

## **“What are You Missing Out On? Big Media, Broadcasting, Copyright and Access to Innovation”**

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Copyright is not usually cited as the main reason for the slow development of digital broadcasting services in Australia. Flawed government policy is generally taken to be the main reason. However, copyright is represented as part of the package that helps media empires and the entrepreneurs behind the next killer apps turn the internet into a clunky, permission-driven, grey-box experience—frustrating the delivery of all the new, nifty, portable and empowering consumer electronics which could give us flexible, on-demand access to programs and films.

We are provided with glimpses of what could eventuate, given the right celestial alignment in the universe—where technology, industry, government policy, legislation and the public interest work together to support a competitive marketplace rich in new, innovative media services and experiences. But contemporary copyright plays a spoiler role. Copyright law, in alliance with Big Media, frustrates access to IceTv, TiVo and the next generation of personal video recorders (PVRs) and ad-skipping tools. Copyright systematically removes timely access to hotly anticipated new-release television programs via YouTube and MySpace, making us wait for them to re-emerge much later, in a controlled time slot, on free-to-air television. Copyright also frustrates those who are happy to pay, right now, for downloads of these shows from an Australian iTunes store. Some of these TV shows have been available for purchase by US consumers from their iTunes store for some time. We have learnt to fear the next generation of unwelcome technological protection measures, restrictive high-definition formats like Blu-Ray, and pushes to legislate for broadcast flags and like initiatives. The impression given is that the law will continue to be out of step with delivering the potential of the new technologies and confound consumer expectations of easy access to content on demand well into the future.

This chapter takes concerns about the negative influence of copyright on innovation and access to new media services seriously. However, my interest is not in proselytising the evils of Big Media, or analysing the evidence of global media’s capture of the policy agenda. With broadcast copyright this often feeds into a presumptive siding *with* the ‘true’ innovators, the technology/consumer appliance industry, and *against* the evil monopolists—the ‘old-media’ content interest. This is an unhelpful dichotomy given the vertical integration and diversity of media portfolios today, and the high-tech collaborations being developed across the computer industry, appliance makers, the entertainment industry and electronic games. It also ignores the significant power exercised by new media darlings like Apple Computers and Google.

The discussion of copyright and digital broadcasting is all too present-minded and too focused on current external influences on the law, and especially US influences and comparisons. What is missing is a broader sense of context and reference to continuity within the category of copyright as it has, and continues to, develop in relation to

innovation. What is currently missing from the literature is an account of the connection between the historical development of the categories of copyright law and the muted prospects for digital delivery we have come to anticipate.

This chapter addresses the contemporary Australian situation by reconsidering the past of broadcast copyright—its introduction into the *Copyright Act 1968* (Cth) and jurisprudential development in case law. This jurisprudence is important because, though perhaps too obvious to mention, it is still primarily the development of exclusive rights to copyright subject matter that establishes the means by which media owners effect control over access to their programs in Australia today. For example, without this foundation, the much debated effects of the new, complex anti-piracy provisions are nonsensical.

The analysis is in two parts. The first part considers how broadcast copyright and related rights were conceived. The second part addresses what this means for access to innovation today.

## **The Conception of Broadcast Copyright in Australia**

### **Legislative Development**

A technologically determinist reading of copyright's history suggests that the arrival of a new and distinctive technology instigates a legal response in the form of new copyrights. A new law is justified as a management tool to optimise the economic climate for the successful dissemination of the new technology. New copyright laws police the unrestrained copying of new commodities that undermine the profits (for some) that were anticipated from the new form of manufacture/service, and perhaps imperil investment in its further dissemination. Copyright is also asked to protect the new 'conduits' for the dissemination of innovation. These two related but distinctive rationales can lead to differentiations in the nature and quality of copyright awarded to original works (literary, dramatic, musical and artistic), and to the other subject matter (sound recordings, broadcasts, film and so on).

By the 1920s the commercial potential of broadcasting was coming to be understood, and this interest was added to international copyright conventions in 1928. However, given there was already protection to the underlying literary, dramatic, musical and artistic works, law reform was not a high priority. When it came to considering the need for new copyrights in sound recordings, films and broadcasts in 1951, the UK's Gregory Committee justified a distinction between 'original' works and those only deserving 'ancillary' rights.

At the best, the record or film has called forth in its production a measure of artistic skill, but there is always a great measure of what is only technical and industrial in its manufacture ... these 'contrivances' (are not) original works.

Another point of distinction for 'industrial products' was the collective conditions of their production, with the new subject matter involving coordination of many, differently skilled efforts (for example, producers, directors, cameramen, sound technicians, effects and so on). It was recognised that there may be a high degree of skill and perhaps artistic judgment involved in aspects of the production; however, acknowledging such a range of talent was rejected as 'not practicable'.

Rejecting the original quality and skill of the labour involved as a defining contribution to these new commodities left the main reference point of the right as the mere technological artefact. Thus, in relation to broadcasting it was the cost of infrastructure and transmission that was considered as the primary economic interest at stake, and the *raison d'être* of protection. The Gregory Committee noted that additional to any copyright in the individual items that go to make up those television programs,

it is not, in principle, very different from that of a gramophone company or a film company. It assembles its own programmes and transmits them at considerable cost and skill ... it seems to us nothing more than natural justice that it should be given the power to control any subsequent copying of these programmes by any means.

The focus of the right was expressed in relation to protection of the broadcast signal, to prevent filming of broadcasts and subsequent rebroadcasting. There was, unsurprisingly, little anticipation of the development of technologies and related industries that would enable greater access to cultural products, overcoming the spectrum limitations of analogue broadcasting and the deterioration in quality that occurs with analogue copying.

The Australian Copyright Law Reform Committee of 1959, known as the Spicer Committee, was sceptical of some of the reforms to the UK *Copyright Act 1956*. In particular it noted that, compared with the *Copyright Act 1911* (UK), the new drafting had created an unprecedented focus on the enumerated 'exclusive rights' of the owner. This drafting change 'directs the mind *to the* infringer—to the things which must not be done without the owners' consent—rather than to the owner and what is comprised in his ownership'. The Spicer Committee had no problem with adding protection against unauthorised broadcasting of original works, but it struggled with how to differentiate the award of copyright to broadcasts which lacked material form and logically exclude rights in other spectacles and performances that were 'transitory in nature'. Nonetheless, following the UK move, it recommended that a right be given to broadcasting authorities to protect against the pirating of their broadcasts.

