material in the future.

III. Copyright Law in the United States

The Constitution of the United States empowers the Congress to "promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."⁷² Copyright Law in the United States is governed by the Copyright Act of 1976, which took effect on 1 January 1978.⁷³ The Copyright Act was the result of an arduous process of drafting and review that had gone on for more than twenty years.⁷⁴ The Copyright Act continued the trend in the United States of providing more copyright protection to creative works. The Act broadened the scope of rights available to copyright owners and increased the term of copyright protection to the life of the author plus fifty years.⁷⁵ Since its commencement in 1978 the Act has been amended twenty times.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid. See also J. McKeough, K. Bowery & P. Griffith, *Intellectual Property: Commentary and Materials*, Law Book Co., Sydney 2002. See also R. Reynolds & N. Stoianoff, *Intellectual Property: Text and Essential Cases*, Federation Press, Sydney, 2003. See also the Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, "Cracking Down on Copycats: the enforcement of copyright in Australia," 4 December 2000.

⁷² U.S. Constitution art I, § 8, cl8.

⁷³ 17 U.S.C.

⁷⁴ See further J. Litman, "Copyright, Compromise, and Legislative History," 72 *Cornell Law Review* 857, 879 (1987).

⁷⁵ This has been further extended to life plus 70 years by the Sonny Bono Copyright Term Extension Act. See further for the issue of duration I. Kilbey, "Copyright Duration? Too Long!" 2003 *European Intellectual Property Review* 105. See also J. Ginsburg, "Copyright Legislation for the "Digital Millennium," 23 *Columbia Journal of Law & Arts* 137, 172 (1999). See generally, M. Hamilton, Copyright

Fair Use

The doctrine of fair use has served as a traditional safeguard in American copyright law. The fair use provisions are contained in section 107 of the Copyright Act.⁷⁶ Section 107 sets out four factors that are used in determining whether the use of copyright materials constitutes fair use. These factors are: (i) the purpose and character of the use; (ii) the amount and substantiality of the portion used; (iii) the nature of the copyrighted work; and (iv) the effect of the use upon the potential market or value of the copyrighted work.⁷⁷ Fair use is generally established by the courts on a case by case basis. The flexibility of the fair use doctrine is unique to the United States with most other jurisdictions having more limited exceptions to copyright owner's rights.

The Digital Millennium Copyright Act

The legislative amendments to the Copyright Act that have evoked the most controversy are the Digital Millennium Copyright Act of 1998.⁷⁸ The laws of the United States were substantially in compliance with the WIPO Copyright Treaty before the DMCA was introduced.⁷⁹ The Digital Millennium Copyright Act (DMCA) implemented the United States' obligations under the WIPO Treaty and went further than those obligations under

Duration Extension and the Dark Heart of Copyright, 14 *Cardozo Arts & Entertainment Law Journal* 655,(1996).

⁷⁶ 17 U.S.C. §107.

⁷⁷ *Ibid.* See further *Harper & Row Publishers v Nation Enterprises* 471 U.S. 539 (1985). Also *Campbell v Acuff Rose Music, Inc.*, 510 U.S. 569 (1994). See also note 16.

⁷⁸ L. Lessig, *The Future of Ideas: The Fate of the Commons in A Connected World*, Random House, New York, (2001); S. Viadhyathanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity*, NYU Press, New York, (2001); J. Litman, *Digital Copyright*, Prometheus Books, New York, (2001); J. Cohen, "WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive," *European Intellectual Property Reporter* 236 (1999); R. Denicola, "Freedom to Copy," 108 *Yale Law Journal* 1661 (1999), R. Denicola, "Mostly Dead? Copyright Law in the New Millennium," 47 *Journal Copyright Society USA* 193 (2000). A. Thierer & C. Crews Jr (eds), *Copy Fights: The Future of Intellectual Property in the Information Age*, Cato Institute, Washington, 2002.

⁷⁹ D. Burk, "Anti-Circumvention Misuse," University of Minnesota Law School Public Law and Legal Theory Research Paper No. 02-10, (2002) at http://papers.ssrn.com/sol3/delivery.cfm/SSRN_ID320961_code020816630pdf?abstractid=320961 atp11. See also T. Cohen, "Anti-Circumvention: Has Technology's Child Turned Against its Mother?" *Vanderbilt Journal of Transnational Law*, May 2003.

