The Centre for International and Public Law presents

COPYRIGHT 2010
A Decade of Moral Rights and the Digital Agenda

Conference | 21 – 22 June 2010 | Sparke Helmore Theatre

ANU COLLEGE OF LAW
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Host

Professor Kim Rubenstein
Director, the Centre for International and Public Law
ANU College of Law
Copyright 2010: A Decade of Moral Rights and the Digital Agenda

This conference considers the history, the legacy, and the future of two key pieces of copyright legislation – the Copyright Amendment (Moral Rights) Act 2000 (Cth) and the Copyright Amendment (Digital Agenda) Act 2000 (Cth) – on the tenth anniversary of their legislative creation.

In a belated effort to comply with its obligations under the Berne Convention, the Federal Government passed the Copyright Amendment (Moral Rights) Act 2000 (Cth). The legislation recognised a moral right of attribution; a moral right against false attribution; and a moral right of integrity. The Attorney-General, Daryl Williams, hailed the legislation as 'yet another important landmark in the government's on-going program of copyright reform'. Nonetheless, the Minister emphasized that 'this bill is not just about fulfilling international obligations'. Williams insisted:

More importantly, it is about acknowledging the great importance of respect for the integrity of creative endeavour. At its most basic, this bill is a recognition of the importance to Australian culture of literary, artistic, musical and dramatic works and of those who create them.

Adopting a grandiose tone, the Attorney-General emphasized: 'This bill is another initiative from a government committed to reshaping copyright law for the 21st century and beyond.' He contended that the legislation was a 'balanced package of rights, which will represent a great advance in the recognition of, and respect for, the creativity of authors, artists and film-makers'. In his view, 'it is a workable scheme that deserves the strong support of this parliament.'

In 2000, the Federal Government implemented the Copyright Amendment (Digital Agenda) Act 2000 (Cth). It introduced a new right of communication to the public; updated exceptions for the digital environment; and created new forms of para-copyright in respect of technological protection measures and electronic rights management. In his second reading speech, the Attorney General, Daryl Williams boasted that the bill would encourage 'online activity' and 'the growth in the information economy':

The Copyright Amendment (Digital Agenda) Bill 1999 (Cth) implements the most comprehensive package of reforms to Australian copyright law since the enactment of the Copyright Act 1968. The reforms will update Australia's copyright standards to meet the challenges posed by rapid developments in communications technology, in particular the huge expansion of the Internet. This extraordinary pace of development threatens the delicate balance which has existed between the rights of copyright owners and the rights of copyright users. The central aim of the bill, therefore, is to ensure that copyright law continues to promote creative endeavour and, at the same time, allows reasonable access to copyright material in the digital environment.

The Minister went onto to stress that this regime was an important step towards harmonisation of Australia's copyright laws with international standards: 'Importantly, the reforms in the bill are consistent with new international standards to improve copyright protection in the online environment adopted in the 1996 World Intellectual Property Organisation (WIPO) Copyright Treaty and WIPO Performances and Phonograms Treaty. The Minister stressed: 'Australia was an active participant in the Diplomatic Conference in December 1996 that agreed to the WIPO treaties, and the enactment of this bill will be a major step towards aligning our copyright laws with the obligations imposed by the treaties.'

On the ten year anniversary of the passage of these bills, this conference considers the history, legacy, and future of the Copyright Amendment (Moral Rights) Act 2000 (Cth) and the Copyright Amendment
It considers the overwrought millennial rhetoric and fervour accompanying these measures, with the cool detachment of hindsight and distance. The event assesses the practical impact and symbolic significance of the legislative measures. It systematically considers the operation of the moral rights regime and the *Digital Agenda Act* in a variety of cultural fields and technological forms — spanning literature; the visual arts; theatre; music; cinema; information technology; architecture; the education sector; and the library and archive community.

This event considers the reception of the twin pieces of legislation, considering how the provisions have been interpreted and understood in landmark cases. In particular, it will delve into the legal reasoning and jurisprudence in Stevens v. Kabushiki Kaisha Sony Computer Entertainment, Roadshow Films Pty Ltd v iiNet Limited and Meskenas v. ACP Publishing Pty Ltd. This conference highlights the unintended consequences of the legislation, and the unforeseen developments in culture, technology, and market forces. It considers the impact of subsequent legislative revisions contained in both the *US Free Trade Agreement Implementation Act 2004 (Cth)* and the *Copyright Amendment Act 2006 (Cth)*. It also examines what outstanding areas of law reform remain – covering both persistent, issues, left unresolved by the legislation, and new problems, which have arisen in the interim.
# PROGRAM

