Copyright, Fair Use and the Public Interest

Submission to the

Attorney-General's Review

of the

Fair Use Exception

to

Copyright

Dr Hazel V J Moir
COOK, ACT 2614

Citizen

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Summary

- The goals of Copyright legislation are in direct conflict.
- Balance is therefore critical.
- Recent history of significantly increased priviledges to holders of these legislated monopoly priviledges.
- Legislating monopolies distorts free markets.
- The consequent rent-seeking behaviour undermines the ethos of competition and leads to a misallocation of resources, reducing welfare.
- The limited empirical evidence shows copyright is not necessary for creativity to flourish.
- Governments have agreed that one cannot participate in free trade without these legislated monopolies. This significantly reduces the room for restoring balance.
- At a minimum the following fair use rebalancing is claimed:
  - time-shifting in any format, except where the use is commercial;
  - maximum use all available technologies to remove unwanted material;
  - format-shifting of all materials, except where the use is commercial;
  - back-up copying of all materials and subject-matters;
  - deny copyright protection to any product using encryption devices;
  - forfeit of copyright if any action to deny fair use;
  - non-profit organisations to use freely any products which have been purchased in the market, provided there is no separate charge for this;
  - non-profit academic institutions employing the journal author(s) to have full free reproduction rights for non-profit activities, such as education;
  - remove additional fair dealing exceptions from legal practitioners, patent attorneys and trade mark attorneys;
  - free use of databases of information about the time and venue of cultural products which can be accessed freely or bought on the open market;
  - automatic licensing, at marginal cost, of all data gathered to meet regulatory purposes, or gathered in monopolistic or quasi-monopolistic industries;
  - compulsory licensing, at marginal costs of production, for all materials that have already returned a profit on their investment;
- Beyond this, urgent action is needed to:
  - restore the requirement for creativity into the Copyright Act
  - provide swift and inexpensive public access to orphan works.

Copyright, Fair Use and the Public Interest

Introduction

The Government's Fair Use Issues Paper identifies the intrinsic conflict between the two objectives of copyright (Attorney-General's Department, 2005: para 2.6). This conflict between two unexceptional goals – promotion of creativity and innovation and promotion of the free flow of knowledge and expression through society – is inevitable *given the use of a legislated monopoly* as the policy instrument to achieve the former goal.

There have been massive extensions in the scope and duration of copyright since the end of World War II. One of the most startling, from the viewpoint of the ordinary citizen, was the judicial decision to extend database copyright, not because of the creative effort required for these – none – but because of the sheer labour involved (Hickey, 2002). Most recently Australia gave away, to *all* WTO members, massively increased private property rights in copyrighted material.[1] The duration of all existing and future copyright material was extended by 20 years as part of the so-called Free Trade Agreement between Australia and the USA.[2] The loss to Australia was estimated as $A700 million in net present value terms (2004 dollars) (Dee, 2004). In addition, Australia moved from a highly flexible to a highly prescriptive form of copyright protection (Weatherall, 2004-05). A range of effective rights were also removed from Australian consumers through the acceptance of the terms of the highly controversial US *Digital Millennium Copyright Act 1998* (DCMA), which prevents the sale of equipment which can be used to copy material provided in an electronic format.

Two aspects of this are bothersome to the ordinary citizen / consumer. Firstly the lack of any empirical evidence that copyright policy is in fact effective in promoting creativity. Secondly the constant extensions in legislative interference in free markets, through the granting of continually extended rights to the benefit of major *distributors* of copyrightable materials. The fact that this has happened on the basis of zero empirical evidence strongly suggests the existence of major and effective rent-seeking. Little consideration appears to have been given to the need to balance consumer rights against those of rent-seekers.

It is against this background that the current review of fair use provisions must be seen. The government should be congratulated on holding this enquiry. One notes, however, that the most controversial aspects of the Australia-USA so-called "Free" Trade Agreement (AUSFTA) were those changing the balance of intellectual property rights. It is sad that this review did not take place prior to the (bi-partisan) decision to sign up to this very controversial agreement. Many options for an appropriate balance between consumer and distributor rights appear to have been foreclosed. This can only be to the detriment of Australia's net welfare.

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[1] Article 4 of the Treaty on Trade-Related Aspects of Intellectual Property Rights (TRIPS) provides that any "higher" intellectual "property" "rights" provided through bi-lateral treaties must be made available to all signatories of TRIPS, ie all WTO members.

[2] So-called, because the inclusion of extended monopoly rights for categories of products has nothing whatever to do with free trade and everything to do with distorted markets.

The Nature of the Copy "right"

Monopoly rights provided through legislation are not a "natural" right. In the English-speaking world the principal view about intellectual property legislation is that the rights conferred by parliaments are granted because there is a net benefit to society (see, for example, Drahos, 1996; Ergas Report, 2000). Copyright is thus a social contract, and so should be judged on the basis of the *balance* between the harm done by legislating for monopolies, and the benefit achieved through any consequent promotion of creativity.