Article 11.⁸⁰ The DMCA prohibited circumvention of technological measures designed to control access to a copyrighted works.⁸¹ The DMCA prohibited circumvention of technological measures designed to protect a copyrighted work.⁸² The DMCA also prohibited the manufacture or distribution of circumvention devices.⁸³ The DMCA provides some minor exceptions for such uses as encryption research,⁸⁴ computer security,⁸⁵ interoperability of computer products⁸⁶ and personal privacy.⁸⁷ Civil and criminal penalties apply for violations of the provisions of the DMCA.

Criticisms of the DMCA

A number of academic commentators have made criticisms of the shortcomings of the DMCA.⁸⁸ Under the DMCA a user cannot use a device to gain access or to circumvent control in order to make fair use of materials that would otherwise be inaccessible.⁸⁹ In this sense the DMCA states that it is not intended to impede existing user rights but it provides no mechanism for the realization of those rights.⁹⁰ The exceptions to the anti-circumvention provisions do not cover the breadth of permitted exceptions under the fair use doctrine.⁹¹ Furthermore the anti-circumvention provisions of the DMCA effectively extend copyright protections to materials that were previously outside the scope of copyright.⁹² For example facts and useful ideas may be interspersed with copyright material, but as they cannot be accessed or copied under the DMCA, they are effectively granted de facto copyright protection.

⁸⁰ Ibid. Also note 77.

⁸¹ 17 U.S.C. §1201(a)(2).

⁸² §1201(b)(1).

⁸³ §1201(a)(2)(A)-(C); (b)(1)(A)-(C).

⁸⁴ §1201(g).

⁸⁵ §1201(j).

⁸⁶ §1201(f).

⁸⁷ §1201(i).

⁸⁸ Ibid note 77.

⁸⁹ Ibid note 78 at p14.

⁹⁰ Ibid. See also D. Nimmer, "A Riff on Fair Use in the Digital Millennium Copyright Act," 148 *University of Philadelphia Law Review* 673 (2000).

⁹¹ Ibid note 78.

⁹² Ibid. See also

The DMCA also has the potential to make even very trivial uses of technology into criminal acts. As one commentator noted a violation of the anti-circumvention provisions of the DMCA could be effected simply by applying a felt tip marker to a copy-protected CD in order to play the CD on a computer.⁹³

True or false: A person can commit a federal crime in the United States with only a compact disc (CD) and a felt-tip marker purchased legally at Wal-Mart. Not long ago, the answer would have been false, but two important things have happened to make the scenario much more plausible. First, the Digital Millennium Copyright Act (DMCA) was signed into U.S. law in 1998. Among other things, the DMCA makes it illegal to circumvent technological measures employed by copyright owners in the protection of their copyrighted materials. Second, copyright owners have begun to use very innovative technologies, such as the copy-protected music CD, to protect their copyrighted materials.

By changing the location of data on compact discs, music recording companies hoped to prevent their discs from being readable by computers and, in turn, to prevent the data from being copied onto computer hard drives and then limitlessly distributed. Once the so-called copy-protected music CDs hit the market, however, crafty consumers discovered that CD copy protection technologies ... could easily be foiled by covering over a section of the disc with a mark from a common felt-tip marker. ... If using a felt tip marker to get around the protection amounts to "circumvention of any measure that effectively controls access to a copyrighted work," then a person commits a federal crime by doing so. Therefore, under the DMCA, a person might be able to commit a federal crime in the United States by applying a felt-tip marker to a CD.⁹⁴

A law that can so easily be violated, and enforces such draconian penalties, cannot really be good for society. This was illustrated in the case of Professor Felten and the Secure Digital Music Initiative (SDMI).⁹⁵ SDMI developed encryption technology to limit the use of certain files with a digital watermark. SDMI announced publicly a challenge for anyone who could remove the digital watermark, offering a \$10,000 reward. Professor Felten of Princeton and his team successfully circumvented most of the encryption technologies and prepared a paper on their work. As Professor Felten and his colleagues were preparing to present the paper at a conference he received a letter from the Recording Industry Association of America (RIAA) warning that public disclosure of the paper might subject him to action under the DMCA. Fearing that the release of the paper would undermine all their investment in the encryption technologies SDMI had sought to prevent Professor Felten's research from becoming public. In the ensuing public furore

⁹³ T. Cohen, "Anti-Circumvention: Has Technology's Child Turned Against its Mother?" *Vanderbilt Journal of Transnational Law*, 961 May 2003.

⁹⁴ *Ibid* at 963.

⁹⁵ See P. Goldstein, *Copyright's Highway*, Stanford Law and Politics, Stanford, revised edition 2003 at pp175-181. See also T. Pack, "Legit Hack Creates Legal Controversy", *EContent*, October 1, 2001, at <http://www.econtentma.com/r8/2001/ecnews10b.html>.

