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## **The Outer Limits Of Copyright Law – Where Law Meets Philosophy and Culture\***

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An interest in philosophy and culture takes you to the outer limits of copyright law. It is not so much that the territory is completely unknown, but it is a twilight zone. Those that have mapped it have sketched features of a long gone past or drawn visionary copyright futures. What they have seen and described is something other worldly- imaginary domains. No-one has thought it relevant to track the terrain shared by law, philosophy and culture in the here and now.

Writers have mapped the influence of philosophers such as Locke, Kant and Hegel on the proprietorial claims of authors, however these writers have treated copyright as an unfinished project. The law has failed to faithfully reproduce the clear thinking of the philosophers, and as such it remains inadequate, unprincipled and inconstant in the treatment of the author's "right".<sup>1</sup> Others have discussed "entitlement" theories of copyright, based upon a calculation of whether the interests of society at large would be best served by protection. Here "author's right" meets "user's rights", and a future legal balance is envisioned with reference to a test of social utility.<sup>2</sup> In both of these approaches philosophy comes into the picture mainly as an external source of legitimation - the measure of what the law currently is not and the inspiration for what might be. Culture is to be served by that happy connection.

Literary theorists, drawing upon the work of Barthes and Foucault, have questioned the cultural necessity of authorial claims.<sup>3</sup> Copyright is recognised as having unstable subject matter. It is about something less than author's rights, but also something other than utilitarian in focus. The problem with identifying copyright's subject matter is mostly related to the broader issue of literary theory - the problem of subject formation and cultural development in the aftermath of romanticism. This kind of work has generated a lot of discussion<sup>4</sup>, and some strong responses. It led one writer to question the notion that philosophical concerns about the conditions and authority

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<sup>1</sup> See for example, Edward Hettinger, "Justifying Intellectual Property", (1989) *Philosophy and Public Affairs*, Vol 18 No 1 p31; Justin Hughes, "The Philosophy of Intellectual Property", 77 *The Georgetown Law Journal*, (1988) p287; Radin, Margaret, "Property and Personhood", (1982) 34 *Stanford Law Review* 957.

<sup>2</sup> As in the work of Wendy Gordon "Creation of Commercial Value: Copyright Protection of Works of Information", (1990) 90 *Columbia Law Review* 1865; "An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory", (1989) 41 *Stanford Law Review* 1343; "A Property Right in Self Expression" (1993) 102 *Yale Law Review* 1533.

<sup>3</sup> Most notably the work of Mark Rose, *Authors and Owners. The invention of copyright*, (Harvard UP, 1993).

<sup>4</sup> See for example Martha Woodmansee & Peter Jaszi (eds) *The Construction of Authorship: Textual Appropriation in Law and Literature*, (Duke University Press, 1994).

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of authorship have any relevance to copyright as a legal subject at all. Copyright, it is claimed, is not preoccupied with language as universal generator of meaning (as with poststructuralist theory) but is only interested in printed books as traded commodities.<sup>5</sup>

A recent historical account of the development of intellectual property law by Sherman and Bently<sup>6</sup> agrees with the proposition that the law was unable to effectively determine the metaphysical dimensions of intangible property, and influenced by criticism of literary theorists, the book looks beyond author theory to explain the law. It is argued that the attributes of modern law explain the structure and priorities of intellectual property laws. Following the 18<sup>th</sup> century literary property debates, there was a jurisprudential shift away from a concern that the law reflect the "natural" property in mental labour, to a "consequential" analysis of the merits of granting a right. In the process it has been left up to law to "create" the intangible property, which can now only be partially defined, and is mainly explained by reference to distinctions between the various categories of intellectual property right.<sup>7</sup>

The book moves beyond commentating on the possibility of exchanges of ideas between the fields of philosophy, literary theory and law, to considering the jurisprudential reasons for the limited influence of philosophy and literary theory on intellectual property law. As such, the work offers a more sophisticated treatment of the subject. However discussion of the role of philosophy relegates it to being a matter of historical note. Philosophy caused problems in the past, and a pragmatic refocussing of legal concerns controlled its corrupting influence on the order of the law. The consequence of this manoeuvre was legal support for a culture of commodification. However the book does not discuss the practice of this culture within the law. Rather it is implied to be an effect of the jurisprudence that developed in response to particular historical challenges.

The intellectual territory that is currently engaged by philosophy, culture and the judicial practice of copyright law remains undiscovered country.

This paper embarks upon an exploration of that territory. It takes as its point of departure the observations of cultural theorists and legal historians that there is something inherently unstable about copyright's subject matter, and that the failure of the law to live up to romantic visions of authorship is no great failing. As with the work of Sherman and Bently, questions of philosophy will be explored through the prism of jurisprudence, but case law, rather than history, is the site of discovery.

My interest in this area is primarily an interest in the cultural life of the law. The attempt is to draw out the cultural values that are currently being supported by a so-called "consequential" approach to copyright law, as well as to consider the reason others' copyright claims are being denied. What is commonly presumed to be no more than a small blip on the outer limits of the copyright landscape, when excavated,

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<sup>5</sup> David Saunders, *Authorship and Copyright*, (Routledge & Kegan Paul, 1992) at 101.

<sup>6</sup> Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property* (Cambridge University Press, 1999).

<sup>7</sup> See Kathy Bowrey, "Book Review: Sherman & Bently, *The Making of Modern Intellectual Property Law*", 22(7) EIPR 2000 at 343.

turns out to be a large and interconnected part of the matter. Philosophical problems with identifying copyright subject matter have not been left behind. Philosophy is still wielding influence within the body the law.

More specifically this paper argues that the law makes use of romantic theory in order to attribute authorship, alongside of its valuing of works as traded commodities. In law, unlike in romantic theory, there need not be an opposition between art and commerce. Fundamental ideas about creativity can be relied upon to bolster weak instrumental legal reasoning in support of commodification.

My interest in this subject is also political and jurisprudential. The political values I discuss pertain, not to the categorisation of intellectual property as "modern law" as discussed by Sherman and Bentley, but more specifically to the values of liberal jurisprudence and legal positivism within copyright. My interest is in seeing how these values frame judicial practice, structure the ongoing development of the law and lead to a hierarchy of legal subjects that belies the law's stated commitment to neutrality. Politics are at the heart of where copyright law meets philosophy and culture. In the cases discussed it is the all too familiar politics of an ongoing legal dispossession of indigenous people of their culture and of legal infatuation with serving the perceived needs of actors in the so-called information economy.