Thomas Jefferson said this beautifully. Like Australia, the USA was a federation of sovereign states, and matters handed to the new federal government included patents and copyright. Jefferson said:

> "He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation."

He went on to comment on the nature of property in ideas, though being a patron of invention he shaped these in terms of inventions rather than creations:

> "Inventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody..."
>
> (letter to Isaac McPherson, 1813 as cited in Kock, A. & Peden, W. (1972). The Life and Selected Writings of Thomas Jefferson. New York: Modern Library). from: http://earlyamerica.com/review/winter2000/jefferson.html consulted 31 March 2005

One notes that at this time the concept "utility" was used to mean a benefit, or value, to the purchaser, or to society. The analysis is still sound today, and equally applicable to copyright, despite the decades of propaganda about "piracy" and intellectual "theft".[3]

More recently, the issue of balance was raised in the Ergas Report:

> "Balancing between providing incentives to invest in innovation on one hand and for efficient diffusion of innovation on the other is a central and *perhaps the crucial element in the design of intellectual property laws*." (Ergas Report, 2000: 24, emphasis added).

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[3] The term propaganda was used by Penrose, in her rather dry analysis of the international patent system, to describe the activities of the pro-patent lobby in trying to persuade non-industrial countries that they should adopt patent systems (Penrose, 1951). The language used by pro-copyright lobbyists is very extreme – invoking as it does images of murder and mayhem. Moreover the alleged "theft" is based on highly suspect estimates. As a consumer, I find the "piracy" notice at the front of videos very over-the-top. It is propaganda, rather than information. It has, however, clearly been effective – pro-copyright lobbyists have managed to acquire criminal penalties for breaches of a legislated monopoly. The punishment seems very disproportionate to the crime.

The Evidence for Interference in the Market

If a government intervenes in the market, on the basis that there will be a net benefit to society, where then is the social and economic evidence of the balance of costs and benefits through the copyright system? A key database of academic journals is JSTOR (http://www.jstor.org/). A search of the business (46), economics (26) and sociology (29) journals in this database using the keywords copyright and any one of economic, economics, social or welfare provided just four references (Plant, 1934, Hurt and Schuchman, 1966, Novos and Waldman, 1984, Klein et al., 2002).[4]

While there therefore appears to be little or no empirical evidence on the economic, social or welfare impact of copyright, there is such evidence in regard to the impact of the patent system. This empirical evidence, from firms in the UK, USA, Australia, Europe and Japan, systematically demonstrates that *most firms do not need patents in order to undertake research and development* (Taylor and Silberston, 1973, Mandeville et al., 1982, Mansfield, 1986, Levin et al., 1987, Arundel and van de Pall, 1995, Goto and Nagata, 1996). The sole exception is the pharmaceutical and fine chemical industries. This strong evidence that patents are generally unnecessary as a means of appropriating a return from industrial innovative effort, means that when a patent system is imposed on such firms it generates a cost burden. This cost burden – once known as the patenting paradox – takes the form of firms patenting solely to ensure that others do not prevent them carrying on their business. *Patenting thus becomes necessary solely because of the existence of the patenting system.* Firms incur unnecessary costs, reducing net social welfare because of the misallocation of resources. The main beneficiaries are the intermediaries (patent attorneys) and a small number of "rights" holders.

There appears to be no parallel empirical evidence on the impact of copyright laws on the creative output of society. In considering the consistency of intellectual property legislation with the National Competition Principles, the Ergas Committee "specifically sought from the Australian Copyright Council (which argued for an extension of the copyright term) evidence that an extension would confer benefits in excess of the costs it would impose. No such evidence has been provided." (Ergas Report, 2000: 83). During that review, the Office of Regulatory Review argued, in its submission, that there was "no evidence that it [an extension in term] would provide incentive to produce works not already being produced" (cited in Ergas Report, 2000: 83). Hurt and Schuchman (1964), considering books, demonstrated clearly that copyright is unnecessary to induce authorship. They divided copyrighted books into three categories. In only one of these were additional books generated by the existence of copyright: works with high creation costs such as encyclopedias. Plant (1934) demonstrated that in the nineteenth century British authors received higher returns from US publishers – where they did not have copyright – than from British publishers, where they did.

Beyond this limited empirical evidence, we know, from the sociology and economics of ideas, that ideas are cumulative.[5] Ideas, whether creative or inventive, take shape from

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[4] In fact six references were found, but two did not analyse copyright. One was eliminated because the word copyright was simply the copyright notice in the abstract and the word social was part of the phrase 'Social Science Research Council'. The other was eliminated as the subject was the preservation of social science source materials, and copyright was thus mentioned incidentally.