The Copyright Bill emerged close to a decade later. The time gap between the 1956 UK legislation, the 1959 Spicer Committee and the 1968 legislation was explained with reference to its controversial nature. In introducing the Second Reading of the Bill, Attorney-General Mr Bowen noted an 'avalanche of complaints and criticism which fell on (government)'. He defended the legislation as 'a reasonable compromise' of conflicting interests. It is worth noting that the United States averted some of the controversy over broadcasting interests by not recognising a right in the broadcast signal *per se*.

It was controversial legislation because in relation to the new Part IV rights precisely what was protected, and why these interests needed protection, remained substantively unclear. Discussion in the House focused on 'the entirely new footing for copyright' and the 'unresolved' nature of the new rights. There were doubts raised about comparative benefits to overseas media organisations and questions about the implications for local production. The failure to offer anything in this bargain to the authors, playwrights and composers 'who have done the constructive work' underlying the sound recordings and

broadcasts was by far the most contentious part.

Academic reception of the legislation matched that in the parliament, with Sawyer suggesting Part IV of the legislation should have been called ‘Special Copyright’ or ‘Limited Copyright’ because the rights have ‘no relationship to the general principles of copyright law, and are unintelligible unless put in the context of the complex commercial arrangements which they serve’.

In reviewing the debates today, it is clear that lawyers and politicians thought the rights ‘unintelligible’ because they were so loosely related to traditional legal justifications for the origins of private property and the presumed individualistic property foundations of copyright. The need to stop free riding by piracy touched a nerve but in relation to broadcasting, given the lack of widespread access to home recording equipment at the time, and restrictions on access to broadcasting spectrum, combating piracy would have been a tenuous justification. The legislation was not seen to benefit creative people who are ‘the life blood of progress in the music and writing worlds’, but chose to support ‘the big companies and the monopolies that have exploited the creative works of composers and writers (and) ... had massive returns’. It was argued that this unprincipled legislation reflected the interests of those ‘likely to have access to the corridors of power’.

### **Broadcast Copyright in the Courts**

It is one thing for media organisations to lobby for particular law reforms. It is another thing to have those rights favourably interpreted by the courts, who need to reconcile the legislative policy with the language of the legislation and established methods of legal reasoning.

In 1998 the High Court in *Phonographic Performance Co of Australia Ltd v. Federation of Australian Commercial Television Stations* considered the relationship between the s. 31 exclusive right to broadcast original works, and the copyright awarded to the broadcaster in s. 91. It was found that the rights awarded in Part III and Part IV of the Act existed independently and concurrently. However, it was not until fifty years after the first television broadcast in Australia, and almost forty years since the passage of the legislation, that the courts had the opportunity to deeply reflect upon the origins and intent of broadcast copyright in *The Panel* cases. Perhaps in light of the legislative history it is not surprising that Finkelstein J would observe: ‘It is usually apparent whether a particular work may be the subject of copyright. ... There are, however, *some exceptions*, and this case deals with one of those exceptions. This appeal is concerned with copyright in a television broadcast’ (emphasis added).

*The Panel* litigation revolved around possible infringements by Network Ten’s *The Panel* program by copying and rebroadcasting segments of Channel Nine programming. The segments were incorporated into *The Panel* chat and commentary, and Channel Nine shows and stars were generally subjected to derisory treatment. While Network Ten had possible defences of insubstantial taking and fair dealing (criticism and review and/or reporting the news), the proceedings required some definition of the basic unit of the protected broadcast, so that these tests could be applied to the segments used by Network Ten.

Interpretations drew upon various tortured attempts to make sense of the amalgam of provisions pertaining to broadcasting in the Act. However, overall there were two possible interpretations—a formalist/purposive view and a physicalist view. The formalist interpretation looks beyond the materiality of the broadcast signal to award

copyright to the form/purpose of the broadcast, read as television programs. The physicalist interpretation awards protection to the material provision of a service, with copyright attaching to the transmitting or communicating of signals.

At first hearing, Conti J, citing the Gregory Committee, favoured a purposive view of the protected broadcast, stating that

the only feasible candidate must be a television broadcaster's programme, or respective segments of a programme, if a programme is susceptible to subdivision by reason of the existence of self contained themes. Moreover in the case of commercial television, an advertisement should logically be treated in the same way as a separate programme, particularly given the difference in theme, the circumstance of discrete production, and the factor that the intellectual property rights involved in any one advertisement would be often complex.

The problem with this approach is that it leads to an unstable scope of protection that tends to conflate the protected broadcast with a presumed underlying dramatic content, narrative or theme.

On appeal the Full Federal Court preferred a physicalist view:

A television broadcast is defined by reference to the visual images that are broadcast ... in my opinion, ... there is copyright either in each and every still image which is transmitted or in each and every visual image that is capable of being observed as a separate image on a television screen.

The majority of the High Court then rejected this on the grounds that:

The context in which the broadcasting right was introduced, including well-established principles of copyright law, the inconvenience and improbability of the result obtained in the Full Court, and a close consideration of the text of various provisions of the Act relating to the broadcasting right, combine to constrain the construction given to the Act by the Full Court and to indicate that the appeal to this Court should be allowed.