### **The Cultural Politics of Closure: copyright is a creature of positive law**

In this part I want to locate the cultural limits of the law and explore how these are legally justified. In the main this involves examining a conventional explanation of the law's limits - namely the claim that copyright is a creature of positive law. As the 18<sup>th</sup> century literary property debates, culminating in the case of *Donaldson v Becket*<sup>8</sup>, failed to endorse any specific philosophical insights into the nature of literary property, it is claimed that, as a matter of law, we were left with the statute for any necessary definition.<sup>9</sup> The received wisdom is that any limitations in the law can be explained by reference to statute. Accordingly any cultural bias in the law is a matter of legislative drafting, rather than being informed by judicial choice.

The claim that copyright is a creature of positive law formed a significant part of the *Bulun Bulun* decision.<sup>10</sup> This dispute was about an indigenous claim to communal copyright ownership. The painting, "Magpie Geese and Water Lilies at the Waterhole", was executed by artist John Bulun Bulun. However the artist, with the support of his community, the Ganalbingu people, argued that the copyright in the work which expressed ritual knowledge of the community should be treated as communally owned.

The case is one where the cultural specificity of copyright law was directly at issue. The judge self-consciously considered his position as interpreter of a different culture. However his openness to cultural difference was moderated by his obligation to preserve mainstream copyright law. While it is true that the special cultural content of the case colours (sic) the decision, von Doussa J. explicitly stated a commitment to

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<sup>8</sup> (1774) 4 Burr. 2408, 98 Eng. Rep. 257.

<sup>9</sup> This is the accepted reading of the legal significance of *Donaldson v Becket*.

<sup>10</sup> *Bulun Bulun v. R & T Textiles Pty Ltd* [1998] 41 IPR 513.

maintaining the integrity of principles of interpretation of copyright law in this case.<sup>11</sup> In this sense the *Bulun Bulun* decision can be confidently claimed as representative of copyright law in general. It is not just a 'special case' where the law has to manage the consequences of the invasion.

von Doussa was sympathetic to the claim that while Mr. Bulun Bulun executed the painting, it was painted in accordance with law and custom of the Ganalbingu people. It was argued that the artistic work was not only an expression of ritual knowledge. The work was itself ritual knowledge and as such Mr. Bulun Bulun should not be considered sole owner of copyright of the work. von Doussa noted that customary law has a role to play in the Australian legal system, citing recent law concerning native title.<sup>12</sup> He acknowledged that "Evidence of customary law may be used as a basis for the foundation of rights recognised within the Australian legal system".<sup>13</sup> Detailed evidence of the customary law and artistic practices of the Ganalbingu people was heard. However he directed argument away from the submission that the ownership of land and ownership of artistic works were coterminous and hence intellectual property rights were an incident of native title, in response to the intervention by the Minister for Aboriginal and Torres Strait Island Affairs in the proceedings. The Attorney General for the Northern Territory also appeared as *Amicus curiae*.<sup>14</sup> Their interest in the case centred on the claim that any determination of native title had to be made in accordance with the provisions of the *Native Title Act* 1993 (Cth). Instead of considering possible linkage between native title and intellectual property claims, von Doussa simply considered whether or not customary Aboriginal laws relating to ownership of artistic works survived the introduction of the common law in 1788.

It was at this point in the judgment that mainstream jurisprudential arguments about copyright law were highlighted:

Copyright is now entirely a creature of statute. McKeough and Stewart, *Intellectual Property in Australia*, 1991 at para 504, *Copinger and Skone James on Copyright*, 13th ed. para 1-43. The exclusive domain of the Copyright Act 1968 in Australia is expressed in s8 (subject only to the qualification in s 8A) namely that "copyright does not subsist otherwise than by virtue of this Act".<sup>15</sup>

von Doussa argued that common law rights such as perpetual rights to unpublished works existed until the passing of the *Copyright Act* 1911 (UK). He argued that this Act "codified"<sup>16</sup> the common law and became part of Australian law by virtue of the *Copyright Act* 1912 (Cth). From this time onwards, the only rights that existed were those allowed for in the relevant legislation.

Under the current law s.35(2), the author of an artistic work is the owner of the copyright that subsists by virtue of the Act:

That provision effectively precludes any notion of group ownership in an artistic work, unless the artistic work is a "work of joint authorship" within the meaning of s.10(1) of the Act. A "work of joint authorship" means a work that has been produced by collaboration of two or more authors and in which the contribution of

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<sup>11</sup> *Ibid* at 524f.

<sup>12</sup> *Mabo v. The State of Queensland [No 2]* (1992) 175 CLR 1; *Wik Peoples v. Queensland* (1996) 187 CLR 1; *Native Title Act* 1993 (Cth).

<sup>13</sup> *Bulun Bulun*, above n10 at 517.

<sup>14</sup> *Ibid*, at 522ff.

<sup>15</sup> *Ibid*, at 525.

<sup>16</sup> *Ibid*.

each author is not separate from the contribution of the other author . . . . A person who supplies an artistic idea to an artist who then executes the work is not, on that ground alone, a joint author with the artist: *Kenrick & Co v Lawrence & Co* (1890) QBD 99. Joint authorship envisages the contribution of skill and labour to the production of the work itself. *Fylde Microsystems Limited v Kay Radio Systems Limited* (1998) 39 IPR 481 at 486.<sup>17</sup>

In order to understand the emphasis on the significance of skill and labour, it is necessary to be mindful of another copyright principle, that is, for copyright to subsist the work must first be reduced to material form.<sup>18</sup> The requirement brings into play temporal factors. It means that copyright comes into existence at one and the same moment that the underlying artwork is executed. The two property rights are separate - ownership of the artwork need not coincide with ownership of the copyright in the work. But copyright cannot exist prior to the execution of the art. This clearly complicates the copyright claims of indigenous peoples based upon the ownership of ritual knowledge expressed in a painting.<sup>19</sup>

McKeough & Stewart discuss the requirement for material form in terms of the idea/expression dichotomy. Whereas ideas can freely circulate, monopoly protection in the form of copyright attaches to the manifestation of those ideas in a tangible work.<sup>20</sup> In these terms ritual knowledge would be considered analogous to merely contributing the idea for the artwork and thus no ownership rights would be invoked. In the terms of materiality, it could be argued that ritual knowledge is an amorphous factor in the creation of the work, compared to the more tangible expression in paint of the artist. This imports temporal and mechanical divisions into the production of the work that separate the idea from the expression. Ritual knowledge is perceived as separable from and prior to the creation of the artwork. Hence the claim that the painting is itself ritual knowledge is precluded from consideration. Neither the requirement for material form nor the idea/expression dichotomy is explicitly referred to in the Act.