## DAY 1 — Monday 21 June

**Topic: Moral Rights**

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<td><em>Moral Rights and Literature in Australia – Relevant or Redundant?</em></td>
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<td><strong>Associate Professor Maree Sainsbury</strong></td>
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<td><em>Moral Rights and Public Art</em></td>
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<td><strong>Catherine Bond, Professor Kathy Bowrey, and Mehera San Roque</strong></td>
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<td>‘What’s Moral About Moral Rights?’:</td>
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<td><em>The Influence of Moral Rights on the Australian Theatre Community</em></td>
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<td><strong>Brent Salter</strong></td>
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<td>Legal Research Officer, High Court of Australia</td>
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<td>11 am</td>
<td><em>A Decade of ‘Immorality’:</em> <em>The Impact of Moral Rights on Authors and Publishers of Musical Works</em></td>
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<td>PhD Candidate, National Centre for Indigenous Studies</td>
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<td><em>Moral Rights and Monty Python’s Flying Circus: Terry Gilliam’s Quixotic Quest to Secure the Final Cut</em></td>
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<td><strong>Dr Matthew Rimmer</strong></td>
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<td><em>Moral Rights – Architecture</em></td>
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<td><strong>Chris Creswell</strong></td>
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<td>Copyright maven and former Attorney General’s Department Consultant</td>
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<td><em>Integrity, Attribution, and Exploitation: Contractual and Normative Moral Rights Protection in Open Licensing</em></td>
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<td><strong>Nic Suzor</strong></td>
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<td><em>Rights and reward: Why Authorship is Unique in Scientific Publishing and how it relates to integrity</em></td>
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<td><strong>Dr Danny Kingsley</strong></td>
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<td><em>Orphan Works: Setting the Orphans Free</em></td>
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<td>Executive Director, the Australian Digital Alliance</td>
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# PROGRAM

## DAY 2 — Tuesday 22 June

*Topic: The Digital Agenda Act*

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| 9 am          | *Google Books – The New Digital Agenda?*  
Associate Professor Maree Sainsbury  
University of Canberra                      |
| 9.30 am       | *Originality Revisited: Is Digital Photography Protected under Copyright Law*  
Professor Kathy Bowrey  
University of New South Wales               |
| 10 - 10.30 am | Morning tea                                                                              |
| 10.30 am      | *Performers and the Digital Environment*  
Dr Mark Williams  
Solicitor in private practice, and an Adjunct Professor in the School of Art at RMIT University.  
Brent Salter  
Legal Research Officer, High Court of Australia |
| 11 am         | *From Kazaa to BitTorrent: Implications of the Digital Agenda Amendments*  
Alan Hui  
PhD Candidate, ANU College of Law            |
| 11.30 am - 12.00 pm | Break                                                                                   |
| 12 pm         | *Avatar: Cinematographic Films and Indigenous Cultural Protocols*  
Terri Janke  
Terri Janke and Associate PhD Candidate, National Centre for Indigenous Studies |
| 12.30 pm      | *'I Drink Your Milkshake': YouTube, Mega Copyright-Litigation, and Mash-ups*  
Dr Matthew Rimmer  
Senior Lecturer, ANU College of Law          |
| 1 – 2 pm      | Lunch                                                                                     |
| 2 pm          | *Digital Agenda Act – Technological Protection Measures*  
Chris Creswell  
Copyright maven and former Attorney General's Department Consultant |
| 2.30 pm       | *Tensions Between the Rule of Law and Graduated Response Schemes*  
Nic Suzor  
Lecturer, Queensland University of Technology |
| 3 – 3.30 pm   | Afternoon tea                                                                             |
| 3.30 pm       | *They’re Digital Rights but not as You Know Them: The Curious Case of Open Access and Copyright*  
Dr Danny Kingsley  
Manager, Scholarly Communication and ePublishing |
| 4 pm          | *Anti-Counterfeiting Trade Agreement: Impact on Individuals and Intermediaries*  
Matthew Dawes  
Executive Director, the Australian Digital Alliance |
| 4.30 pm       | Close                                                                                    |
Abstracts — Day 1

Moral Rights and Literature in Australia – Relevant or Redundant?
Associate Professor Maree Sainsbury

There has been no case law in Australia on moral rights and literature in the ten year period that those rights have existed. This paper will examine some of the explanations for that. The first possibility is that the decision made by the Federal Parliament was a wrong one – Australia should never have enacted moral rights legislation. The refusal to introduce specific legislation for the previous century should have been continued. This argument is founded on the notion that moral rights are not relevant in the Australian legal system – they are based on Civil Law concepts and inaccurate notions of authorship. A second explanation is that there have been fundamental changes in the use of literary works since 2000 that have rendered moral rights irrelevant – in particular the proliferation of ‘interactive fiction’ and more opportunity for its widespread dissemination. Some modern practices which raise moral rights implications will be considered, including fan fiction, unauthorised sequels and other adaptations. Finally, a proposal for reconceptualising moral rights will be considered. If a view of authorship was adopted that better reflected the reality of the creation of literary works, then moral rights are more important than ever.