The physicalist approach favoured by the Full Federal Court leads to a definition of the protected broadcast 'evacuated of any reference whatsoever to anything ... which could be an object of aesthetic or critical attention or evaluation'. It awards excessively strong protection of images and sounds broadcast compared with that accorded to the Part III original works, regardless of the point, skill or costs associated with their assemblage. Accordingly, the High Court found that:

Where the 'subject-matter' of copyright protection is of an incorporeal and transient nature, such as that involved in the technology of broadcasting, it is to be expected that the legislative identification of the monopoly ... and its infringement ... of necessity will involve reference to that technology. But that does not mean that the phrase 'a television broadcast' comprehends no more than

any use, however fleeting, of a medium of communication. Rather, as the Gregory Report indicated, protection was given to that which had the attribute of commercial significance to the broadcaster, identified by the use of the term ‘a broadcast’ in its sense of ‘a programme’. In the same way, the words, figures and symbols which constitute a ‘literary work’, such as a novel, are protected not for their intrinsic character as the means of communication to readers but because of what, taken together, they convey to the comprehension of the reader.

The High Court’s determination thus was that the protected broadcast involves *more than* a singular image and relates to *programs* (which are stated as not the same as a dramatic work, but described in terms of segments, items and themes). However, the court then deferred definition of the relevant units of programming ‘of commercial significance to the broadcaster’ to a factual determination of infringement by the Federal Court.

The Full Federal Court then proceeded to determine infringement without endorsing any particular criteria for determining a unit of programming. In reflecting upon the test of whether a substantial part was taken, Hely J cast doubt on the assistance to be provided by a consideration of whether the two works were in competition, as one work may not be a substitute for another, yet unfair advantage of the plaintiff’s skill and labour may still have been taken. He concluded that

the fact that the *Panel* Segments were used by Ten for the purpose of satire or light entertainment [and therefore comprised a different object or purpose to that of Nine] strikes me, with respect, as throwing little, if any, light on whether the parts taken were a substantial part of the source broadcasts.

The judicial ‘solution’ to the definition of broadcast copyright provides us with little practical criteria for resolution of the basic issue at stake: what are the limits to the protected broadcast, or, as the Spicer Committee noted, ‘what is comprised in [t]his ownership’? It remains particularly unclear what kind of use would *not* be of commercial significance to the broadcaster, even though the High Court confirmed that the requirement in s. 14 that the taking be of a substantial part means that it does not follow that *any copying* will infringe.

As an exercise in legal reasoning, *The Panel* cases engage in ‘hiding the ball’. The Federal Court and High Court judges simply pass the broadcast ball along one of the two likely trajectories, bolstering their choice with reference to the chosen meandering path that crosses the related broadcast sections in the Act, even though no obvious preferred view can be said to leap out. As Pierre Schlag argues in his article ‘Hiding the Ball’, the whole charade rests on suppressing recognition of the plurality of potential meanings and resisting inquiries into ontological questions about law. To end *The Panel* dispute with recourse to a factual determination of the protected program to be made at the lower level, implies that the identity of the broadcast ball is readily apparent to appropriately trained personnel, without any need to clearly define anywhere the objective characteristics to be applied to recognise the qualities of this particular kind of ball. In this inquiry, what the law continually evades is a discourse about the nature of this

commodity and its need for protection, notwithstanding judicial notice that it is all about the ‘commercial significance’ of the segments broadcast.

### **The Propertisation of Media Audiences**

Critiques of ‘consumer society’ suggest that the expansion of copyright subject matter is not about protecting investment in innovation. What copyright facilitates is the advance of capitalist relations into new fields of social life. In other words, new additions to copyright subject matter create the ‘culture industry’, to support and supplement the existing trade in manufactured objects and to advance commodification into other domains. In our economy there is an insistent ‘need to generate a constant stream of unique (if often similar) products with a severely limited life span’. What drives desire for these new products, and especially for more ‘ephemeral’ cultural products, is the messages contained in their marketing. Consumption choices primarily reflect purchaser receptivity to the ‘symbolic meaning’ of the commodities, as ascribed to them through their particular advertising and marketing.

Commercial mass media is a major mechanism for stabilising the serial production of new meanings for products and services, and hence it is fundamental to creating/marketing new needs. Thus, as well as focusing on the importance of protection of the value of the new media conduits, commodification critiques infer we should look to the way copyright accommodates the creation of rights *in the production of mass audiences*. Copyright and broadcasting regulation assembles audiences that facilitate the marketing of goods and services.

Who owns and has access to mass communications media becomes central to the capitalist’s risk-management strategy because it increases political and economic power generally. Media concentration, vertical integration and diversification further increase access to investment capital, global market power, and national and international political influence. This combination of tools and powers allows for ‘an unprecedented degree of potential control over the range and direction of cultural production’. The messages conveyed by film, radio and television are essential to create ‘symbolic’ meanings for consumers. They drive passions and fashions, and suggest identities to be fulfilled through consumption.

Copyright awarded to ‘other subject matter’ is slightly different from the copyright awarded to works, because of the way these media forms facilitate consumption more broadly. Defining *the property owned within the new subject matter* is not the main game and the lack of a clear definition of these rights would not for the most part create any significant problems. It is not really necessary for a media proprietor to define or own the media spectacle they create as a form of property within copyright. What is more important to them is to protect the dynamic of assembling audiences, to on-sell to advertisers and invent and reinvent demand for more and more products and services.

It is clear from the legislative history that broadcast copyright was never clearly understood within copyright principles. However, its fundamentally featureless shape—wavering between its technical characteristics as a signal, and artistic pretensions as a dramatic work—makes sense once it is understood that the real object of regulation is *not supposed to be the broadcast at all*.

As s. 91 of the *Copyright Act* makes clear, what is protected in copyright is primarily determined with reference to a right to service an audience as made possible in accordance with a licence awarded under the relevant broadcasting regulation, and as

refined by various content regulations. This means it is the audience assembled to receive a mass media service that is the interest at stake in broadcast copyright. These audiences are not demarcated by copyright, but by broadcast regulations that create limits—geographically, culturally and in line with other particular political interests and objectives that affect what can be broadcast, to whom, and when.

By using the power to grant media broadcast licences, and the power to create copyright in the content broadcast, the state creates a legal capacity to ‘own’ these audiences of consumers. This, of course, entails the right to directly communicate ‘content’/advertising and marketing to ‘the public’. Thus it could be argued that in advanced capitalist societies, what copyright primarily creates is not an exclusive right to own content *or* the means of distribution of content to audiences. What copyright supports is the production of desire/demand for the actual cultural products broadcast, as well as for the other diverse kinds of manufactured objects and services advertised to the public via the mediums of commercialised mass communication.