[5] Ideas are generally referred to as knowledge in the sociology literature and information in the economics literature.

the learning and other cultural influences impacting on the originator. Where the inventive/creative process is a matter of logic – as in academic research or industrial innovation – the inventor/creator adds something to the previous body of knowledge (see, for example, Ricketson, 1992: 56) or makes an analogous leap between fields (Magee, 2002). The new "something" can be significant, or it can be miniscule, or anywhere in between. Property rights systems which hand full exclusive rights to the last person in this chain do an injustice to all the previous contributors: effectively such systems legitimize theft from the public domain and from prior contributors. Where property rights are extended, this theft from the public becomes larger.

We also know that copyright was initially instituted, not for the benefit of authors, but for the benefit of publishers (see, for example, Plant, 1934 and Court, 2004). Certainly publishers invoke the needs of creators when they argue for higher and higher copy"rights", but the limited available evidence on where the returns to creative effort flow, suggests that most of these end up with the distributors not the creators (for a viewpoint regarding the recorded music industry see Love, 2000, and for a viewpoint regarding films see Courtroom Television Network LLC, 1995). For example, in the film industry, distributors costs are paid *before* any royalties become due to the creators.

If the creative output of society could not be effectively *distributed* through society without interference in the market to increase the profits of distributors, then there may be a case for government intervention. But this should be considered on its own merits.

But intervention whose effect is to provide *distribution monopolies*, and where there is no evidence of a positive impact on creative output, are a simple case of rent-seeking, and should thus be abhorrent in any modern democracy.[6] They certainly are inconsistent with the modern paradigm of the importance of free markets. And it is positively Orwellian to see continually increased monopoly priviledges included in so-called "free" trade agreements.

Public choice theory indicates that rent-seeking will be problematic where small groups gain large benefits and the cost burden of these benefits is widely dispersed through society. It is rational for the small group to invest in collective lobbying action, because of the high rents they will gain. It is much harder for the large dispersed group which will pay the costs to organize, as the costs of organisation can be high and the relative gains low (Olson, 1971).[7] Intellectual property is a prime example of where rent-seeking could be expected: those that benefit are numerically small, and because they can gain very large monopoly profits, the return to rent-seeking is very high. The cost is borne by all those firms who have to take action simply because there is an intellectual property regime; those whose existing activities are inhibited because they are now unlawful; and consumers. The first two sets are more important in regard to patenting, where independent discovery is disallowed by law. Consumers, of course, pay the price of all legislated monopolies, and where the consumer is a business, this will unnecessarily raise costs.

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[6] Abhorrent because such favours and priviledges granted to a few were a prime characteristic of monarchies.

[7] Actually most citizens expect their elected representatives to protect this public interest. Experience shows, however, that the corporate interest systematically wins out over the public interest. Perhaps this explains the increasing political disillusionment in "western" democracies?

Scope for Change

Clearly there is only very limited scope for any immediate return to the Australian public of basic freedoms in regard to the use of copyrightable material. Successive governments have effectively given away Australian consumer rights in exchange for alleged improved access to overseas agricultural markets.[8] Australia participated as a "friend of intellectual property" in the Uruguay Round negotiations which gave rise to TRIPS (Drahos with Braithwaite, 2002) and to the requirement that a nation become a signatory of TRIPS if it wishes to participate in the global "free trade" community. There was bipartisan support for the outcome of these negotiations, and very limited parliamentary debate of their impact on Australia (Margetts, 1999).

The two major political parties in Australia have already provided massive extensions in rights to the "owners" of intellectual "property" despite the lack of any evidence that this will be of overall benefit to Australia. And they have made binding agreements about this with foreign nations. The empirical estimates of the costs to Australia of the patent extensions granted through the WTO/TRIPS fiasco (Gruen et al., 1996) and the copyright extensions in the AUSFTA (Dee, 2004) suggest the negative impact of these decisions is massive. Gruen et al. estimate direct costs of between $A 376million and $A3.8 billion in net present value terms (1996 dollars), while Dee estimates $A700 million in net present value terms (2004 dollars).

Furthermore, the continual extension of this market intervention augurs poorly for resources being well allocated in society. If businesses – and it is businesses, usually large ones – find they gain a greater return from lobbying to change the rules than they do from getting on with the production of new ideas, goods, or services, then we will all be the poorer for it. The diversion of resources to rule-changing exercises is the very basis of that school of economic thought (the Chicago School specifically, and neo-classical economics more generally) which finds government intervention in the market anathema (or rather, welfare-reducing).