Moral Rights and Public Art
Catherine Bond, Professor Kathy Bowrey, and Mehera San Roque

This paper looks at a recent controversial art installation that exposes the many difficult questions raised by placing art in the public domain, and raises a broader moral rights question that challenges the traditional view of ‘moral rights’ as belonging to a sole artistic creator. Drawing on both the wider context of public art commissioning in Australia, alongside a review of the moral rights framework for creators of artistic works, this paper asks whether the moral rights regime has added anything meaningful to protections for creators of public art and whether it can provide a satisfactory response to the complex issues generated by public art practice in Australia.

‘What’s Moral About Moral Rights?’:
The Influence of Moral Rights on the Australian Theatre Community
Brent Salter

In the past two decades some of the most notable legal disputes in the Australian theatre community have involved issues of moral rights: the Heretic dispute at Sydney Theatre Company between former Artistic Director Wayne Harrison and the iconic Australian playwright David Williamson, the dispute between Company B Belvoir and the estate of Samuel Beckett during the 2003 Sydney Festival and a heated exchange between American composer and lyricist Stephen Sondheim and Australian musical theatre company Kookaburra over a Sydney production of Sondheim’s Company. All three disputes received considerable attention in the press but ultimately settled before formal litigation was commenced. Despite integrity issues being a central aspect of these notable disputes, the application of moral rights to theatre received no attention during the moral rights debate in the late 1990s and has generally been uninfluential on theatre practice over the last decade. As one practitioner has suggested, “[T]o actually take recourse in moral rights sounds to me like the production is in deep trouble and often the deep trouble can have to do with things that are beyond the notion of moral rights. Certainly in my role I can’t see it making any difference to my practice.” The paper examines some of these disputes outlined above and why the moral rights amendments to the Copyright Act have had such limited influence on Australian theatre practice.
A Decade of ‘Immorality’: The Impact of Moral Rights on Authors and Publishers of Musical Works

Alan Hui

Schott Musik International GMBH & Co v Colossal Records of Australia Pty Ltd remains the leading Australian case on moral rights for musical works. In affirming the judgement of the Federal Court in the case, Lindgren J noted that “the view which I favour produces its own anomaly: moral rights of authors are not protected by the Act; it is the copyright owner, not the author, who has standing to sue a manufacturer which falls foul of the exception in sub-s 55 (2).” The Copyright Amendment (Moral Rights) Act 2000 (Cth) rectified this anomaly by granting moral rights to authors of musical works, amongst other material. It could be said that the moral rights amendments came at a fortunate time for authors of musical works, given the explosion of uses in musical works in the past decade. Yet, authors of musical works have yet to use moral rights amendments to protect their works. The integrity of an estimated 3500 musical works was not questioned when sampled by The Avalanches in their album ‘Since I Left You’, a rare case of a diligent sample clearance. When a substantial part of an iconic piece, ‘Kookaburra Sits in the Old Gum Tree’, composed by a Toorak teacher, Marion Sinclair, was reproduced without attribution, no action was taken. When it was leaked that anti-piracy company MediaDefender had created thousands of fake files hosted on the servers of Kazaa and other file-sharing networks to deter users, no protests were made about false attribution. As a result, despite the potential moral rights issues in these examples and many others, there is still no case law on the Copyright Amendment (Moral Rights) Act 2000 (Cth) in relation to musical works. This paper considers why authors of musical works in Australia have been reluctant to exercise their moral rights and the role of music publishers in protecting moral rights.

Moral rights: No Passage for Indigenous communal moral rights?

Terri Janke

In 2000 when the moral rights amendments to the Copyright Act 1968 were being debated in Parliament, then Senator Aden Ridgeway called for the protection of Indigenous Communal Moral Rights. In 2003, the Attorney General’s Department drafted the Indigenous Communal Moral Rights Bill which aimed to provide Indigenous communities with the moral rights of attribution, false attribution and integrity. The Bill has never put to parliament. This paper will examine the application of moral rights to Indigenous cultural material in order to consider the issues for Indigenous creators, and Indigenous cultural custodians. Are the moral rights law applicable to Indigenous cultural works? The paper examines some of the international sui generis models such as the Pacific Model Law for the protection of Traditional Knowledge and Expressions of Culture and the WIPO Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore.

Moral Rights and Monty Python’s Flying Circus:

Terry Gilliam’s Quixotic Quest to Secure the Final Cut

Dr Matthew Rimmer

In addition to being a moderately amusing comic troupe, Monty Python’s Flying Circus have also, collectively and individually, been unlikely, quixotic crusaders for moral rights. Appropriately, the documentary recording the life and works of Monty Python’s Flying Circus was titled Almost the Truth: The Lawyer’s Cut. Unfortunately, though, the work was much too modest about the legal contributions of the group.