This reasoning leads to a rejection of the view that copyright expands into new subject matter as we come to appreciate new forms of cultural practice and creativity. There is little intrinsic value or motivation to be ascribed to the cultural goods and services produced, because the greater number of them are manufactured and marketed in light of market survey information about the character of the mass audience, and their potential viewing, listening and reading choices.

The construction of the audience-as-market and as-consumer has meant that the relationship between producers and their audiences is increasingly commercially calculative, rather than premised on disinterestedness. Moreover, it is argued that the significance of the already existing relationships between members of the audience is seen to have diminished; that is, they are designated as a set of individual and equal consumers, who are organised as a serial rather than an associative community.

The media and medium’s value is not calculated in terms of discrete units of content, but in terms of exhibition value and franchise longevity. Thus it is no surprise that in considering rights in broadcasts, there was a reluctance to engage in a discourse about the creativity, originality and authenticity of mass media. The argument that such new endeavours deserve a copyright on the grounds of their originality misses the point, and a focus on copyright law revolving around the foil of creativity only diverts us from studying the more important economic relations and conditions for consumption that broadcast and copyright regulations make possible.

There is support for this reading of broadcast copyright from the judicial development of the exclusive right to perform and broadcast works to ‘the public’. In the *Telstra music-on-hold* case, the High Court affirmed the view that the private setting of receiving a communication was irrelevant to it being a communication ‘to the public’. Dawson and Gaudron JJ endorsed the relevant object of the exclusive right as the ‘copyright owner’s public’. This is judged by reference to the question, ‘Is the audience one which the owner of the copyright could fairly consider a part of his public?’.

The distinction between what is ‘in public’ and what is ‘in private’ is of little assistance in determining what is meant by transmission ‘to the public’. The transmission may be to individuals in private circumstances but nevertheless be to the public. Moreover, the fact that at any one time the number of persons to whom the transmission is made may be small does not mean that the transmission is not to the public. Nor does it matter that those persons in a position to receive the transmission form only a part of the public, though it is no doubt necessary that the facility be available to those members of the public who choose to avail themselves of it.

It did not matter to copyright law that the public may not have even wanted to receive the transmission.

The valuable asset created by the investment in broadcast technologies remains primarily the creation of mass media audiences for particular kinds of programming and advertising. This is conventionally measured in terms of program statistics—ratings, demographics, market trends and so on. However, copyright also facilitates the production of subsidiary markets of audiences, such as the private audience for a video screening in a hotel, or receipt of music-on-hold services. Copyright expands its ambit to include all forms and scales of audience, capable of a marketing definition of interest to advertisers, and formulated so as to permit extraction of a fee.

With digital distribution and the ability to stream on demand to an ever increasing range of media platforms, the technological specificity of copyright provisions designed for an earlier age of mass media communications became a limitation on the ability to control and direct cultural production. The *Copyright Amendment (Digital Agenda) Act 2000* (Cth) thus repealed the earlier definition of broadcast that pertained to wireless broadcasts, replacing it with ‘an extended, technology-neutral definition which means a communication to the public within the meaning of the *Broadcasting Services Act 1992*. ... The communication right is not limited to specific technologies. The definition of “communicate” makes it clear that an electronic transmission may occur via a combination of delivery mechanisms’. This amendment affirms the capacity to treat all potential consumers/audiences as the media owner’s property, regardless of the medium of communication.

### **The Public Interest and Copyright**

Though there is still a passing reference to the public in copyright legislation, this is merely as constituted as a potential collective to be acquired by existing media proprietors, marketed to and on-sold to advertisers. There is no space for a proper consideration of the ‘public interest’ *within* copyright itself because the media owner’s private interest is seen as mutual with serving the public interest, by servicing the provision of media products, services and advertising to them, by whatever means of delivery chosen. To the extent that it matters at all, the public interest is really presumed to be catered for by the broadcasting regulations and by reference to the specific licensing conditions of the broadcaster. But there is no public interest to be found contained in the application of copyright broadcast itself. Further, everyone is presumed to fall within at least a few demographics of interest to media owners and marketers. As such it is not possible to conceive of a legitimate public interest in receiving material outside of established media market dynamics, such as content obtained at the user’s direction and

obtained for free. User initiative in servicing personal consumption choices can only be seen as anarchy and deviancy.

## What this Means for Access to Innovation Today

The history of copyright shows that throughout the nineteenth century new rights were added in response to industry lobbying, to facilitate control over industry development and expansion. However, there was little standardisation of the rights until the collation of the various industry-specific Acts in the 1911 revision. The 1968 reforms further universalised these rights, while providing for industry and technological specificity for Part IV subject matter. Limits to the new copyrights were considered a necessary ‘compromise’, given the diverse interests at stake and the problem of there being no fundamental principle agreed upon, on which such rights could be more broadly based.

Compare that history with the origins of the 1968 Act, and this explanation given for the Digital Agenda legislation from Attorney-General Daryl Williams:

Some of you might ask ‘Why is copyright reform needed?’. The reason why is clear.

Advances in communications technology have exposed *gaps* in copyright protection in the on-line environment. Existing transmission-type rights in the Copyright Act are *technology-specific* and are *limited in scope*. ...

When the Copyright Act was passed in 1968, the Internet and cable TV were in the realm of science fiction and it was thought that a wireless broadcasting right would cover all the possible broadcasting uses of copyright material. Because of the fact that the broadcasting right is technology-specific, the advent of the Internet and cable pay TV has meant that owners of copyright are *not able comprehensively to control* the use of their work on those systems. Copyright owners, users of copyright material, ISPs and carriers have all become increasingly *frustrated by the uncertainty* surrounding copyright in the digital environment, particularly the Internet. (emphasis added)

Throughout the late twentieth century, media ownership globalised (so far as media ownership rules support this), portfolios were diversified and media holdings consolidated. Earlier common sense distinctions between the print, radio, music, cinema and television sectors subsequently further blurred. However, for the most part, ‘convergence’ was simply code for repackaging and rebroadcasting ‘old media’ content in a range of formats.