Consistent with the rent-seeking hypothesis, there is considerable noise and heat in debates over intellectual property. What is needed if government has an interest in net economic welfare is sound empirical analysis. There are some data – but these are systematically ignored in political considerations, in deference to vested interests, some of which have considerable control over mass media. It is my hypothesis that "strong" IP protection is not even welfare-enhancing for a nation with high net exports of IP-goods, such as the USA. The limited available empirical evidence supports this hypothesis.

Australia has played, and continues to play, a strong role in attempting to demonstrate in global fora, that agricultural protectionism reduces welfare. Given our reputation in this area, we could play a positive role in future economic well-being if we undertook similar empirical research in this growing area of protectionism. In this context, perhaps Australia could also take a more sympathetic position in regard to the legitimate

[8] Despite which there appears to have been no evaluation of whether these other gains have in fact occurred (countries which have large agricultural subsidies, particularly the USA, being notorious for disregarding their Treaty obligations and giving further subsidies to these sectors). Unfortunately there is nothing in the TRIPS Treaty which makes the rights granted in TRIPS *conditional on* the improved market access (for agricultural and textile products) which was the other side of the bargain.

concerns raised in the proposal for a Development Agenda for the World Intellectual Property Organisation (WIPO).[9]

Before leaving the subject of constraints, the "three-step test" for providing exceptions to copy"right" monopolies clearly demonstrates the strong influence of profit-making non-government organisations (the corporate sector) on the outcomes, and the lack of consideration of the net cost-benefit outcome or consumer interests. One notes also that "interpretation of this test has been closely considered in a decision under the WTO DSS" (Attorney-General's Department, 2005: para 4.7). There is considerable international disquiet about the terms and conditions of the WTO Treaties and their implementation – demonstrated in mass protests by the non-profit NGO sector, and also in academic discourse (see, for example, Evans, 1998).

Fair Use / Dealing

It is against this background of a massive shift in balance in the framing of intellectual "property" "rights" that the fair use provisions must be seen.

Given the constant extensions in the scope and duration of copyright since the end of World War II, in this one enquiry at least the rights of consumers should prevail.

Here we need to look closely at the goals underlying intervention in the market for ideas: promotion of creativity and innovation; and the free flow of knowledge and expression through society.

In the background provided above, it is clear that the relationship between copyright and the former goal (promotion of creativity) has not been established. Against this background, it is interesting to read that "to achieve this second objective, the Copyright Act contains exceptions to copyright" (Attorney-General's Department, 2005: para 2.6). In other words copy"right" acts directly to prevent the second goal for which it exists. Copy"right" impedes the free flow of knowledge and expression through society.

To minimize the damage done to this objective by the monopoly priviledges granted to successful rent-seekers, the government needs to maximize the "fair use" exceptions to the Copyright Act. With this in mind, I posit a citizen's right's claim to minimize the damage done by this legislation. Fair use provisions in Australia should be revised to:

- allow for time-shifting in any format, with no restrictions except where the use is commercial;
- time-shifting exceptions should also provide for maximum use by ordinary persons of any and all available technologies to remove unwanted material, such as advertising or other subject-matter not suitable for children;
- allow for format-shifting of all materials, with no restrictions except where the use is commercial;
- allow for back-up copying of all materials and subject-matters;
- deny copyright protection to any product or medium which uses encryption devices (or any other technological or legislated means) to protect the content;

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[9] This proposal was presented to the WIPO General Assembly by Argentina and Brazil on 5 October 2004 (see WIPO Document Number WO/GA/31/11 of 27 August 2004, available at http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/pdf/wo_ga_31_11.pdf

- copyright to be forfeited by any owner preventing in any way fair use of their copyrighted material;
- allow for non-profit organisations and associations to use freely any music and film products (and any other media) which have been purchased in the market by any person, provided there is no separate charge for access to those products;
- where the content of an academic journal has been provided without charge to a publisher, any non-profit academic institution which employs the author(s) should be entitled to reproduce the article in full, without limit, provided this is for non-profit activities, such as education;
- remove fair dealing exceptions, over and above those available to any ordinary citizen, from legal practitioners, patent attorneys and trade mark attorneys;
- allow for the free use of databases of information about the time and venue of cultural products which can be accessed freely or bought on the open market (eg timetables for free-to-air or pay TV);
- allow for the automatic licensing, at marginal cost of access terms, of all data gathered to meet regulatory purposes (eg pharmaceutical drug trials), or gathered in monopolistic or quasi-monopolistic industries (eg telephone entries);
- provide for compulsory licensing, at marginal costs of production, for all materials that have already returned a profit on their investment;

Time and format shifting; back-up copying

Copyright was introduced for books, which are a very flexible medium for users, despite their "old-fashioned" technology. You can read a book anywhere; you can read it at any time; you can lend it to your friends; you can read it again – and again.