Famously, in Gilliam v American Broadcasting Company 538 F.2d 14 (1976), the comic group brought an action against that the ABC television network over the excision of almost a third of running time of episodes in the United Kingdom series Monty Python’s Flying Circus. In the United States Court of
Appeals for the Second Circuit, Lumbard J noted: ‘American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors’. The judge stressed: ‘Nevertheless, the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent.’ Gurfein J observed: ‘If a distortion or truncation in connection with a use constitutes an infringement of copyright, there is no need for an additional cause of action beyond copyright infringement.’ The United States Court of Appeals for the Second Circuit ordered the district court to grant an injunction, because the editing constituted a copyright infringement of appellants’ copyright in their scripts and because mutilation of the programs was precluded by the Lanham Act.

In his solo career as a film director, Terry Gilliam has been embroiled in a succession of disputes and conflicts with film studios and distributors over his cinematographic films. Famously, Terry Gilliam was locked in conflict with Sidney Sheinberg, the president and chief executive officer of MCA-Universal, over the final cut for the dystopian piece of speculative science fiction, Brazil. In a classic 1989 article, Rudolph Carmentay observed that ‘The Brazil situation offers one the opportunity to explore how the force of contract is used against the film director and exposes the need to fashion new law.’ The dispute has been immortalised in the book The Battle of Brazil and multi-DVD packs of all the versions of the film. Terry Gilliam also faced production problems in The Adventures of Baron Munchausen. His ordeal in trying to make a Don Quixote film – documented in Lost in La Mancha – raises larger questions about moral rights and unfinished works.

Monty Python’s Flying Circus also raises the vexed question of copyright law and political speech. In 2009, Chris Christie, the Republican candidate for Governor of New Jersey, used scenes from a famous skit from ‘Monty Python’s Flying Circus’ television series in an official campaign advertisement entitled, ‘Déjà vu’. Screened on national television and YouTube, the advertisement attacked the incumbent New Jersey Governor Jon Corzine. Members of Monty Python’s Flying Circus were unhappy with the unauthorised use of the copyright material. Michael Palin objected, furthermore, to the use of his likeness in the advertisement: ‘I’m surprised that a former U.S. Attorney isn’t aware of his copyright infringement when he uses our material without permission. He’s clearly made a terrible mistake. It was the endorsement of Sarah Palin he was after – not that of Michael Palin.’

In addition to being advocates for moral rights, Monty Python’s Flying Circus also highlight the need for suitable protection for parodists, satirists, blasphemers, and mash-up artists.

Moreover, Monty Python’s Flying Circus has raised larger questions about fan fiction and consumptive use. The group has been somewhat more indigantly tolerant to the sharing of clips from the series on the Internet site, YouTube. The comic troupe observed: ‘For 3 years you YouTubers have been ripping us off, taking tens of thousands of our videos and putting them on YouTube.’ The group observed that ‘We know who you are, we know where you live and we could come after you in ways too horrible to tell.’ The comic troupe noted: ‘But being the extraordinarily nice chaps we are, we’ve figured a better way to get our own back: We’ve launched our own Monty Python channel on YouTube.’ The group stressed ‘But we want something in return. None of your driveling, mindless comments. Instead, we want you to click on the links, buy our movies and TV shows and soften our pain and disgust at being ripped off all these years.’

The comparative case study of Monty Python’s Flying Circus is instructive in thinking about the decade of operation of Australia’s moral rights regime.
Moral Rights – Architecture
Chris Creswell

The application of an architect’s moral rights to buildings designed by him or her is a contentious issue, but has apparently not yet been ruled on in the courts. The creations of architects were recognised early as an active area for moral rights. Moral rights have a distinctive application because of the singular nature of architecture. Like film scripts, architectural plans themselves do not receive as much public exposure as their realisation, i.e., the buildings erected according to them. Buildings are works protected by moral rights in addition to the plans on which they are based. In contrast to films, of which the script writer is an author as well as of his or her script, the architect of plans is not necessarily also author of the building based on them. Buildings mostly have a highly practical use and require substantial investment. Accordingly, in the development and enactment of the Moral Rights Act (now Part IX of the Copyright Act 1968) lobbying by architects for moral rights protection was countered by lobbying by building owners opposing restraints on their freedom to alter or demolish their properties. The result was the inclusion in Part IX of special provisions allowing such treatment of buildings after specified contact with the architects and opportunities for consultations between them and the owners. To date there have been reports of several cases in which architects have threatened or initiated proceedings objecting to alterations of buildings they designed, but in each case the dispute has apparently been settled. This is consistent with the aim of Part IX as stated by the government, namely, to build upon good existing industry practice and to raise awareness in an educative way of the need to respect the creativity of authors and artists, and with its expectation that enforcement of moral rights through the courts would be an exceptional occurrence. Arguably, then, Part IX has so far worked as intended.