Nonetheless, with ‘convergence’ as the buzzword of the future and the hope for industry expansion, it becomes arguable that there is, or at least will be, just one amorphous ‘entertainment industry’, with fading, historically distinct sectors. Given this development, the old industry-specific copyrights are projected as an ill-fit with the economic landscape.

If it is believed that copyright has always been there to service the ‘needs’ of industry and provide economic ‘incentives’ for cultural production, then it now becomes common sense that the rights need to be further generalised for the digital age—to erase the newly identified ‘gaps’ and ‘limitations’, and deliver ‘comprehensive control’ and ‘certainty’.

Copyright owners, whether they be writers, musicians, artists *or* the generic ‘media owner’, now have the same level of entitlement to ‘protect’ their assets from unauthorised access and distribution.

Previously, there was legislative concern for copyright’s internal coherence as jurisprudence—defined with reference to private property principles and social priorities such as providing support for original cultural production. Out of respect for this, distinctions between Part III and Part IV rights were established. In the late twentieth century justifications for law reform have been externalised—the problem is with the new technology. A more personalised engagement with media is not seen as a positive development—by simply having access to a more diverse range of media, to many points of distribution, to technologies that enhance a new form of durability for works and facilitate a higher degree of portability. These technological ‘advances’ are cast as threats to the ‘established’ industry order.

This means, of course, that the providers and purveyors of these new technologies have not been accorded the same status as the innovators of the early to mid-twentieth century. They are not seen as another new industry that also ‘needs’ new rights from copyright. Digital innovators have been constructed as outsiders, newcomers, freeloaders and rebels that need to learn their place within the domain of copyright. In the digital agenda debates, new technologies are represented as the cause of the problem—platforms for the new forms of deviancy that imperil the progress of entertainment markets. Accordingly, in place of new rights, internet service providers (ISPs) and computer software makers are only given new exceptions to infringement—that apply if they can prove they are compliant.

Whereas previously there was a concern for regulatory capture by media owners with ‘access to the corridors of power’, with the digital agenda debates the preoccupation became one of parliament demonstrating legislative capacity to rectify an apparent regulatory ‘failure’. This meant fine-tuning market controls, by limiting the capacity of others to service new and emerging kinds of audiences for works.

### **The Realities of User Interactivity**

In 2006 the *Time Magazine* person of the year was not another great man:

It’s a story about community and collaboration on a scale never seen before. It’s about the cosmic compendium of knowledge Wikipedia and the million-channel people’s network YouTube and the online metropolis MySpace. It’s about the many wresting power from the few and helping one another for nothing and how that will not only change the world, but also change the way the world changes ... And for seizing the reins of the global media, for founding and framing the new digital democracy, for working for nothing and beating the pros at their own game, TIME’s Person of the Year for 2006 is *YOU*. (emphasis added)

As is well discussed in the ‘new media’ literature, one of the most distinctive aspects of digital media is the change in the quality and nature of interaction with audiences, from that possible with mass media and broadcasting. With the internet and narrowcast technologies, the audience is not preassembled or shackled to precise locations, limited modes of viewing and passive forms of interaction. They now become

participants in defining their relation with the media 'provider'.

We can choose to learn about what is the latest great thing from a myriad of user-provided information sources—fan sites, blogs, SMS (Short Message Service), emails, friends' lists, playlists and so on. We can tap into MySpace, YouTube, Flickr, Wikipedia and Google to satisfy our transient whims for more. There are ample applications that allow us to download, upload, compile, share and store the data we still anachronistically refer to as photos, music, television programs and films. There is an emerging economics of 'sharing' that is about the economic value of sharing cultural content (and not about free and open source software). But can copyright law think beyond 'an audience' and allow for an identity other than as passive recipient of a media message?

Superficially, digital copyright law has created the power to tip the balance strongly against 'user's rights', by, for example, supporting strong forms of digital rights management (DRM) and restricting access to circumvention tools, and obliging service providers to promptly remove allegedly infringing material. However, historically, users have been very sceptical of these legislative initiatives.

In the 1990s there were a multitude of websites devoted to posting online and mocking the latest 'cease and desist' letters from media owners received by fandom, voicing outrage and pillorying media companies for their contemptible attitude of 'proprietaryship' towards audiences. The bad press led to some softening of attitudes and legal practice towards copyright and trademark infringement by the fan base. These developments supported a body of academic literature.

Exclusive content deals, such as that forged in the mid-1990s between Microsoft Network and Paramount/Viacom that made some high-demand content only available to Internet Explorer users and not accessible to Apple Mac or Netscape users, were not renewed. 'Star Trek fans spoke, and we listened', said David Wertheimer, president of Paramount Digital Entertainment.

Anti-piracy messages have been continually diluted by the profiling of well-regarded artists who distance themselves from the official position of the Recording Industry Association of America, and by the emergence of mainstream 'social networking' stars such as Lily Allen and the Arctic Monkeys where liberal online strategies were essential to their achieving phenomenal global success. With the exception of Apple's iTunes store, which is estimated to have 70 to 85 per cent of legal digital music in the United States, pay-per-download music services have struggled, rife with indecision about business models and consumer demand. This is a market that generated US\$400 million in 2005 and is expected to reach US\$14 billion by 2011.

There is a growing sensitivity to consumer awareness of, and irritation with, the more obviously restrictive forms of DRM, such as code that ties you to a particular player or platform, or times out. Market surveys show that consumers value the least restrictive options. But consumers will always respond to good-value content, even if it is delivered in a restricted environment.

Many consumer organisations are lobbying against DRM, and there is a move to produce handbooks to alert users to problems with it that can only increase its unpopularity. Furthermore, in France there is continuing pressure to expand the role of competition law, especially in terms of third-party licensing of DRM. Most recently, Apple Computer's Steve Jobs has sought to defend his corporation's decision to develop FairPlay DRM technology:

Since Apple does not own or control any music itself, it must license the rights to distribute music from others, primarily the ‘big four’ music companies: Universal, Sony BMG, Warner and EMI. These four companies control the distribution of over 70% of the world’s music. When Apple approached these companies to license their music to distribute legally over the Internet, they were extremely cautious and required Apple to protect their music from being illegally copied. The solution was to create a DRM system, which envelopes each song purchased from the iTunes store in special and secret software so that it cannot be played on unauthorized devices.