This was the standard for consumers at the time copyright was introduced, and should be the standard for any product which seeks to have copyright protection applied to it. Only the application of such a standard is an adequate protection of consumer rights. All these rights were available to the reader of books. The fact that media for sight and sound require various devices to be used, should not change this. Rather it means that a small amount of *private use copying is essential for user enjoyment*. All these products are very expensive, at least to a person on median weekly earnings, and there appears to have been no reduction in relative prices. When paying these high prices for books, tapes, CDs, videos, and DVDs one expects to acquire *full rights of use*, not highly proscribed rights.

This does not mean that such media should not have the protection accorded to books: namely that persons buying a book are not allowed to copy the book and sell this in the market. Indeed the criteria for judging priviledges which should be accorded to copyright holders is that of *simple copying to compete in the marketplace*. No other priviledges should be handed out, as there is no evidence to suggest that any further priviledges are of any net welfare benefit to society. Should such evidence become available, the matter could be reconsidered.

As an older person, I have watched a range of media for sound and sight arrive in the market, together with a changing range of devices for using them. When I first copied my records to tape so I could listen to them in the car, there was no discussion that this was an illegal practice, and indeed it probably was not then. There would have been a

public uproar at the idea of such an interference of one's private enjoyment of a legitimately, and expensively, purchased product.

Similarly I have always made copies of my music tapes. They do wear out, and having paid a high price for a product, I expect to get continued enjoyment from it.

When VCRs came in we all heaved a sign of relief at being able to re-program free-to-air TV. Skipping the ads was also a wonderful experience. I have read that there is now a move in the USA to declare this latter practice theft: "One American TV executive described “fast forwarding” through the ads on a legally taped video of a TV program as “stealing” the good bits" (Gruen, 2004).

Given the way in which web pages constantly change, it should be a legitimate practice to make back-up copies for reference. I have watched with amazement the contortions libraries have to go through in regard to temporary electronic copies. It is simply a ludicrous waste of resources, and *at a minimum libraries should be reimbursed for these costs by copy"right" owners*. Preferably, if it is economical to store – even semi-permanently – material to meet fair use provisions, then *the law should not be used to force a more expensive process*.

One can understand and accept that if someone wants to make *commercial use* of any copyrighted product, one should have to pay the creator. But further payment for, or restriction of, *private enjoyment* of an expensive product purchased in the market is unacceptable in terms of justice, unsupported by any empirical evidence of benefit to society, and destroys the balance which is so essential if intellectual property laws are to achieve their conflicting objectives.

"Rights" holders have trumpeted various estimates of the "losses" they incur due to such activities. Most consumers will not buy two copies of the same music, simply to comply with copyright laws with which they disagree. They will buy one copy and make another. There is **no loss** to the "rights" holder as *no additional purchase would ever have been made*. Indeed the "rights" holder should be happy – they have sold a product at well in excess of its marginal cost of production. The estimates of losses – regularly referred to as "theft" by interested parties[10] – are based on unsound economics, and are grossly exaggerated.

Proposals for a levy through which consumers would "reimburse" the holders of legislated monopoly priviledges for "lost" revenue are simply unjustifiable. There is no valid empirical evidence of any loss. Moreover, these consumer rights should never have been given away. Re-balancing of copyright means just that. It does not mean handing yet more unjustified and unjustifiable priviledges to a select few.

Beyond this, there is evidence that the economically important years of copyright are the first 5 years (see, eg., Plant, 1934). Any restrictions on consumer use of material that is over 5 years old should be stringently limited. Alternatively exceptions to copyright should be increased in scope for material over 5 years old.

This might go some way towards dealing with the vexed problem of orphan works.

I have neither the time nor the resources to deal adequately with the sad issue of "orphan" works. But these do point to the inadequacies of the current copyright regime,

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[10] And in this propaganda war, the pro-copyright lobby group do not even have the courtesy to use the term "alleged", which is normal practice for any unproven allegation.

with its emphasis on monopoly rights rather than the spread and use of ideas. We are all the poorer for it. There are no winners regarding orphan works. Immediate attention to this issue is required. Consumers should have to take only simple, clear and inexpensive action to contact copy"right" owners. If these fail, consumers should have full legal rights of use.

Encryption to prevent fair use

Should producers of cultural products decide to use encryption devices to protect their material, this should disqualify them from use of copyright. Or vice versa.

The very recent advent of digital technologies has allowed some producers to obtain multiple forms of protection to ensure they are able to generate and exploit market monopolies. It is the role of an effective government in a modern democracy to prevent such exploitation occurring.

Copyright was designed in the years after the advent of the printing press, when mechanical means of copying first became possible. With this technology, it was not possible to "tag" the book so that it could not be copied. With digital "tagging" it is now possible for producers themselves simply to use technology to prevent copying. In this case, there is absolutely no need, nor any justification, for copyright protection *in addition.*

Alternatively, owners of copyrightable material can claim copyright protection, but in that case they should not be allowed to encrypt the material.