It is difficult to ascertain whether or not von Doussa grasped the cultural implications that flow from his endorsement of these precedents about joint authorship. At key points in the decision closure to consideration of the indigenous point of view was achieved by using legal positivist interpretative practice. He identified the appropriate legal rule concerning joint authorship without reference to any discourse about the meaning of the terminology. Copyright law is "entirely a creature of statute".<sup>21</sup> The meaning of joint authorship as provided for in s. 10(1) was limited to its interpretation in past case law, even though the factual circumstances of the previous cases did not involve consideration of the claims for indigenous communal authorship.

From an indigenous point of view the painting was collaborative:

The continuity of our traditions and ways including our traditional Aboriginal ownership depends upon us respecting and honouring the things entrusted to use by Barnda (our creator ancestor) . . .<sup>22</sup>

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<sup>17</sup> Ibid.

<sup>18</sup> S. Ricketson & M. Richardson, *Intellectual Property. Cases, Materials and Commentary*, (Butterworths, 1998) at 4.1.25.

<sup>19</sup> Communal ownership of the copyright could however arise once the artist acts upon community authorisation to paint in accordance with custom.

<sup>20</sup> J. McKeough & A. Stewart, *Intellectual Property in Australia*, (Buterworths, 1997) at 6.3.

<sup>21</sup> *Bulun Bulun*, above n10 at 525.

<sup>22</sup> Affidavit of Mr. Bulun Bulun, in *Bulun Bulun*, above n10 at 518.

My creator ancestor passed on to me the elements for the artworks I produce for sale and ceremony. Barnda not only creates the people and landscape, but *our designs and artworks originate from the creative acts of Barnda*.<sup>23</sup>

Mr. Bulun Bulun explained that the classes of people. . . who comprise *the traditional Aboriginal owners of Ganalbingu country* have interests in Djulibinyamurr (the Waterhole site) and also in the Madayin (corpus of ritual knowledge) including in paintings such as the artistic work. Many of these people *would need to be consulted on any matter that concerned Djulibinyamurr*.<sup>24</sup>

To focus on Mr. Bulun Bulun's efforts in isolation from the contribution of his ancestors and the significant role played by contemporary elders in the creation of the work obliterates the significance of the art from an indigenous point of view. When the law displaces these contributions, the law creates a work of an entirely different significance.

Copyright is formally disinterested in judgement of the significance of works. What is potentially valuable in this is openness toward culturally diverse works - the judiciary avoids judgment of the worth of artistic works. However in the case "openness" proved a chimera. Cultural discrimination was merely reproduced at a different level of the judgment concerning who, in law, was entitled to credit as an author.

The indigenous interpretation was not precluded from a linguistic point of view. The legal definition of joint authorship – a work that has been produced by collaboration of two or more authors and in which the contribution of each author is not separate from the contribution of the other author – is not entirely unsuited to application to the indigenous claim. But this interpretation was precluded because von Doussa assumed that the definition of "joint authorship" had been colonised by the conventional understanding established in prior cases. His style of legal reasoning assumed that only one interpretation of joint authorship was possible. He also avoided any consideration of the cultural particularity of this definition. The legal and cultural difficulties that have to be borne by indigenous peoples following from his reading, are presented as unintended. Any complications are merely a consequence of following (what the judge interpreted as) conventional jurisprudence. No cultural problem arose because of the culturally exclusive intentions of the judge or of copyright law.

von Doussa's acknowledgment that the law has limitations in reckoning with significant cultural differences was potentially radical. It could have led the judge to expressly formulate the values of copyright law in cultural terms. Once these values were articulated, they could have been more broadly examined and their contemporary relevance debated. However this path was precluded by the jurisprudential choice he made. von Doussa hints at the cultural particularity of the law, but fails to directly address the privileged cultural values at stake. His style of reasoning exposes a commitment to conservative political values. Ultimately he prevents the hearing of a debate that could lead to a challenge to the presumed neutrality, generality and universality of copyright law.

Copyright law may have problems in dealing with the needs of indigenous peoples, but in this instance the problem is presented as lying with the specific definition of

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<sup>23</sup> Ibid. (emphasis added).

<sup>24</sup> *Bulun Bulun*, above n10, at 520. (emphasis added).

joint authorship. The identification of the problem is focussed at the lower level of definition, rather than at the higher level of the cultural principle, aim or purpose of copyright law. This lets the sympathetic judge and copyright law in general, off the hook. Had the legislative definition of joint authorship been more generous, von Doussa's hands would not have been so tied . . .

Thus the problem is characterised as one that 'indigenous people have' with the current definitions of copyright. Reform need not relate to an inquiry into the way the law endorses narrow, perhaps outdated western cultural values. No general cultural precepts upheld by copyright law need articulating, let alone deserve evaluating. We can continue taking the law for granted, following conventions, and assuming equality before the law.

Reform in the interest of indigenous peoples, requires a less significant tinkering - amendment to the definition of joint authorship. This strategy hands the problem back to Parliament:

The inadequacies of statutory remedies under the Copyright Act 1976 (sic) as a means of protecting communal ownership have been noted in earlier decisions of this Court . . . and "Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples" (1994, National Capital Printing) where it was said at p6:

"While joint authorship of a work by two or more authors is recognised by the Copyright Act, collective ownership by reference to any other criterion, for example, membership of the author of a community whose customary laws invest the community with ownership of any creation of its members is not recognised."<sup>25</sup>

That such a change requires parliamentary attention rather than judicial innovation preserves the essential positivist fiction of a distinction between law and politics. Statutory interpretation may require the importation of various notions into copyright law, such as the need for the 'idea/expression dichotomy', in order to lend copyright protection to the law's preferred constituencies. No such generosity is required with respect to meeting the needs of indigenous peoples. That would involve a 'political' intrusion into the law.