Coincidentally, the licensing agreement with the Big Four is due for renegotiation. Jobs is carefully trying to position Apple to not take the blame for continuing with its iTunes restrictions. He may also be pushing for FairPlay to become the industry standard for DRM that Apple licenses to others. Audience disinterest and disobedience to the dictates and spirit of copyright and concern over showing any servility to the ‘established’ culture industry is now starting to be factored into business and marketing strategies.

This is not to suggest that ‘interactive audiences’ are beyond the confines of consumerism. Convergence has simply led to different kinds of audience assemblages and marketing practices.

When convergence simply meant repackaging old content for new forms of delivery, corporate advertising strategy sought to maintain a consistent message across all the potential platforms. The strategy was one of blanket marketing drawing upon the psychological profile of the target generations. To maintain consumer interest the one idea was expressed in different ways—the ‘playful’ viral Web campaign, the billboard message, the print media, radio, free-to-air television advertising campaigns and so on: ‘This is believed to be more effective as there are multiple encodings of the same idea, which reinforces the impact on the consumer’.

However, this ‘blanket’ strategy is now giving way to much more sophisticated methods of communicating with audiences, and playing on their individual technological interests and abilities. The new method is transmedia planning.

*Time Magazine* recognised the foundations for it in December 2006 with the arrival of Web version 2.

The new Web is a very different thing. It’s a tool for bringing together the small contributions of millions of people and making them matter. Silicon Valley consultants call it Web 2.0, as if it were a new version of some old software. But it’s really a revolution.

Acknowledging the ‘revolution’ of interactivity among users involves recognition of the commercial value of the ‘sharing’ input. However, it is a mistake to think of this user interactivity and sharing of contributions in the old 1990s language of proprietary versus free flows of information. Transmedia is a new method of cultural production, where the numerous small accumulations of effort are available and able to be engaged in new media enterprises.

Originally transmedia was a concept used to explain the dynamics of fan-based fiction, where fans engaged in constructing new narratives surrounding characters and events. Some of this was commercially produced; for example, *Dr Who*, *Star Trek* and *Buffy the Vampire Slayer* novellas. These products were both derivative and highly original, and, in a commercial sense, confused the traditional demarcation and hierarchy of ownership that copyright and trademark impose.

The success of transmedia story-telling was picked up on and reformed as part of new media advertising strategies, especially those targeting younger demographics. 'Transmedia planning' takes for granted the availability of audience access to multiple platforms and the attraction of active engagement with narratives, and directs these resources to serve corporate ends:

In this model, there would be an evolving non-linear brand narrative. Different channels could be used to communicate different, self-contained elements of the brand narrative that build to create a larger brand world. Consumers then pull different parts of the story together themselves. The beauty of this is that it is designed to generate brand communities, in the same way that *The Matrix* generates knowledge communities, as consumers come together to share elements of the narrative. It has a word of mouth driver built in.

Transmedia concepts have already affected the delivery of mainstream television. Examples include current high-ranking programs in Australia such as *Lost*, *Desperate Housewives*, *Ugly Betty*—where additional incidental plot detail and 'add-on' content like interviews with stars may be revealed on the franchise web page. This 'interactivity' with the narrative is presumed to support franchise loyalty and longevity, and generate a bigger audience share through playground and water-cooler talk. Film genre examples include *The Matrix* and *Lord of the Rings* franchises, where web pages and computer games were utilised to deliver 'more connections' for audiences to interact with. In these examples traditional media forms are being pushed out into new terrains, and with that, the old notion of audience transforms.

The level beyond this includes tabloid current affairs television programs, blogs, forums, game shows and Massive Multiplayer Online Role-Playing Games (MMORPGs). Here, interaction with other participants and the outside world forms part of the unfolding narrative experience, and reaction to those inputs is evident to the audience/players. Where individual contributions to the whole media experience are able to be identified and valued, a dialogue on 'virtual property' and the right to co-own user contributions is starting to emerge. Copyright tests of transformative use and parody will also be challenged by these efforts which are separate but deeply collaborative in nature.

Beyond this are the new media vehicles such as Wikipedia, MySpace and YouTube. These form the latest level of 'mass' user collaboration. Compared with the aforementioned examples, with these sites it is quite hard to discern any particular direct control over the productions, or any commercial benefit to be had from encouraging any particular narrative line. Site owners can edit and remove unwelcome contributions and there are efforts to enforce copyright. However, the reality is that the size and scale of the enterprise ensures serious limits on copyright enforcement. For example, popular items can be removed by site managers, but they are most likely to simply be reposted from

another address. As with DRM issues, overt ‘management’ of user/contributor interactions conflicts with the ethos of the medium, and intervention is likely to drive users to move on and contribute to other, more amenable alternatives.

### **What Copyright is Missing**

We now have many mainstream notions of audience interaction usurping the passive mass media notion, preferred by copyright. However, coming out of the Digital Agenda and the amendments brought about by Chapter 17 of the Australia–United States Free Trade Agreement, there is little appreciation of the significance of that change. We have had minor reforms to accommodate digital realities—a clumsily expressed, limited time and format-shifting exception, a parody exception, and confirmation that region encoding is not (generally) a ‘technological protection measure’. These are laughable. They fail to take into account the complexity of the changes to audiences that are part of the media age we are now in. They do nothing to address the social and economic context of uses of copyright material today, but only sustain the gap between law and social expectation. Further, our newly reformed copyright law is entirely focused on what we *were doing* with media a few years ago. It suggests no legal capacity to understand and respond creatively to where these technologies and practices might be going.