From the viewpoint of the ordinary citizen and consumer, ie against the background provided earlier in this submission, it is highly inequitable for these rent-seekers to be allowed to have their cake and eat it too. Given encryption, all arguments for government interference in the market to create copyright simply disappear, and it becomes a completely unjustifiable intervention.

The situation is even worse for computer software, where rights owners are now allowed to claim both patent and copyright protection as well as using encryption technologies. Many would dispute the legitimacy of any of these forms of "protection", given that software is the simple application of mathematical logic to particular problems. Many persons are thus capable of generating the "creation" or "invention", and to prevent others from exercising their intelligence seems both morally wrong and economically inefficient.[11] But abstracting from this issue of whether software should receive any form of government protection in the market, to be able to simultaneously access *three forms of protection* does seem like overkill.

Software "owners" should be able to ulitise any one of patents, copyright or encryption to protect their work. But use of any one form should make unlawful use of any other.

Further, in order to protect the balance of copyright legislation, any action to restrict or undermine fair use access to copyrighted material should lead to automatic forfeit of the copyright to that work. While apparently severe, the behaviour of copyright owners has shown a blithe disregard to fair use rights. A provision such as this would make them

[11] Indeed patenting of encryption technologies to be used to prevent the free flow of knowledge and ideas should surely fall under the rubric of harm to the *ordre publique*. Following this logic, such patenting could be declared unlawful without in any way upsetting the TRIPS agreement.

take it seriously, and go a long way to reassuring consumers that the government takes their interests seriously.

Use by academic institutions of material created by their employees

It is ironic that much research which is funded by the tax-payer has to be paid for again by tax-payer funded libraries in the form of expensive journal subscriptions to commercial publishers. Globally, most academics are employed either within the government sector or in the not-for-profit sector. And most of their research is funded by the government or by Foundations.[12]

The majority of academic journals have been created by professional associations of academics, for the purposes of disseminating research and increasing the state of knowledge within their respective fields. Over the past several decades many such associations have been approached by commercial publishers who have traded economies of marketing and administration for copyright in the journal content. The consequent massive increase in subscription costs is well known, and university libraries in particular have drawn attention to this crisis for some time.

Given the role of tertiary education institutes in the economic prosperity of a nation,[13] and the fact that most such institutes are either funded by tax-payers or on a charitable basis, it is astonishing that it is government intervention in the marketplace which allows commercial publishers to acquire, usually at no cost, the content for journals which it then re-sells to the supplying institutions at a substantial profit.

The fair use change proposed here is a minimal attempt to correct this glaring example of theft from the public domain.

Removal of lawyers additional fair dealing exceptions

Major beneficiaries of the government's intervention in the market through the provision of legislated property rights for ideas are those who make a living advising on the use of these legislated property rights. Intellectual property lawyers are frequently strong advocates of extended property rights, and their professional associations play a leading role in advocating the continual extension of the scope and duration of property rights for ideas and their expression.[14]

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12 The increasing trend, particularly within the sciences, for some research to be funded by industry still appears to be the small minority.

13 There is a large literature on the key drivers of economic growth, and a consensus of opinion that increasing knowledge and human skills are critical factors in this (see, for example, Romer, 1994, Sheehan, 1998).

14 Yes, there are intellectual property lawyers, particularly those working in academia, who have protested the continuing extension of intellectual property "rights". However, as a student of intellectual property, I have yet to see an *association* of intellectual property lawyers argue for other than extensions to the "rights" legislated for owners. A particularly obnoxious example is the comment, included in the International Association for the Protection of Industrial Property (AIPPI) submission to the Advisory Council on Intellectual Property's Review of the Patenting of Business Systems, "that, due to the difficulty in obtaining evidence of infringement of business methods, the *reversal of the burden of proof was necessary* for such patents to be effective." (International Association for the Protection of Intellectual Property (IAPIP), 2002: 10, emphasis added).

It therefore seems perverse that these persons have obtained for themselves a fair use right that is not available to the general public. In order that intellectual property lawyers fully understanding the impact of these market interventions, they should have no exceptions beyond those available to the general public.

Fair use rights for non-profit community organisations

Despite the recognition by many, particularly the Prime Minister, the Hon John Howard, MP, of the importance of community, the continued encroachment of the profit-making non-government sector inhibits the actions ordinary citizens may take to develop and support their communities. Mr. Howard, and many others, have expressed grave concerns about the attenuation of community. I agree with these concerns. I take the view that it is the over-emphasis of the importance of markets rather than community, and the priority given to economic over social outcomes, that is a major cause of the decline in community.[15]

With this in mind, limits should be placed on profit-making organisations' ability to impose unnecessary costs on community organisations.