The reference to copyright "being entirely a creature of statute"<sup>26</sup> affirms the sovereignty of the Commonwealth Parliament and the authority of positive law over common law and customary law. Our positivised copyright law is presented as rational and coherent, (potentially) culturally inclusive, open and impartial. In this sense copyright is not just a body of law dealing with the intellectual property rights of authors, artists and alike. Copyright is also constructed as symbolic of all liberal law.

The political symbolism written into the structure of the *Bulun Bulun* decision is supplemented and fortified by a more practical tailor-made solution to the Ganalbingu people's claim for culturally appropriate forms of ownership. von Doussa found that so far as dealings with the painting were involved:

equity would impose on him (Mr. Bulun Bulun) obligations as a fiduciary not to exploit the artistic work in a way that is contrary to the laws and custom of the Ganalbingu people, and, in the event of infringement by a third party, to take

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<sup>25</sup> Ibid, at 515. (emphasis added).

<sup>26</sup> Ibid, at 525.

reasonable and appropriate action to retrain and remedy infringement of the copyright in the artistic work.<sup>27</sup>

It was found that as Mr. Bulun Bulun had taken legal action against the infringer, R & T Textiles Pty Ltd, he had not breached his obligations to his community.

Here equity was used to ameliorate the harshness of the current definition of joint authorship. Justice can be seen to be done, although given the circuitous mechanism provided for binding third parties, its practical application might be quite limited. The redress to equity for justice relegates the issue of indigenous intellectual property claims to the category of unexpected personal problems, at least until there is appropriate legislative action. That equity can offer some solace reinforces the assumption that no major reform of copyright law is necessary.

This analysis of the *Bulun Bulun* decision should not be read as belittling the important attempt made by von Doussa at copyright-reconciliation with indigenous peoples. The decision represents a sincere and creative attempt to deal with a difficult challenge to the law and was probably crafted by a mind anticipating an unsympathetic appeal court.<sup>28</sup> But as von Doussa appears for the most part to be a dispassionate advocate of mainstream copyright law, his observance of its confines is all the more telling.

This case analysis suggests that in an instance where copyright law reform was generally accepted as desirable, it is seen as a matter beyond judicial competence. Further it was characterised as a matter of updating legislative definition, without the need for appraisal of the broader aims, principles, values or purpose of copyright. The reason the agenda was so limited was because of a commitment to protecting established liberal jurisprudential values. The case demonstrates a problem with the politics of the law expressed in the broadest possible terms. It was not just a minor problem with the wording of the statute.

### **The Cultural Politics of Addition: where copyright exceeds positive law**

By way of contrast, I would like to explore what has uncontroversially been added to copyright legislation. The point is not a crude complaint of hypocrisy. There are legitimate jurisprudential reasons why certain avenues for interpretation are considered closed, and others not.<sup>29</sup> My argument is not that legal positivism is an illegitimate interpretative tradition. Rather the point is to unpack the cultural assumptions that have been added in the process of making sense of copyright legislation, and in particular the *Copyright Act 1968*.

The current Act is quite inadequately drafted from a strict legal positivist perspective. von Doussa's reference to copyright legislation having "codified"<sup>30</sup> the common law is quite misleading. Commitment to a positivist legal rationality has been prejudiced by an instrumental logic. For example, reforms have not embarked upon a

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<sup>27</sup> Ibid, at 531

<sup>28</sup> The individualist concept of the person as owner of property is so fundamental to the modern law of property that it is clear why a positivist interpretation would assign the issue of communal authorship to the 'political'.

<sup>29</sup> See Joseph Raz, *The Authority of Law*, (Clarendon Press, Oxford, 1979) at pp70-77.

<sup>30</sup> *Bulun Bulun*, above n10 at 525.



comprehensive re-evaluation of prior case law leading to clear legislative definition of key copyright terms. Many of the “common law” definitions are, to the layperson, counter-intuitive, derogating from the positivist principle of legal clarity. For example, for copyright purposes accounting forms<sup>31</sup> or a betting slip<sup>32</sup> may count as a literary work. It need not be a work that demonstrates any literary quality.<sup>33</sup> Legislative inaction in this regard has served a purpose. It has allowed existing beneficiaries of legislation to live through reform processes with minimal disruption to their established expectations- a trade off of legal clarity for legal certainty.

The lack of legislative definitional closure has also extended an invitation to new players to broaden the purview of protection, continuing throughout the 20<sup>th</sup> century copyright's commitment to a kind of neutrality in industrial patronage and technological treatment. In some cases where the courts have not met new kinds of demands for protection for the reasons explained above, parliament has passed amendments to redress the situation. For example in response to the *Apple* litigation<sup>34</sup> the *Copyright Amendment Act 1994* defined computer works a special sub-category of "literary work".

The upshot of this political and legal instrumentalism has been the development of a law that is characterised by a conglomeration of categories and sub-categories of entitlements where the relation between categories is not altogether clear.<sup>35</sup> It is presumed that, as all the legislative provisions relate to copyright, there is a common rationale or logic uniting the various objects of copyright protection, that is, the kinds of things copyright protects and the entitlements of users of copyright materials. But the legislation itself is silent on this point.

The case *Kalamazoo*<sup>36</sup> demonstrates the difficult job of statutory interpretation facing the court.

The copyright issue centred upon the claim that a series of blank accounting forms constituted "original literary works" under s32 of the *Copyright Act 1968*. The forms were "pegboard systems" formulated as a medical instant billing system; a vertical pay-roll 10-entry system; a vertical pay-roll 18-entry system; a solicitors' account system; a real estate management and accounting system; and a combined purchases and cash payments system. It worked by carbon copies being made on lower documents as an entry was written on the top document. The defendant had acknowledged copying the blank forms, believing no copyright subsisted in them. If the forms were protectable subject matter, the defendant would be found to have infringed copyright.

Thomas J. considered whether the forms constituted "literary works" under the Act. The definition of literary work under s10(1) provided minimal guidance:

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<sup>31</sup> *Kalamazoo(Australia) Pty Ltd v. compact Business Systems Pty Ltd* (1985) 5 IPR 213.

<sup>32</sup> *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [1964] 1 WLR 273.

<sup>33</sup> *Kalamazoo*, above n.31 at 231.

<sup>34</sup> *Apple Computer Inc v. Computer Edge Pty Ltd* (1983) 50 ALR 581;(1984) 53 ALR 225; *Computer Edge Pty Ltd v. Apple Computer Inc* (1986) 161 CLR 171.