Integrity, attribution, and exploitation:
contractual and normative moral rights protection in open licensing
Nic Suzor

Over the last twenty years, the use of open content licenses has become increasingly and surprisingly popular. The use of such licences challenges the traditional incentive-based model of exclusive rights under copyright. Instead of providing a means to charge for the use of particular works, what seems important is mitigating against potential personal harm to the author and, in some cases, preventing non-consensual commercial exploitation. It is interesting in this context to observe the primacy of what are essentially moral rights over the exclusionary economic rights.

The core elements of common open content licences map somewhat closely to continental conceptions of the moral rights of authorship. Most obviously, almost all free software and free culture licences require attribution of authorship. More interestingly, there is a tension between social norms developed in free software communities and those that have emerged in the creative arts over integrity and commercial exploitation. For programmers interested in free software, licence terms that prohibit commercial use or modification are almost completely inconsistent with the ideological and utilitarian values that underpin the movement. For those in the creative industries, on the other hand, non-commercial terms and, to a lesser extent, terms that prohibit all but verbatim distribution continue to play an extremely important role in the sharing of copyright material. While prohibitions on commercial use often serve an economic imperative, there is also a certain personal interest for many creators in avoiding harmful exploitation of their expression – an interest that has sometimes been recognised as forming a component of the moral right of integrity.

One particular continental moral right – the right of withdrawal – is present neither in Australian law or in any of the common open content licences. Despite some marked differences, both free software and free culture participants are using contractual methods to articulate the norms of permissible
sharing. Legal enforcement is rare and often prohibitively expensive, and the various communities accordingly rely upon shared understandings of acceptable behaviour. The licences that are commonly used represent a formalised expression of these community norms and provide the theoretically enforceable legal baseline that lends them legitimacy. The core terms of these licences are designed primarily to alleviate risk in sharing and minimise transaction costs in sharing and using copyright expression.

Importantly, however, the range of available licences reflect different optional balances in the norms of creating and sharing material. Generally, it is possible to see that, stemming particularly from the US, open content licences are fundamentally important in providing a set of normatively accepted copyright balances that reflect the interests sought to be protected through moral rights regimes.

As the cost of creation, distribution, storage, and processing of expression continues to fall towards zero, there are increasing incentives to adopt open content licences to facilitate wide distribution and reuse of creative expression. Thinking of these protocols not only as reducing transaction costs but of setting normative principles of participation assists in conceptualising the role of open content licences and the continuing tensions that permeate modern copyright law.

Rights and Reward: Why Authorship is Unique in Scientific Publishing and How it Relates to Integrity
Dr Danny Kingsley

This talk explores the moral right of attribution by asking ‘what is authorship’? While ostensibly a simple question, when it comes to scientific publishing, the definition shifts depending on one's perspective. Authorship means ‘responsibility’ to journal editors, employers and the wider society. This reflects the unique nature of scientific authorship and how it relates to intellectual property. In science there is no direct monetary reward for authorship, instead, reward takes the form of professional status. This partly explains why researchers consider authorship to more widely mean ‘credit for work’.

The correlation in science between authorship and responsibility is central to why scientific integrity is held as so important. Generally there has been an understanding that science has a set of ‘norms’ to which all members adhere, and these maintain scientific integrity, amongst other things. However, as the stakes for reward escalate, with the introduction of increasingly intensive measurement protocols (the ERA project being one example), so do the incentives to cheat the system. The talk will briefly look at some case studies which demonstrate how scientific integrity is being compromised – both through fraud and political interference. It is instructive to look at how in the last decade there has been a recognition that the traditional methods of responding to issues such as fraud, for example retracting a paper, have become less effective. In response there has been an increase in systematic attempts to deal with this threat in the form of professional regulatory bodies and government agencies.

Orphan Works: Setting the Orphans Free
Matt Dawes

The problem posed by orphan works has been given prominence in recent times as the efforts of cultural institutions to use new technologies to make orphans available have been largely frustrated by unbalanced copyright protection. Cultural institutions hold a wealth of copyright works that are colloquially known ‘orphans’ because it is practically impossible or difficult to locate the copyright holders. This creates a copyright conundrum – where the orphans are not made accessible to the public because of copyright restrictions, even though doing so would create significant social value and cause minimal prejudice to the interests of copyright holders.
This paper proposes amendments to the section 200AB flexible dealing exception to overcome the practical restrictions that limit its ability adequately address the unique circumstances of orphan works. This paper also proposes measures to address the absurdity of perpetual copyright protection for unpublished works in Australia, which exacerbates the orphan works problem.
Abstracts — Day 2

Google Books – The New Digital Agenda?
Associate Professor Maree Sainsbury

The shift to electronic publishing has been hailed as 'biggest transformation in books since Gutenberg's invention of the printing press'. It has attracted a lot of attention in recent times with the Google Books settlement and the introduction of the iPad. The Google Books settlement also highlights the obstacles potentially posed by copyright law to mass digitisation of literary works and the opportunity to make the works widely available online.