SDMI and the RIAA backtracked and guaranteed Professor Felten and his colleagues that they would not sue.

In the case of Russian software programmer, Dimitri Sklyarov, he was jailed under the provisions of the DMCA.⁹⁶ Sklyarov had prepared a copyright circumventing program in Russia for his employer, ElcomSoft. At the time that Sklyarov wrote the program it was perfectly legal in Russia. He was arrested in the United States whilst in Las Vegas to speak at a conference on digital security mechanisms. His arrest sparked more adverse publicity for the DMCA. Ultimately he was released from prison in exchange for testifying against his employer.

Both the cases of Professor Felten and Dimitri Sklyarov indicate the potential for the DMCA to be used to serve commercial interests and to frustrate the research and the pursuit of knowledge. These are the draconian aspects of the DMCA that have raised the ire of academic commentators and internet lobbyists. The potential for the DMCA to be used to serve existing commercial interests and to stifle knowledge is a significant public policy issue.⁹⁷

IV. Digital Rights Management

The rapid advancements in technology have created much market opportunities for the various information industries. However, as noted above, there has also been a corresponding increase in information piracy. In order to counter this threat there has been an increase in digital rights management.⁹⁸ Basically digital rights management is

⁹⁶ Ibid note 93 at p991. See also L. Lessig, "Jail Time in the Digital Age," New York Times, July 30, 2001. See also B. Templeton, "An eBook Publisher on Why the U.S. Attorney Should Free Dmitry Sklyarov," available at <http://www.templetons.com/brad/free.html> (last visited March 18, 2003). L. Trager, "U.S. Prosecutors Claim DMCA Applies Around the Globe," Washington *Internet Daily*, Feb. 12, 2002, available at LEXIS, News Library, Warren Publications File.

⁹⁷ See further P. Samuelson, "Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised," *14 Berkeley Technology Law Journal* 519 (1999).

⁹⁸ T. Bell, "Fair Use vs Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine," *76 North Carolina Law Review* 557 (1998).

the employment of technological tools that create increased levels of protection for works in the digital environment.⁹⁹ These tools can operate in a variety of ways but the main goals are to prevent access, monitor access or limit the use, reproduction and manipulation of works in a digital format.¹⁰⁰ The underlying goal is to raise the cost of engaging in the unauthorized use of a copyright protected work above the benefits of that use.

An example of a digital rights management tool is a virtual container. A virtual container contains protected material that the user can only access if he or she agrees to the terms and conditions set by the owner.¹⁰¹ The agreement is likely to take the form of a license or contract. Typically these agreements are not negotiated and the user has only the options of agreeing to the terms and conditions or disagreeing and thereby forfeiting use of the content.¹⁰² Other forms of digital rights management tools are encryption technologies and watermarks.¹⁰³ Encryption technologies convert information into a digital code. The information can only be accessed if the user has a key or a password. Watermarks contain data and are part of the protected work. Watermarks allow owners to track the use of their works.

Digital rights management tools are also able to collect payments from users in exchange for access to materials on the internet.¹⁰⁴ These digital rights management tools are able to equip the owners of material with the ability to price discriminate against consumers.¹⁰⁵ That is, for a small payment the user may get the right to view the document once. For a slightly higher payment the user may get the right to view the material several times and for a much larger payment the user may get the right to make

⁹⁹ B. Hugenholtz, Speech to the Baker & McKenzie Law and Policy Centre, Symposium on Digital Rights Management and Public Interests, Sydney, 18 March 2002. At <http://www.austlii.edu.au/cgi-bin/disp.pl/au/special/cyberlpc/2002/DRMS%5fPapers/DRMS%5ftranscript.htm?query=%7e+digital+right>

¹⁰⁰ Ibid.

¹⁰¹ Ibid note 93 at p873.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ See further S. Leibowitz, "Copyright in a post-Napster World: Legal or Market Solutions?," and F. Hausmann, "Protecting Intellectual Property in the Digital Age," in A. Thierer & C. Crews Jr (eds), *Copy Fights: The Future of Intellectual Property in the Information Age*, Cato Institute, Washington, 2002.