<sup>35</sup> It is within this same space that Sherman & Bently recognise a kind of dialogue occurring that correlates the various heads of intellectual property protection, so that copyright as a body of law anticipates the role of design and patent law.

<sup>36</sup> *Kalamazoo*, above n31.

'literary work' includes-  
a table, or compilation, expressed in words, figures or symbols.

It was argued that each group of forms constituted a compilation, in the sense that each individual form was a component of the system. The problem was that "The forms, individually and collectively, consist of a number of lines, columns and boxes, and a few words which are either headings or directions to facilitate the use of the forms".<sup>37</sup> Thomas rejected the view that they were tables, because the forms did not communicate any information or data. However he found they were compilations building upon the notion that the columns and boxes were "drawings" and as such "artistic works" under the Act. The definition of "compilation" was not contained to the literary sense of meaning anthology, but expanded to include reference to another category of copyright subject matter under the Act. Drawing upon the analysis of *Copinger & Skone James on Copyright (12<sup>th</sup> edit)* with respect to similar but not identical English legislation, Thomas argued that compilation need not be explicitly literary in nature but could also refer to a combination of literary and artistic material.<sup>38</sup> Thus the blank forms, considered as a compilation of "literary" and "artistic" work, deserved protection.<sup>39</sup>

The judge's creative interpretation of the legislative definition of literary work (based upon an academic text) created a connection between two categories of protection that might otherwise be considered as separate. In the process it is not just the blank forms that appear as more substantial productions. The presentation of copyright, as a rational and industrially relevant body of law, is enhanced through legal reasoning.

The forms were also challenged on the ground that they lacked "originality". s32 provides that copyright subsists in "original literary, dramatic, musical or artistic work . . .". Thomas considered "originality" as a separate requirement to that of "literary work".<sup>40</sup> However "originality" is not defined in the legislation. Thomas noted that while there was a significant amount of case law about the issue, "there are conflicting and quite irreconcilable judicial statements as to the degree of originality required."<sup>41</sup>

In clarifying his own test for this legal requirement, it becomes clear that despite differences, in all the cases mentioned a test of "skill and labour" was used to gauge originality. Disagreement has focused upon defining the amount of skill and labour required - need it be "substantial" or "more than negligible"?<sup>42</sup>

Thomas rejected the need for any specific quantitative benchmark for originality. He stated that the test of originality involved a judgement of "fact and degree".<sup>43</sup> He also endorsed the test in *University of London Press Ltd v. University Tutorial Press Ltd*:

The object of the search for originality is not to assess the novelty or worth of the thought which a person injects into his work, but whether his expression is original, in the sense that it results from his own work and is not copied from another.<sup>44</sup>

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<sup>37</sup> Ibid, at 231.

<sup>38</sup> Ibid.

<sup>39</sup> In response to the criticism that the 'system' was insubstantial, Thomas found "that there is intellectual input in the forms in as much as they are designed and presented in a way which will produce meaningful results to the user." Ibid, at 232.

<sup>40</sup> In the judgment the two are treated under separate headings.

<sup>41</sup> *Kalamazoo*, above n31 at 233.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid, at 234.

The combination of these two formulations is troubling. Any rigorous assessment of the skill and labour involved in the making of the work is compromised by the dictate of the *University of London* case that the purpose is not to assess the novelty or worth of the work undertaken. Is it possible to (retrospectively) assess the significance of what went into the making of the work, without considering the quality of the end product itself?

Thomas' application of the "originality" criteria suggests it was not:

... whilst I refuse to find that the authors showed great skill, I do find that their presentation required a degree of concentration, care, analysis, comparison, and a certain facility in using and adapting the altered forms to a composite 'one-write' system. In each use, some awareness of contemporary developments and marketability of such forms played a part in their creation.<sup>45</sup>

He accepted that the forms involved "labour" – a quantifiable factor but was less certain about the "skill" involved – a qualitative judgment. His appeal to the significance of "some awareness of contemporary developments and marketability" suggests that he thought that the skill involved did not really relate to the production of the forms as such, but to a managerial assessment of the profitability of their mass circulation. If so, he must in fact have judged the "worth of the thought which a person injects into his work"<sup>46</sup> despite his endorsing of precedent that says that this kind of judgment is inappropriate.

That he did not consider his application of the test actually involved a judgment of the merit of the work shows the extent to which economic rationales for protection are taken for granted by the judiciary. The dicta from the *University of London* case merely prohibited the import of aesthetic criteria into the test of originality. A substantive assessment of the aesthetics of a work would bring into question the purported neutrality and objectivity of the law. And it might depress the expectation of a continual expansion of copyright to new subject matter, or more accurately, lead to serious doubt about the extent of possible redefinition of the established definition of works.

In endorsing the *University of London* judgment Thomas endorsed a notion of originality that says more about the status of the alleged infringement than it does about the "original work". By implication, the test cast doubt over the legitimacy of the alleged infringing work, which clearly may not be "his own work", even though it should be legitimate to copy from a wholly unoriginal work. The judgment reads into the spirit of the legislation an objective of protecting original investments in intellectual work. In view of this *Kalamazoo* can be read as further evidence of an established nexus between our property laws and wealth creation (for some). But this connection is hardly surprising. For my purposes, a more significant dimension of the decision relates to how it deals with technological issues. It is technological change that has been the significant cause of the development of the law.

At first glance one could be led to believe that there were no significant technological aspects raised by the case. However with older and established technologies there is a tendency to suppress recognition of the role technology played in production. Creating *Kalamazoo's* accounting forms involved numerous technologies and

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<sup>45</sup> Ibid, at 237.

<sup>46</sup> Ibid, at 234.

labouring inputs from the conceptualisation of the ‘systems’ to the final printed product. At what point in this process did a “literary work” come into being?