This paper will look at the different uses of literary works made by Google under the Google Books Settlement. It will consider how the Australian law might apply to Google's use – for example, what defences to infringement might be available. It will also consider the other implications for copyright law/paracopyright – particularly digital rights management information. Finally, some of the broader issues raised by electronic publishing, electronic libraries and the Google Books Settlement will be considered.

The creation of electronic libraries offers tremendous opportunities for access to information. Is the Google Books Settlement setting the right precedent for dealing with this opportunity?

Originality Revisited: Is Digital Photography Protected under Copyright Law
Professor Kathy Bowrey

In the 19th century there was significant debate about the status of photography as an art form, and whether daguerreotypes and calotypes were original works of art, or merely technological artefacts. Today digital scanners, satellites, surveillance cameras are ubiquitous technologies that produce visual imagery. But do they (1) have a human author and (2) have requisite originality? This paper explores the implications of IceTV's musings on originality for copyright in digital photography.

Performers and the Digital Environment
Dr Mark Williams and Brent Salter

In this paper we examine the extent to which performers have been adequately protected by amendments to Australian copyright law and focus on the implications of the protection framework for theatre performers in a digital environment. The paper will trace some of the key developments in arts policy and the law including the impact and actual response to the first significant technology to influence performers, namely recording and sound broadcasting, both here and in England, the formation of the Musicians Union and APRA in Australia, the groundbreaking work done by Baumol and Bowen on the economics of the performing arts and the uncertainties (and insecurities) of the performers/MEAA relationship.

We suggest that the new digital rights have largely failed to alter live theatre-making practice or empower technologically-enhanced innovative live performance or live/electronic hybrid forms. This is in part because there are serious craft discrepancies between film and television-making and live theatre-making. Where the legislation has failed to deliver for performing artists more obviously, however, is in relation to the vast fragmentation of the market, the loss of industrial organisation through structural labour market reform, failure of financing to establish a model for adequate risk-return and the proliferation of new technologies and consequent fragmentation of both labour and production. Where silence is a central element in many forms of theatre creation, practical and artistic issues are considered, including the problematic nature of regarding performers as co-makers of sound recordings of live performances rather than audiovisual performances.
From Kazaa to BitTorrent: Implications of the Digital Agenda Amendments
Alan Hui

The 2005 case of Universal Music Australia Pty Ltd v Sharman License Holdings Ltd [2005] FCA 1242 (5 September 2005) remains one of the significant victories claimed by record companies and music publishers against file sharing. The Copyright Amendment (Digital Agenda) Act 2000 underpinned this verdict by clarifying the right to communicate recordings to the public, and the matters to be considered in determining authorisation, underpinned the verdict. However, in his orders, Wilcox J took care not to restrict the use of file sharing for non-infringing uses. At the time, IFPI chief John Malcolm said: “The message is very clear for P2P services: It’s time to go legal”. However, as Kim Weatherall from Melbourne University commented: “If filtering proves impossible it is not clear what will happen.” With the rise of the BitTorrent protocol, filtering has proven difficult. Filtering based on keywords and gold file flooding, as suggested in Universal v Sharman are not relevant to BitTorrent. This paper considers the implications of the digital agenda amendments for Kazaa, BitTorrent clients and BitTorrent trackers.

Avatar: Cinematographic Films and Indigenous Cultural Protocols
Terri Janke

Copyright protects cinematographic films giving the rights to control the resulting film to the filmmaker. However, when filmmakers work with Aboriginal and Torres Strait Islander people, or use Indigenous cultural content, Indigenous cultural protocols come into play. Indigenous film protocols advocate the need to look beyond usual copyright clearance practices to consult groups about what cultural material is suitable for wide dissemination, and how Indigenous culture is represented. Applying Indigenous cultural protocols to documentaries is commonplace, but there is new ground to break with dramatisation of Indigenous themes in feature films including by way of digital enhancements such as Avatar. A Pandora’s box? This paper will discuss Indigenous cultural protocols in filmmaking.

‘I Drink Your Milkshake’: YouTube, Mega-Copyright Litigation, and Mash-Ups
Dr Matthew Rimmer

The frameworks established in the Copyright Amendment (Digital Agenda) Act 2000 (Cth) and its successors, and the Digital Millennium Copyright Act 1998 (US) have struggled to withstand the scale of the mega-copyright conflicts being fought between Internet search engines, Web 2.0 social networking sites, media conglomerates, copyright owners, consumers, and mash-up artists.