¹⁰⁵ Ibid note 99.

copies.¹⁰⁶ In this way the digital management tools can supplant existing user freedoms in a way not currently envisaged by copyright laws. Indeed digital rights management tools may bring about the emergence of “fared use” in copyright. The concept of “fared use” was discussed by Professor Bell:

At its most powerful, ARM (Automated rights management) supports the “superdistribution” of proprietary information. In other words, it allows information providers to market documents that disallow certain types of uses (e.g., copying) and provide continuing revenue (e.g., charging 2 cents per access) regardless of who holds the document (e.g., including someone who obtained it post-first sale). Superdistribution thus offers information providers a rather daunting compendium of powers. In practice ... no ARM system can guarantee absolute control over information, especially after it escapes digital media Even if only partially effective ... ARM will radically improve the efficiency of licensing practices in the digital intermedia. Consequently, it will have a radical impact on the fair use doctrine.¹⁰⁷

The implications for fair use and fair dealing are apparent in the rise of digital rights management tools.¹⁰⁸ The notion of “fared use,” as opposed to fair use, has significant consequences for user rights in the real world. It illustrates the potential for digital rights management tools to shift the balance between users and owners strongly in favor of the latter.

There is nothing in either the DMCA or the Digital Agenda Reform Act to indicate that either the parliaments of Australia or the United States have considered this possibility in much depth. In fact the decision of the Australian Parliament to not adopt the flexible fair dealing provision advocated by the Copyright Law Review Committee puts Australia at a distinct disadvantage in this area.

V. Can the Balance be Restored?

Protecting copyright in the digital era is driven by the concerns of industry, international agreements and pressure from other jurisdictions. As the process of globalization continues it is inevitable that there will be a concerted effort to harmonize laws on copyright. It would be difficult to maintain an increasingly global market for information in an environment where the laws vary widely from jurisdiction to jurisdiction.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid note 98 at p567.

¹⁰⁸ See further M. Leaffer, “The Uncertain Future of Fair Use in a Global Information Marketplace,” 62 *Ohio State Law Journal* 849, (2001).

The similarities between Australian and American copyright laws are reflective of these pressures. However there are compelling reasons to avoid moving too far in one direction. The legal changes to date have strongly favored the owners of copyright. The balance of interests between users and owners is intuitively appealing. Even within the civil law legal system, whose traditions mostly honor the moral rights of author's there has been some deference to the public interest.¹⁰⁹

The first step would be too openly acknowledge that the balance of interests between the users and owners of copyright is in a state of disequilibrium. In an analysis of copyright law in cyberspace, Professor Trotter Hardy identified four inter-related factors that assured copyright owners that any copying of their works would be limited.¹¹⁰ The factors identified by Professor Hardy were: (i) entitlement like protection in the form of copyright laws, (ii) contract-like protection; (iii) state-of-the-art limitations in the form of technological limitations on how much copying can take place; and (iv) special purpose technical limitations in the form of technological devices to specifically limit copying.¹¹¹ Professor Hardy's hypothesis was that a change in one factor leads to changes in the other factors:

It is helpful to think of this four-part "aggregate assurance" of limited copying in the form of a pie chart. One slice of the "pie" represents the limitations inhering in the 'state-of-the-copying-art,' another represents "entitlement-like" protection, and so on. The overall size of the pie – the sum of all four factors - is what matters to information producers, because the overall size determines how limited the unauthorized copying of their product will be. The taxonomy implies that if one of the "slices" of the pie grows or shrinks, other slices must shrink or grow proportionally if the producer is to preserve the same overall assurance of limited copying.¹¹²

Another way of examining this is to see how Professor Hardy's copyright "pie" affects the balance of interests between copyright users and owners. If we assume that prior to the digital revolution these four factors existed at their relative levels and provided some degree of equilibrium between the interests of owners and users. Then the advent of the

¹⁰⁹ Ibid note 1.

¹¹⁰ T. Hardy, "Property (and Copyright) in Cyberspace," 217 *University of Chicago Legal Forum* (1996).

¹¹¹ Ibid.

¹¹² Ibid.

digital era, with the ease of copying, created a state of disequilibrium between owners and users. This disequilibrium was brought about by a change in Hardy's third factor that favored the users. Consequently the owners of copyright sought to readjust the factors, as is consistent with Professor Hardy's analysis.¹¹³ The copyright owners changed their legal entitlements, wrote new contracts and sought special purpose technological limitations on copying in the form of DRMS. In short in response to a change in technology that enabled more copying, the owners changed the other three factors. The result is not that the state of copyright reverts to the equilibrium that it was in prior to the digital era. The result is that the copyright has reached a new state of existence with a disequilibrium in favor of the owners.

In part this has occurred because governments have been quick to find ways to protect economic interests. For example, the limitation on internet liability in the Digital Agenda Reform Act represented a reversal of the verdict of the Australian High Court in *Telstra v APRA*.¹¹⁴ In *Telstra v APRA* the High Court found Telstra to be liable for the transmission of copyright infringing material on its system. Telstra is Australia's largest telecommunications service provider and the decision would have had significant implications for its business. The Australian Government moved quickly and correctly to safeguard the interests of internet service providers by modifying the copyright law, and thus denying some of the interests of copyright owners, so that internet services in Australia could run smoothly.¹¹⁵ Arguably this was a correct decision but it is indicative of the focus on economic rights and interests.