Given the significance of the idea/expression dichotomy to copyright, the mere conceptualisation of the markets and the knowledge that printing and associated technology was capable of manufacturing a “pegboard system” of forms was insufficient. The sketching of prototypes for the individual forms comprising the systems, incorporating design inputs, gets Kalamazoo closer to the © mark. Various versions of the forms eventuated, until a corporate style and a proof of each system was agreed upon.<sup>47</sup> But at this point what existed were individual forms, which Thomas had found too “insubstantial” to be considered as “literary works” in themselves.<sup>48</sup> These forms were manually cut out and assembled to simulate how the “system” worked - to test the functionality of the design and, presumably, to provide a model so that advice could be given about changes needed to prepare the pages for the printing press. Perhaps a “literary work” came into being with each of these “drafts”. However the judge acknowledged the “relatively unsophisticated”<sup>49</sup> techniques used in producing these drafts. They only roughly looked like the finished product. Only after a positive original had been developed, the lithographic plates prepared, the paper printed, punched, guillotined and assembled as pegboard systems was the “literary work” considered by Thomas brought into existence.

The issue of when copyright came into existence was not raised as an issue in this case. Kalamazoo would have been considered corporate owner of all the work of their employees on the systems.<sup>50</sup> Whenever works capable of sustaining a copyright came into being, the company can be presumed to have attained the associated copyrights. However in this case the skill and labour of the printer(s) also had a major bearing on the production. It was the printer who assembled what was recognised as the “systems”. In view of this it is of concern that no evidence appears to have been taken from those involved in this stage of the production. It seems that the role of the printers in producing the “literary work” was simply not recognised as being of legal importance. This suggests a tendency amongst copyright lawyers to avoid analysis of the role played by technology in the creation of works. It is not clear from the case report if the printing was done in-house or by an independent contractor(s).<sup>51</sup> Where the technology used in production is familiar and uncontroversial such omission can pass unnoticed.

Copyright law “common sense” suggests that creative efforts give rise to the original work. The printer’s skill was merely “technological”, and their efforts (only) related to “reproduction”. This ‘common sense’ reading relies upon dichotomies familiar to romantic literary theory that separate labour/technology, creation/reproduction and the original/the copy. The second of the pair is devalued in light of the significance attributed to the first. *Kalamazoo* demonstrates the currency of these dichotomies. They provide the sub-text for this decision, in place of a proper evaluation of the facts of production.

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<sup>47</sup> Evidence was given of the development of each system at 217-226.

<sup>48</sup> *Ibid*, at 237.

<sup>49</sup> *Ibid*, at 220.

<sup>50</sup> s35(6) *Copyright Act* (1968).

<sup>51</sup> If it were the latter, this could be considered a case of “joint-authorship”.

Despite a rejection of romantic pretensions about originality, copyright law has been influenced by romantic attitudes toward technology. But whereas a true romantic would denounce the contribution of technology to original production, the law is more instrumental. It simply refuses to address the significance of the technological contribution, even where technology was integral to the existence of the work. The lack of judgment about the role of technologies is in keeping with the political commitments of the law discussed above.

In *Kalamazoo* there was a brief discussion of whether or not the “functional” aspects of the pegboard system rendered it unfit as copyright subject matter.<sup>52</sup> This was mainly discussed in relation to “originality”. Thomas conceded that:

It presents problems in identifying work suitable for protection by copyright law as distinct from patent or design, But, in the end, . . . the documents *have their own character, their own form of expression, and in a sense tell their own story to the user*. Therefore, even though it is true that they form part of a tool or device, I do not think that this aspect of their character needs to be severed or disregarded when evaluating their literary and original qualities.<sup>53</sup>

Technological contributions were seen to imperil the claim for copyright. “Technology” belongs to other areas of intellectual property law. Because of this the functional reality of the forms was downplayed. What remained was a description of a work that sounds more like blank verse than blank stationery.

The terminology used to describe the legal requirement of originality – the work must be “his own work” and demonstrate “skill and labour” – suggests that the literary work resulted from an individual effort, where the creator’s skill and labour could be judged without reference to the particular machinery operated or the reality of numerous workplace and industrial collaborations. This abstract valuation of labour accords with a romantic view of creation. It also matches a managerial perspective, where labour and technology are seen as two distinct kinds of investments. However from the perspective of judging what goes into the creation of a work, the connections between labour(s) and technologies should be apparent. It should be possible to discuss the importance of both to the production of a work without imperilling a work’s copyright status. Copyright protection should not depend upon the suppression of modern production realities.

The *Copyright Act* 1968 requires the addition of substantive criteria that allow for works to be assigned to a known legal category, judged worthy or unworthy of protection, or as a copyright infringement. Such elaborations are required to make sense of the rather bare legislation and to rationalise disorderly precedent. What is added is usually expressed in vague and abstract language, even though it is generally in terms familiar to established property law and supportive of the ongoing expansion of the law to accommodate investments in new kinds of productions. While romantic aesthetics were claimed as irrelevant to a determination of “originality”, there was no general prohibition on recourse to such cultural references where this assisted in creating new copyright subject matter. In other words, romantic precepts could be added to the law where this assisted the case for expanding the scope of protection. Romantic ideals are valued by copyright law where they serve the legislation’s stated economic (and unstated political) agenda.

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<sup>52</sup> *Kalamazoo*, above n.31 at 235 & 238.

<sup>53</sup> *Ibid*, at 238. (emphasis added).

While copyright legislation is not aligned with any specific philosophical point of view, this does not necessarily mean that as a matter of interpretation the law is equally open to all philosophical positions. Saunders' criticism of the relationship between philosophy and law<sup>54</sup> may have some validity by way of critique of romantic and poststructuralist approaches to the romantic subject in copyright's history, but that does not mean that romantic values do not inform the law as it is understood judicially. Further Sherman and Bently's claim that the law is motivated by "consequential reasoning"<sup>55</sup> does not mean that there will not be recourse to more "fundamental" values, where this helps the cause of the law and its preferred legal subjects.

In a more recent case, the *Sega* litigation<sup>56</sup> the court had to more explicitly deal with the question of the role of technology in the creation of copyright subject matter than in *Kalamazoo*. Unlike in *Kalamazoo* where the works were products of technological processes, in this case the works were technological products. The works, two interactive video games, could only be experienced as an experience of the technology, that is by playing the game machine. In these circumstances discussion of the role of technology in the production of the work could not be avoided. Nevertheless there was some continuity with *Kalamazoo*. *Sega* also advocated the desirability of avoiding deliberations on issues concerning technology and recourse to romantic fictions to support the claims of the legal creator.