In Viacom International Inc, et. al. v. YouTube, Inc. et. al., Declaratory No. 1:07-cv-02103 (LLS) (FM), Viacom International demanded in the United States District Court for the Southern District of New York that YouTube take down over 150,000 copyright works - including television programming and motion pictures, such as SpongeBob SquarePants, The Daily Show with Jon Stewart, The Colbert Report, South Park, Ren & Stimpy, MTV Unplugged, An Inconvenient Truth, and Mean Girls. In its 2010 brief, the media behemoth complained that ‘tens of thousands of videos on YouTube, resulting in hundreds of millions of views, were taken unlawfully fiom Viacom’s copyrighted works without authorization’. It alleged that ‘fostering and countenancing this piracy were central to YouTube’s economic business model.’ Viacom emphasized: ‘The fundamental issue is whether Defendants are liable for that intentional infringement of copyrights or whether, alternatively, they may hide behind a policy of willful blindness and seek to shift responsibility to clean up their site to victimized content owners like Viacom.’

In The Football Association Premier League Limited et. al. v. YouTube, Inc. et. al., 07 Civ. 3582 (LLS), a class action was brought in the United States District Court for the Southern District of New York by the Football Association Premier League Limited, the music publisher, Bourne Co., and others. The complaint was designed to ‘vindicate the rights of owners of copyrighted intellectual property, both
large and small'. The class action complained that the ‘Defendants, which own and operate the website YouTube.com, have knowingly misappropriated and exploited this valuable property for their own gain without payment or license to the owners of the intellectual property.’ In its 2010 brief in the Viacom dispute, the class action alleged: ‘Far from being a passive Internet intermediary that is unaware of the infringing activities on its systems, or that promptly and meaningfully responds to occasional copyright infringement appearing on its site, the vast amount of infringing activity on the YouTube site is an essential element of [the] Defendants' success.’

In its defence, in its 2010 brief, YouTube and Google emphasized the public good provided by Internet videos: ‘YouTube has afforded political candidates and elected officials a new way to communicate with the public; enabled first-hand reporting from war zones and from inside repressive regimes; allowed unknown performers, filmmakers, and artists to rise to worldwide fame; inspired laughter at the antics of dancing babies and skateboarding dogs; let students of all ages audit classes at leading universities; and given creators of all sorts a powerful new way to promote their work to a global audience’. YouTube and Google has emphasised that, in both actions, that it is shielded by the safe harbour provisions of the Digital Millennium Copyright Act 1998 (US), because it has expeditiously removed copyright-infringing material when contacted by copyright owners: ‘YouTube, which has pioneered efforts to protect copyright, while maintaining an open environment for creative, political, and personal expression, is exactly the kind of service that Section 512 (c) was enacted to protect.’

The Electronic Frontier Foundation has also played a role in the debate over copyright law, and Internet videos. In a number of matters, it has intervened in disputes, seeking to protect the rights of consumers from take-down notices – most notably, in the dispute between Stephanie Lenz and Universal Music. Putting in a brief in 2010 to the conflict over YouTube, the Foundation commented:

As is now abundantly evident, the Internet has grown into an unprecedented, global, accessible, vibrant platform for free speech and creative expression. Never before have so many citizens been able to reach an audience across so many mediums, at such low cost. All of this activity depends in turn upon a thriving marketplace of service providers—including YouTube, MySpace, Facebook, Blogger, and Flickr, to name a few—providing inexpensive (or free) public fora for speech and innovation. Changes to the legal climate for these service providers can have profound consequences for the future of free expression online. Thus, proper interpretation of copyright laws as applied to online service providers is a matter of crucial public interest.

The group stressed that the safe harbours regime had promoted the growth of social networking services: ‘Services no longer merely host simple text and images on websites, in chatrooms, and in discussion forums, but now also offer myriad platforms for speech and commerce, including web stores (e.g., Amazon ZShops); e-commerce listings (e.g., eBay); blogs (e.g., Blogger); tweets (e.g., Twitter); photographs (e.g., Flickr); documents (e.g., Scribd); video (e.g., YouTube); and audio (e.g., SoundCloud) on behalf of tens of millions of Internet users.’ The group complained that the ‘Plaintiffs attempt to thwart Congress’ intent and reintroduce the very climate of uncertainty it sought to ameliorate – a climate that would inevitably hamper innovation and free expression.’

Such litigation highlights the need for law reform in respect of intermediary liability – and, by law reform, one does not mean the crude self-serving proposal of copyright owners for a ‘3-strikes’ policy, but a genuine effort to streamline and modernise the safe harbours regime, while providing for adequate protection of citizens’ rights in respect of privacy, freedom of speech, and consumer protection.
Digital Agenda Act – Technological Protection Measures
Chris Creswell

The requirement in WIPO Internet treaties of 1996 for adequate protection and effective remedies against circumvention of technological protection measures (TPMs) on copyright materials was in general terms. As a result, the provisions in the Digital Agenda Act 2000 on TPMs differed in some important respects from the US Digital Millennium Copyright Act (DMCA), by which the USA implemented the treaties. Notably, the Digital Agenda Act scheme did not extend to actual use of circumvention devices and services, and allowed supply of such devices for ‘permitted purposes’ – such as uses by libraries, archives and educational institutions allowed by the Copyright Act.