When a non-profit organisation puts on a seminar or event, there is often a need for some music. Similarly short film clips might be shown. Usually the original product has been purchased in the market by a member. Non-profit community organisations should be able to play music brought by members, or films brought by members, without having to worry about laws designed to increase the profits of companies.

These uses are a small proportion of any market. Moreover it is highly unlikely that most non-profit associations would be able to use such products if they had to pay significant royalties. The benefits of the flow of information and ideas far outweigh any minor losses to distributors.

Naturally distributors will argue that they will loose the full market value of the product(s). Any student of economics will advise them that the figures they regularly use – which argue that each non-market sharing of their product is equal to a full sale lost – are simply wrong, ignoring as they do both price-elasticity and income constraints. However "rights" holders regularly broadcast such highly exaggerated estimates of their "losses". *The Economist* magazine was moved recently to comment on the gross exaggerations of losses by the Business Software Alliance.[16] In fact the actual outcome of such uses of media might be to increase sales, as participants might be introduced to music and film that they enjoy and had not previously been aware of.

Databases of information about t cultural events

The extension of copyright to databases is extraordinary. As Reichman and Samuelson noted some years ago "... the proliferation of poorly conceived, hybrid intellectual property rights has cumulatively begun to undermine the competitive ethos on which market economies depend, and the current database proposals represent the most recent (and perhaps the most extreme) instance of this trend ... the current database schemes

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[15] Stallman goes so far as to argue that the copyright proscription of sharing with one's neighbour is a significant contributor to the decline in community (Stallman, 2002).

[16] "Software theft is bad; so is misstating the evidence", *The Economist*, 19th May 2005 [Business/software piracy] [Accessed through on-line subscription so page number unknown].

represent a low point in the history of intellectual property law" (Reichman and Samuelson, 1997:163-4).

The extraordinary European Court of Justice case regarding access to timetables for free-to-air TV programs (Rothnie, 1998) shows the lengths to which rent-seekers will go to derive further profit from legislated priviledges. These companies have mostly acquired free access to scarce spectrum - a public resource - yet they attempt to extract very high prices from other distributors in regard to potential viewers being able to know what is being broadcast when.

Surely free provision of information about what material is being broadcast and when is the minimum price for use of the public spectrum, or as part of the terms and conditions of a pay TV license? If, as a society we have as a goal the free flow of knowledge and expression through society, then free provision of information about publicly accessible cultural events is essential. This applies to free-to-air TV, pay TV, theatre, cinema etc.

Databases of information required by regulation or gathered in monopolistic industries

One of the challenges of the use of a property system for providing the possibility of an economic reward to new ideas, is that decisions about the rules occur in courts, away from the gaze of policy makers or economists or any citizen with an interest in balance, fairness or a cost-benefit approach to incentive schemes. This puts legislators in a difficult position: they have to take action to return to the prior situation of greater balance. In this process they will be subject to lobbying by those with deep pockets.[17]

The extension of copyright to databases with no original content is a case in point.

> "In Australia's most significant recent copyright decision, the Telstra 'telephone directories' case, Australia's Full Federal Court rejected the United States position that some minimum level of creativity, some "creative spark", is required to merit copyright protection.[18] … The Full Court [declared] that "originality" did not have a creative component attached to it in copyright law, but meant only that the origin of the work must lie with the author. To that end, Telstra's labour and expense involved in collecting, verifying, recording and assembling data were a sufficient contribution to the making of the telephone directories to establish authorship." (Hickey, 2002).

This decision is very out-of-line with the understanding of ordinary citizens, and bears no relation to the social contract which underlies and justifies copyright law. It is a prime case where Australia's law-makers should urgently intervene to clarify that *the purpose of copyright law is to stimulate creativity*. In exchange there should be a net benefit through improved there needs to be a net social benefit through improved flows of knowledge and expression through society. *Courts should be required to ensure that both conditions apply*, before providing any further monopoly priviledges, because of the damage these do by distorting markets.

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[17] Partly assisted by the tax-deductibility of these expenses. This gives rise to the ironic situation of taxpayers funding activities which are directly against their interests!

[18] Desktop Marketing Systems Pty Ltd ["DtMS"] v Telstra Corporation Limited [2002] FCAFC 112. The US case requiring a "creative spark" was Feist Publications Inc v Rural Telephone Service Co Inc 499 US 340 (1999).

Until such amendment is undertaken, a fair use exception is needed to offset the welfare losses occasioned by this decision. Automatic licensing, at marginal cost, would do this.

Automatic licensing once investment recopued

Plant demonstrated seven decades ago that copyright laws act to benefit distributors and not authors/creators (Plant, 1934). This line of analysis is ably drawn out by Court (2004).

Clearly net social welfare would be improved by the elimination of copyright. If this is not possible, a second-best alternative would be a radical reduction in the copyright term, say to five years. Unfortunately this is prohibited by the international treaties our government has signed on our behalf.