In *Sega*, the correct classification of two Sega interactive video games, "Virtua Cop" and "Daytona USA" was at issue. Were the games "cinematographic films" because they involved sequences of moving images and sounds? Were they "computer works" because the images and sounds were not a display of pre-recorded animation sequences but were computer generated in real-time? Or given that the computer program was stored in an integrated circuit, were the games protected under the *Circuit Layouts Act* 1989 (Cth)? Did this preclude 'dual protection' as a "computer work" under the *Copyright Act*? "Virtua Cop" had been imported without licence into Australia by Galaxy Electronics, and "Daytona USA" by Gottlieb Enterprises. Discussion of the case centred upon "Virtua-Cop", although it was accepted that the legal issues were identical for "Daytona USA".

The defendants jointly argued that classification of the game as a "cinematographic film" was precluded by the statutory definition in s10(1):

The aggregate of the visual images embodied in an article or thing so as to be capable by the use of that article or thing-

- (a) of being shown as a moving image; or
- (b) of being embodied in another article or thing by the use of which it can be so shown,

and includes the aggregate of sounds embodied in a sound-track associated with such visual images.<sup>57</sup>

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<sup>54</sup> Above n.5.

<sup>55</sup> Above n.6.

<sup>56</sup> *Sega Enterprises Ltd & Anor v. Galaxy Electronics Pty Ltd* (1996) 35 IPR 161; (1997) 37 IPR 462.

<sup>57</sup> s24 further provides that:

For the purpose of this Act, sounds or visual images shall be taken to have been embodied in an article or thing if the article or thing has been so treated in relation to those sounds or visual images that those sounds or visual images are capable, with or without the aid of some other device, of being reproduced from the article or thing.

They argued that images and sounds were not “embodied” until user interaction provided the computer program with inputs that allowed a story sequence to be generated. In essence this meant that there was no material form of imagery provided by the program makers to which a film copyright could attach. They conceded it was a computer program, but because s24 *Circuit Layouts Act* allows the commercial exploitation of an original circuit and that “eligible layout” can contain a copy or adaptation of a computer work, it was argued that there had been no infringement of Sega’s rights by the importation of the games.

It was accepted that the sequence of sounds and imagery were computer generated and that the 3D images and sounds corresponded with the 2D designs of the program manufacturers. The user experience of the images and sounds was mediated by the parameters of the programming. By way of analogy, it was as if the program makers had provided a package of negatives. User inputs were required so that the computer program could assemble the correct sequence of negatives and process them to appear in the positive animated form that the user experienced. But was the input by the program makers sufficient to constitute an embodiment of the visual images as required under s10(1)? Or did the need for user input to manifest the images and sounds preclude it from "embodiment" and hence protection as a film?

Burchett was impressed by evidence of the planning of the imagery and animation sequences:

Graphic designers developed the scenes, and representations of the characters. In doing so, they made drawings and models, and decided, for instance, how a particular character would walk. Sets were made up. . . . Further detailed sketches of scenes to be depicted on the screen were prepared by hand. These sketches were used as the basis for the preparation of the computer programming, according to which particular scenes were ultimately enabled to be depicted on the screen.<sup>58</sup>

He emphasised the ‘directorial’ role of the designers and reiterated that ‘material’ versions of the imagery were made at an early stage. The translation of images from 2D to 3D was recognised as mathematically complex but treated as a mechanical exercise, guided by the original creative vision of the graphic designers. Program design, including the translation of 2D forms to 3D, was not treated as itself requiring creative input. The scripting was merely instrumental, enabling the machine to later generate the images and sequences as required. In this sense Sega repeats *Kalamazoo*’s discriminations concerning what constitutes a creative input.

Burchett drew upon diverse linguistic and legal sources to justify a definition of ‘embodied’ that avoided the problem that a sequence of images did not materialise until the game was played. The designers embodied the film because they provided a means of:

giving his creation a form in which it could be held for continued existence and use.<sup>59</sup>

The significant “creation” was attributed to the designer. Any differences between the 2D still images and the 3D interactive sequences were ignored. The form of the creation’s “continued existence and use” (the computer program) was treated as practically irrelevant to the question of it qualifying for copyright protection as a film. Burchett treated something as ‘embodied’ once its materialisation had been anticipated and some mechanism had been provided for this eventual reality.

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<sup>58</sup> *Sega* (1996), above n.56 at 163.

<sup>59</sup> *Ibid*, at 165.

Whilst this interpretation is specifically tied to the meaning of “embodiment” in ss10(1) & 24, it is consistent with the treatment of the materialisation of the “literary work” in *Kalamazoo* as discussed above. If *Sega* were read as relevant to the requirement for material form in copyright more generally it could have far reaching consequences. The logic behind the position seems to be that ‘material form’ is only required in copyright for evidentiary purposes. The expression of the work must be fixed so that the nature of the property claim can be discerned, against which an alleged infringement can be judged. But the method by which the work is fixed is unimportant. The requirement is consequentially, but not fundamentally important to the law.

In the appeal to the Full Federal Court, Burchett’s interpretation was supported by Wilcox J:

The visual images depicted in these video games did exist before the game was played. They existed in the minds of their creators and the drawings and models they made. The images were embodied in the computer program built into the video game machine *so as to be capable*, by the use of that program, of being shown as a moving picture. *It does not matter that they were embodied in a different form; that is, three-dimensional vertices of the polygon model, rather than a two-dimensional image.* The statutory definition says nothing about the form of embodiment.<sup>60</sup>

If *Sega* was more broadly accepted as the current logic of the ‘material form’ requirement there seems to be no reason why a copyright claim such as in *Bulun Bulun*, based upon communal ownership of ritual knowledge, would be precluded because of a lack of embodiment of the ritual knowledge. The ritual knowledge existed in the minds of members of the Ganalbingu community. There was a communal anticipation that ritual knowledge would be embodied in an artwork, executed under authorisation, that is, it would significantly determine the content of the art work. That an individual artist provided the means by which the work materialised later in time should not affect the claim to copyright ownership. The reinvention of copyright concepts to accommodate new technologies need not be confined to the cause of investors in new technologies alone.

However in this case support for Burchett’s interpretation of embodiment in film was also provided by reference to the legislative history of film and new technologies specifically. In the circumstance of copyright in film, the legislative history shows plainly that Parliament did intend to take a broad view, and not to tie the copyright to any particular technology:

Against the background of previous legislation, of technological developments and the Gregory Report, it seems to me that the definition of ‘cinematographic film’, expressed as it is in terms of the result achieved rather than of the means employed, points very strongly to an intention to cover new technologies which do actually achieve the same result.<sup>61</sup>

For copyright purposes a ‘cinematographic film’ is presented as an audio-visual aesthetic experience – the delivery of a moving image and associated sounds. Presumably any technological means capable of producing and/or delivering this result would be considered a “film”.