This reflection on Big Media, broadcasting and copyright began with an exploration of the legislative and jurisprudential development of Part IV rights because it is that history that created the confined space the law is stuck in today. The problem with contemporary Australian copyright is not just that digital copyright laws reflect the sway of old media interests over new media ones. It is not simply that the laws are designed to suppress or outlaw everyday technological practice. The larger problem is the historical one. Copyright did not really know how to accommodate mass media such as broadcasting, and did it so crudely. It created a broad, ill-defined, far-reaching power for media owners to communicate with audiences in Parts III and IV of the Act. It created the right to assemble and market to an ongoing sequence of mass media audiences (with the add-on of broadcasting regulations to adjust that content, in line with general guidelines in the public interest). Limited exclusive rights were then generalised by the courts, and even further abstracted by the digital agenda and subsequent revisions. While there was no direct right to own audiences created by the *Copyright Act*, that nonetheless is the current effect of the law.

The second part of this chapter explored the implications of this history and how far media practice has moved on from what copyright law has imagined is possible and desirable. For the time being, the retro-flavour of copyright does mean that Big Media can, so far as it chooses to, try and encumber the operation of the new digital devices and stifle development of a greater range of media services. However, this is an unrealistic long-term strategy. There is quite limited market growth in pursuing that option. Securing audience loyalty will be harder than it was in the past. The younger demographics will increasingly require some concessions to their technical appetites and interactive lifestyles. Eventually the laws and practices will have to change.

What is currently missing from Australian copyright law is comprehension of the realities of innovation and audiences today. What copyright needs to do about this is begin to offer something relevant to contemporary audiences to support the future of innovation. The alternative is that copyright remains the master of old media aspirations, but it ceases to have any relevance to the future of cultural production.

## References

- Adorno, Theodor and Horkheimer, Max, *Dialectic of Enlightenment*, Verso, London, 1979.
- Attorney General's Department, *Copyright Amendment (Digital Agenda) Act 2000, Fact Sheet*, AGD, Canberra, 2001, [http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications\\_CopyrightAmendment\(DigitalAgenda\)Act2000factsheet-2001](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_CopyrightAmendment(DigitalAgenda)Act2000factsheet-2001)
- Australian Consumers' Association, *Response to the Attorney General's Department Issues Paper: Fair Use and Other Copyright Exceptions*, May 2005, <http://www.choice.com.au/files/f120756.pdf>
- Submission to House of Representatives, *Inquiry into Uptake of Digital Television In Australia*, May 2004.
- Australian Heritage Commission, 'Chapter 9: Radio and Television, 1905–1970', in *Australia: Our National Stories—Linking a Nation: Australia's Transport and Communications 1788–1970*, AHC, Canberra, December 2003, <http://www.ahc.gov.au/publications/linking-nation/chapter-9.html>
- Balkin, Jack M and Noveck, Beth Simone, *The State of Play: Law, Games and Virtual Worlds*, New York University Press, New York, 2006.
- Barlow, John Perry, 'The Economy of Ideas: A Framework for Rethinking Patents and Copyright in the Digital Age', *Wired*, vol. 2, no. 3, March 1994, pp. 84–90, 126–9.
- Barron, Anne, 'The Legal Properties of Film', *Modern Law Review*, vol. 67, 2004, pp. 177–208.
- Bettig, Ronald, 'Who Owns the Message?', in *Copyrighting Culture: The Political Economy of Intellectual Property*, Westview Press, Boulder, CO, 1996.
- Bohn, Philipp, 'Attitudes Towards DRM in the Independent Music Sector', *Indicare*, 19 August 2005, [http://www.indicare.org/tiki-read\\_article.php?articleId=130](http://www.indicare.org/tiki-read_article.php?articleId=130)
- Bowrey, Kathy, 'Fertile Ground: Law, Innovation and Creative Technologies', in Fiona Macmillan (ed.), *New Directions in Copyright Law*, vol. 4, Edward Elgar, Cheltenham, UK, forthcoming.
- Brennan, David, 'Australian Television Broadcasts as Copyright Property', in Fiona Macmillan and Kathy Bowrey (eds), *New Directions in Copyright Law*, vol. 3, Edward Elgar, Cheltenham, UK, 2006, pp. 107–16.
- Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May–13 June 1968.
- Coombe, Rosemary, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law*, Duke University Press, Durham, NC, 1998.
- Copyright Law Review Committee, *Report to Consider what Alterations are Desirable in the Copyright Law of the Commonwealth*, Commonwealth of Australia, Canberra, 1959.
- 'Digital Pop Star is Poster Girl for Social Networking Site', *Reuters*, *C|Net news.com*, 20 January 2007,

1035\_11-6151822.html

Doctorow, Cory, 'Europe's Broadcast Flag: The Digital Video Broadcasting Project Content Protection and Copy Management: A Stealth Attack on Consumer Rights and Competition', *Electronic Frontier Foundation*, 29 September 2005, [http://www.eff.org/IP/DVB/dvb\\_critique.pdf](http://www.eff.org/IP/DVB/dvb_critique.pdf)

—'Opinion: Apple's Copy Protection Isn't Just Bad for Consumers, It's Bad for Business', *Information Week*, 31 July 2006, <http://www.informationweek.com/news/showArticle.jhtml?articleID=191000408>

Drahos, Peter, *The Philosophy of Intellectual Property*, Dartmouth Press, Aldershot, UK, 1996.

Electronic Frontier Foundation, 'The Customer is Always Wrong: A User's Guide to DRM in Online Music', <http://www.eff.org/IP/DRM/guide/>

Fisher, William, *Promises to Keep: Technology, Law and the Future of Entertainment*, Stanford University Press, Stanford, 2004.

Flew, Terry, *New Media: An Introduction*, 2nd edn, Oxford University Press, Oxford, 2005.

Gasser, Urs and Begue, Gabriela Ruiz, 'iTunes: Some Observations after 500 Million Downloaded Songs', *Berkman Center for Internet and Society*, 2005,

[http://cyber.law.harvard.edu/BerkmanPress/iTunes\\_August\\_update\\_final%5B1%5D.pdf](http://cyber.law.harvard.edu/BerkmanPress/iTunes_August_update_final%5B1%5D.pdf)

Given, Jock, "Not Unreasonably Denied": Australian Content after AUSFTA', *Media International Australia*, vol. 111, May 2004, pp. 8–22.