It could, however, be feasible to introduce unconditional automatic licensing. This could be done from the beginning, or from the five-year point. A minimalist claim (from the consumer viewpoint) would be from the point at which costs have been recovered. This is in fact a very modest claim as shown by the experience of, say Winston Groom in regard to the movie *Forrest Gump*.

> "the motion picture "Forrest Gump," … had enjoyed the fourth highest gross income in the history of the industry. Winston Groom, author of the book [on which the movie was based], was told that despite a worldwide gross of $660 million as of December of 1994, *there had been no net profit*. … This was despite the fact that "Forrest Gump" had been chiefly responsible for its studio, Paramount Pictures, increasing the studio's 1994 box office gross income by 60 percent over the previous year, and boosting it from sixth to third place in market share of the movie business." (Courtroom Television Network LLC, 1995, emphasis added).

Which Model: US or Australian?

From a consumer viewpoint it is the outcome that matters. From some viewpoints the US model is attractive, with its recognition of time-shifting and the requirement for a creative element for copyright to apply. On the other hand, since the creation of the specialised Court of Appeals of the Federal Circuit (CAFC) in 1982, there has been a real shift in balance away from consumer interests and towards the interests of "rights" holders.[19] Some of the US decisions, in regard to computer software copyright are also of concern (see Dempsey, 1998).

In regard to the Australian system, our judges seem to be unnecessarily swayed by legal opinion from the USA,[20] and the High Court decision that declared creativity was not

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[19] For example, the radical increase since 1982 in the proportion of patents found to be inventive is documented by Gallini (Gallini, 2002).

[20] "In 2001, the judgement of the Federal Court in *Welcome Real-Time SA v. Catuity Inc* found the US *State Street* decision on business systems to be persuasive, in that business systems should be subject to the same requirements as any other invention." (ACIP, 2002: 12). One notes that this US judgement created an uproar, and a massive literature of protest, much of it from academic sources (see for example, (Merges, 1999 and 2003, Freedman, 2000 and Williams and Bukowitz, 2001)

needed for copyright priviledges to be invoked (see above). Both these matters are very troublesome.

It is the content of law that is important. And in an area where the government intervenes in the market to allow some parties to intervene in the legitimate business of other parties, the other important issue is a low cost for defending attempts by holders of monopoly priviledges to use these to sue innocent parties.

Conclusion: Australia's Net Benefit

Knowledge, education, ideas, innovation, creativity, technology … The vast literature on theories of economic growth shows a virtually unanimous consensus that the key factor in economic growth is the "unexplained residual", nowadays referred to as total factor productivity (for example see Romer, 1994, Sheehan, 1998). There are a variety of theses about the key factors driving total factor productivity, but they all revolve around some aspect - whether embodied or disembodied - of being cleverer, or more innovative, or more creative.

Quite often the mechanism is specified as "spillovers" from innovation and creativity lifting the productivity in other firms and sectors and thus giving rise to faster economic growth (for a review of this literature, see Sena, 2004). It is thus the *diffusion of knowledge, information and ideas* which is critical in the dynamic performance of a nation. In terms of the cultural life of a community one could make a parallel case: that without the free flow of knowledge and ideas, there will be less cultural creativity.

It is therefore unfortunate that so-called intellectual "property" laws have achieved an apparently iron grip on the world. ***These policies, by their very nature, impede the free flow of knowledge and ideas.***

For the well-being of Australia it is time that our elected leaders, from all parties, asked for concrete evidence of benefit before handing our monopoly priviledges. It is time we stopped and assessed what policies would actually be most effective in the diffusion of knowledge and ideas. Gillian Dempsey has provided an excellent assessment of the contrast between the paradigm of ideas as a commodity, focusing on returns to the producer, and ideas as an input to economic and creative life, focusing on the high cost of the acquisition of new knowledge (Dempsey, 1998). Our policies need to give priority to the *dissemination* of knowledge and ideas. There are adequate imperfections in the market - without government intervention - for inventors and creators to gain an adequate return. The route to future social and economic prosperity lies in the diffusion of knowledge and ideas not in the provision of monopoly profits to distributors.

A re-design of copyright laws to meet the needs of creators rather than distributors would have a very positive impact on the free flow of knowledge and ideas in Australia.

What is needed immediately is a significant re-balancing towards consumer rights and the diffusion of knowledge and ideas. The proposals outlined in this submission would go some way to achieving such a re-balancing, though they are still a third-best option.

To maximize the free flow of knowledge and ideas and restore the competitive ethos which is so essential for the effective and efficient operation of markets, copyright should either be abandoned as a policy, or radically reduced in term and scope. This would be the most welfare-enhancing move the government could make, and would best promoting future cultural and economic well-being.

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