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<sup>60</sup> *Sega* (1997), above n.56 at 470. (my emphasis).

<sup>61</sup> *Sega* (1996), above n56 at 167.



*Sega* has forged new and interesting connections between categories of copyright protection. As with *Kalamazoo*, a desire to remain sympathetic to the expansionist inclinations of the legislature has authorised unanticipated links between categories of protection. As such *Sega* evidences the flexibility of copyright law in meeting new technological challenges, but conversely, the very need to stretch existing definitions suggests there must be some limits to this strategy.<sup>62</sup> Observers of the decision voice some anxiety about the implications of the case, one summing the ongoing problem facing the courts up as “the well-recognised problem of trying to force a square peg into a round hole”.<sup>63</sup> While *Sega* demonstrates a commitment to expand the purview of the legislation, this is still moderated by a desire to remain faithful to the words of the statute.<sup>64</sup> While the judiciary were happy to rely upon a creative and rather eclectic use of sources to assist the interpretative practice, this is considered a short-term measure.<sup>65</sup> Continually stretching definitions to keep pace with contemporary demand for protection is perceived as potentially undermining the jurisprudential advances achieved by 20<sup>th</sup> century law reform.

Whereas earlier copyright law reform saw the creation of new categories of works, such as for ‘cinematographic film’, as a suitable way of accommodating technological change, recent case law has led to a broader re-evaluation of legal classification. The convergence of technologies, the proliferation of new technologies and the pace of change are seen as a destabilising influence that radically complicates legal classification. Complex technical issues have to be grasped and then rendered into the language of the law. Technical complexity is compounded by a high degree of legal abstraction as terminology is reinvented in light of unanticipated situations. Where legal classification and definition are usually seen as working in the interest of legal clarity and certainty, in these circumstances they are seen as the cause of legal obscurity and arbitrariness. Thus revision of the existing categories and definitions is seen as essential in order to bring the law back in line with established liberal political expectations.

It is interesting that one of the current Copyright Law Review Committee proposals for meeting this challenge is to depart from the existing categorisation of copyright subject matter and replace it with two broad categories, with differing levels of protection- “creations” and “productions”. A higher level of protection is suggested for works “within the literary and artistic domain”. These creations result from “significant intellectual effort by the person who undertakes its creation”. The level of

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<sup>62</sup> Developments in artificial intelligence and more sophisticated user interaction in software have progressed rapidly in the computer industry. The graphic designer’s role is becoming correspondingly more complicated and more deeply integrated with the programming and other production processes. As with the film industry, special effects technologies are also becoming increasingly important to the computer games market. How this affects the attribution of authorship to the vision experienced by the user remains to be seen.

<sup>63</sup> Anne Fitzgerald, “National Report: *Sega Enterprises Ltd & Anor v. Galaxy Electronics Pty Ltd & Anor* (1996)”, [1997] 2 *EIPR* D-37 at 38.

<sup>64</sup> Burchett referred to Gibbs CJ’s comment in *Computer Edge Pty Ltd v. Apple* (1986) that: “. . . although it would be no doubt right to give the Copyright Act a liberal interpretation, it would not be justifiable to depart altogether from its language and principles in an attempt to protect the products of scientific and technological developments which were not contemplated, or only incompletely understood, when the statute was enacted.” in *Sega* (1996), above n.56. at 169.

<sup>65</sup> This concern was heightened further following *APRA v. Telstra Corporation Ltd* (1993) 46 FCR 131; (1995) 60 FCR 221; (1997) 146 ALR 649 leading to the passing of the *Copyright Amendment (Digital Agenda) Bill*, 2000.

"originality" helps determine the point. Where a work is merely the result of the application of time, effort and resources, it is a "production". In either case it is suggested that there not be a requirement of any form of tangible embodiment to qualify for protection.<sup>66</sup> It is suggested that computer generated work could be protected by conceiving of execution in terms of a tool-manipulating human who "undertakes the creation or production of copyright material", rather than "authoring" the effort.

The dissenting report argued that such a radical reorganisation of copyright subject matter was unnecessary, given the "open-ended" definitions currently adopted.<sup>67</sup>

Both Majority and dissenting views indicate the ongoing currency of earlier philosophical ideas about creativity. Both draw upon the "common sense" suggested by our cultural heritage, and authorise the need to refresh definitions in line with more contemporary political and economic "needs". The main difference between the two views lies in a difference in opinion about the structural appearance of the law and whether changing this creates more or less uncertainty for the law's preferred subjects. There is no mention of indigenous cultural ownership in the Committee's term of reference nor discussion of it in the subsequent Report.

## **Conclusion**

The philosophy and culture of copyright law can be studied, but not by looking for it at the outer limits. It is on display in everyday jurisprudential practice and evidenced by interrogating the values legitimated and denied within this conventional legal space.

Legal practice supports a culture of commodification. Judges largely use consequential reasoning to achieve this end. They also refer to more fundamental romantic ideals where these assist in structuring, prioritising and expanding creative claims. But the problem is not simply that legal reasoning supports a culture of commodification. It goes beyond that. Housed within the broader agenda of commodification there is an ongoing process whereby copyright law naturalises various forms of social discrimination. The marginalised include indigenous peoples whose communal structures and values divide them from the norm, as well as other skilled "collaborators" whose failing is mainly one of sophistication in the use of technological tools, precluding recognition of a creative spirit.

This practice of cultural exclusion is disguised by the politics of copyright jurisprudence. It is difficult to track the confluence of law, philosophy and culture because the jurisprudence averts attention away from the possibility of there being any such nexus. Frequent invocation of copyright's positivist base, reference to the practice of judicial neutrality, of equality before the law and the importance of the separation of powers between legislature and court, suggests that such a search would be futile. History tells us that philosophy and law parted company centuries ago - so reported sightings can only be of its ghost. But philosophy is not dead in copyright law, and to suggest that it might be is mystification.

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<sup>66</sup> Copyright Law Review Committee, *Simplification Report: Part 2*, Chapter 5.

<sup>67</sup> *Ibid.* Chapter 6.