The social concerns that have underpinned common law copyright should not be marginalized. Indeed it is implicit in Locke's consideration of man and property in *Two Treatises on Government* that social obligations arise out of the creation of property.¹¹⁶ That is, the creators of property have the right to adequate reward but there is also an obligation to share some of the fruits of their labors with others provided that there is

¹¹³ Ibid. For a critique of Professor Hardy's paper see J. Cohen, "Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management," 97 *Michigan Law Review* (1998).

¹¹⁴ (1997) 191 CLR 140. Amended by s10(1) of the Digital Agenda Reform Act.

¹¹⁵ See further Explanatory Memorandum to the *Copyright Amendment (Digital Agenda) Act 1999*.

¹¹⁶ Ibid note 15.

sufficient supply. This notion is further strengthened by the concept of the intellectual commons. As the creators of intellectual property invariably draw from the intellectual commons in making their works they also have a duty to assist in maintaining and enriching the commons.¹¹⁷

The way that owner's rights are broadening towards becoming control rights represents a diminishment of the intellectual commons. The way in which the American fair use doctrine is limited by the anti-circumvention laws, and the failure of the Australian fair dealing laws to be adequately adapted to the changing situation, are a part of the wider limitations on user rights. As a result copyright is heading towards become a personal property right. This is something not envisaged in the United States Constitution or ever contemplated by American or Australian legislators.

The notion of "fared use" brings with it the very real prospect of a real digital divide occurring within nations. The concept of fair use as market failure does not account for the capacity to pay of each individual consumer. It simply derives from the notion that the market cannot find a suitable way for the copyright owner to be compensated. Those users who cannot afford the cost of "fared use" will be denied access to information that they otherwise would have received under the fair use doctrine or fair dealing.

There is a legitimate need for copyright protection in the digital era. However the way in which that copyright protection is achieved need not be by recourse to draconian laws. It is possible that a campaign of educating consumers about the reasons and virtues of respecting copyright might prove successful. Anthropologist Michael Brown examined a variety of issues and case-studies relating to culture and intellectual property.¹¹⁸ In one case study Native American groups at Devil's Tower in Wyoming found themselves in conflict with the rock climbers and campers with regard to the use of Devil's Tower for

¹¹⁷ See further J. Cohen, "Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management," 97 *Michigan Law Review* (1998). See also J. Litman, "The Public Domain," 39 *Emory Law Journal* 965 (1990).

¹¹⁸ M. Brown, *Who Owns Native Culture?*, Harvard University Press, Cambridge, 2003.

religious ceremonies.¹¹⁹ Public discussion and debate on the issue resulted in the authorities responsible for the national park containing Devil's Tower to issue a general request to the public to avoid using the Tower in June, when the Native American groups held their most significant religious ceremonies. By and large the request was observed.¹²⁰ Once the issues had been properly explained to the public a culture of compliance developed.

There is no reason why a similar degree of cooperation cannot exist with respect of copyright in Australia and the United States. Education and awareness could challenge the notion that copyright infringement is a victimless crime. It could also reinforce with the public the reasons why copyright law exists in the first place.

VI. Conclusion

The US Constitution contains the best rationale for the protection of copyright. That is, progress in the form of the advancement of science and the useful arts. It is intuitive that for any society to function and flourish that there must be a relatively free-flow of information and ideas. This does not mean that the flow of information should be so free so as to not recognize the legitimate interests of authors and thereby to create a disincentive for creativity. What it means is that copyright law must be a constant balancing act, a negotiation and a renegotiation, of the protections for copyright owners and the interests of copyright users. The public has a dual interest in balancing the rights of owners and users. The public good is best served by a model of copyright law where there is a high level of access to information as well as a great degree of incentive to create.

The challenge facing policy makers is that in the midst of the information revolution maintaining the balance between increasingly activist owners of copyright rights and the interests of users is not a task for which there are easy answers. However the logic that

¹¹⁹ Ibid at pp151-172.

¹²⁰ Ibid.

has defined the common law approach to copyright cannot so easily be discarded. It is imperative that the United States and Australian Governments find a way to restore the balance, even if it means engaging in a constant process of adjusting copyright laws to cope with a changing technological environment. The purpose of copyright law is to provide incentives for creativity whilst maintaining the public interest in access to information. It is not appropriate for copyright law to be co-opted to serve the interests of established businesses and to entrench their market power.