The Digital Agenda Act scheme was extensively considered by the Federal Court then the High Court in Stevens v Sony. The High Court’s interpretation of the legislation was of short-lived application, as the Digital Agenda Act scheme was replaced in 2007 by a more expansive and complex scheme enacted in the Copyright Amendment Act 2006, as mandated by the Australia-US Free Trade Agreement which largely reflected the DMCA.

There are substantial differences between the Digital Agenda Act scheme and the 2007 replacement scheme. Under the latter, circumvention of an ‘access control’ TPM is itself actionable, and the exceptions allowing supply of circumvention devices are much more limited than under the Digital Agenda Act scheme.

From the absence of judicial decisions on the 2007 scheme and of any further regulations adding new exceptions, can it be inferred that copyright owners are satisfied and that users are managing within the limits imposed by the scheme?

Tensions Between the Rule of Law and Graduated Response Schemes
Nic Suzor

The recent iiNet decision highlights an important tension in copyright law over the role of intermediaries in responding to what is seen as a crisis in rates of online infringement. Recent legislative developments in the UK, New Zealand, and France seek to require ISPs to terminate the accounts of subscribers suspected of infringing copyright on a number of occasions. The iiNet decision at first instance suggests that such a scheme cannot easily be implied as part of Australian authorisation liability and that a legislative scheme will likely be required if one is to be introduced.

The recent decision of the French Constitutional Council on the first iteration of a French graduated response scheme highlights fundamental rule of law concerns with the creation of an extra-judicial punitive regime designed to curb rates of copyright infringement. The desire to reduce the costs of copyright enforcement is problematic when considered against the requirements of due process, predictability, and transparency expected in liberal democratic theory. The crisis-management based goals of such schemes can also be difficult to reconcile with requirements of proportionality in the enforcement of legal rights. These problems compound with the increasing recognition that internet access is fundamentally important to all aspects of participation in society.

This paper examines these tensions and seeks to identify whether a scheme based upon the termination of internet access of households or individuals found to have infringed copyright can be compatible with rule of law theory. At a minimum, such a scheme is likely to require significantly more judicial oversight than has been proposed by the applicant-appellants in the iiNet litigation. Whether it is possible to decrease enforcement costs without unduly sacrificing due process is likely to be an ongoing debate over the immediate future.
They're Digital Rights but not as You Know Them: The Curious Case of Open Access and Copyright

Dr Danny Kingsley

One of the rationales for the Digital Rights Addendum was: “The Government believes that libraries and archives must be able to use new technologies to provide access to copyright material for the general community”. But in the area of scholarly publication, the move to online distribution has actually resulted in the general community having less access to research papers than a decade ago.

Open access, which has grown as an international movement over the past 20 years, has a very similar tenet to this decade old statement: the full text results of scholarly research should be immediately, freely and permanently available to anyone with access to the internet. While it focuses on equitable access to research output, open access also represents a response to increasing journal costs.

Open access is achieved in two ways, either where journals provide open access to articles, called the ‘gold road’, or by authors depositing their articles into a digital repository, called the ‘green road’. While both instances represent a shift in the copyright arrangements between authors and publishers, there are more challenging copyright issues in the self-deposit, green solution. In response there has been a considerable government and institutional effort to develop copyright guidelines and interpret the law within this area. Major funding bodies in the US, UK and Europe now require open access availability of research output as a condition of funding. In Australia the NHMRC is including this clause in their 2010 round of funding.

This talk will explore how the open access movement has succeeded where the Digital Rights Addendum has failed. It will focus on the copyright issues associated with making scholarly research open access, rather than the rights of the people who use the material.

Anti-Counterfeiting Trade Agreement: Impact on Individuals and Intermediaries

Matt Dawes

The decision to release an official version of the Anti-Counterfeiting Trade Agreement (ACTA) is a significant stride towards greater transparency. It is an opportunity to focus on meaningful public discussion of the real issues and to receive detailed comment from government.

This paper analyses potential conflicts between the requirements of ACTA and Australia’s domestic settings, and recommends policy action for consideration during future negotiations. Several articles of ACTA appear to require changes to Australian copyright law, and other laws, including, but not limited to: damages, criminal liability, anti-circumvention, privacy, due process, injunctions and third party liability and limitations. Where current Australian provisions and obligations meet ACTA’s requirements, Australia stands to lose much needed flexibility.

ACTA threatens to upset the delicate balance of Australian copyright law that protects consumers, enables access to information and is fundamental to the success of the digital economy. It is vital that voices representing the public interest perspective have a chance to be heard and to influence the outcome of the negotiations.
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