Goldsmith, Ben, Thomas, Julian, O'Regan, Tom and Cunningham, Stuart, *The Future For Local Content?: Options For Emerging Technologies*, Australian Broadcasting Authority, Sydney, June 2001, [http://www.aba.gov.au/newspubs/radio\\_TV/documents\\_research/Future\\_local\\_Cont.pdf](http://www.aba.gov.au/newspubs/radio_TV/documents_research/Future_local_Cont.pdf)

Grossman, Lev, 'You. Time's Person of the Year', *Time Magazine*, 25 December 2006, p. 22.

Handler, Michael, 'The Panel Case and Television Broadcast Copyright', *Sydney Law Review*, vol. 25, 2003, pp. 391–407.

Hassall, Greg, 'Brute Force Slows March of Time', *The Guide, Sydney Morning Herald*, 9 October 2006, p. 2.

Holahan, Catherine, 'Meet the iTunes Wannabes', *Business Week Online*, 5 September 2006,

[http://www.businessweek.com/technology/content/sep2006/tc20060905\\_083985.htm](http://www.businessweek.com/technology/content/sep2006/tc20060905_083985.htm)

Indicare, 'Consumer's Guide to Digital Rights Management', 2006, [http://www.indicare.org/tiki-view\\_articles.php](http://www.indicare.org/tiki-view_articles.php)

Jeanneney, Jean-Noël, *Google and the Myth of Universal Knowledge: A View from Europe*, trans. Teresa Lavender Fagan, University of Chicago Press, Chicago, 2007.

Jenkins, Henry, *Convergence Culture: Where Old and New Media Collide*, New York University Press, New York, 2006.

—'How Transmedia Storytelling Begat Transmedia Planning ... (Part

One)', Confessions of an Aca-Fan: The Official Weblog of Henry Jenkins, 11 December 2006, [http://www.henryjenkins.org/2006/12/how\\_transmedia\\_storytelling\\_be.html](http://www.henryjenkins.org/2006/12/how_transmedia_storytelling_be.html)

—'Star Trek Rerun, Reread, Rewritten: Fan Writing as Textual Poaching', *Critical Studies in Mass Communication*, vol. 5, 1988, p. 85–107.

Jobs, Steve, 'Thoughts on Music', *Apple.com*, 6 February 2007, <http://www.apple.com/hotnews/thoughtsonmusic/>

Katz, Helen E, *The Media Handbook: A Complete Guide to Advertising Media Selection, Planning, Research and Buying*, Erlbaum Associates, Mahwah, NJ, 2003.

Kellner, Douglas, 'Book Review —*The Culture Industry Revisited* by Deborah Cook', 1996, <http://www.uta.edu/huma/illuminations/kell15.htm>

Knight, Ben, 'Concerns for Internet Services after Broadband Plan Ditched', *Australian Broadcasting Corporation: 7.30 Report*, 8 August 2006, transcript at <http://www.abc.net.au/7.30/content/2006/s1710050.htm>

Kohler, Alan, 'Ad-Free TV Just a Click Away, Five Years Late', *Business, The Age*, 24 August 2004, p. 1.

Lee, Julian and Higgins, David, 'Apple Launches Australian Music and Video Store', *Sydney Morning Herald*, 25 October 2005, <http://www.smh.com.au/news/technology/apple-launches-australian-music-and-video-store/2005/10/25/1130006093720.html>

Lee, Martyn J (ed.), *The Consumer Society Reader*, Blackwell, Malden, MA, 2000.

Leiboff, Marett, 'Australian Media Law Update: TV and Radio Standards', *Media & Arts Law Review*, vol. 8, 2003, pp. 127–33.

Lessig, Lawrence, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, Penguin Press, New York, 2004.

Lury, Celia, *Cultural Rights, Technology, Legality and Personality*, Routledge, London, 1993.

Maiden, Samantha, 'No Help in Switch to Digital', *IT, The Australian*, 23 November 2006, p. 13.

McGuire, Mike and Slater, Derek, 'Consumer Taste Sharing Is Driving the Online Music Business and Democratizing Culture', *Berkman Center for Internet and Society*, 13 December 2005, <http://cyber.law.harvard.edu/home/uploads/511/11-ConsumerTasteSharing.pdf>

Miller, Jack D, 'Apple's Secret Battle For Music, Movies, And TV', *Mac360.com*, 8 February 2007, [http://mac360.com/index.php/mac360/comments/apples\\_secret\\_battle\\_for\\_music\\_movies\\_and\\_tv/](http://mac360.com/index.php/mac360/comments/apples_secret_battle_for_music_movies_and_tv/)

Moses, Asher, 'Copyright Ruling Puts Hyperlinks on Notice', *Sydney Morning Herald*, 19 December 2006,

<http://www.smh.com.au/news/web/copyright-ruling-puts-linking-on-notice/2006/12/19/1166290520771.html>

Murray, Simone, 'Think Global, Act Global: Corporate Content Streaming and Australian Media Policy', *Media Information Australia*, no. 116, August 2005, pp. 100–16.

Nichols, David, Farrand, Tom, Rowley, Tom and Avery, Matt, *Brands and Gaming: The Computer Gaming Phenomenon and the Impact of Brands on Gaming*, Palgrave Macmillan, Basingstoke, UK, 2006.

O'Regan, Tom, Garland, Ian, Muir, Ian, Chard, Robert, Thomas, Abigail and Hartley, John, 'Ratings in Transition: Industry Implications', *Media International Australia*, vol. 105, November 2002, pp. 10–30.

Pelline, Jeff, 'Star Trek open to Navigators', *C|NET news.com*, 13 January 1998, <http://news.com.com/2100-1001-207050.html>

Sawyer, G, 'The Commonwealth Copyright Act 1968', *Australian Law Journal*, vol. 43, 1969, pp. 8–12.

Schlag, Pierre, 'Essay: Hiding the Ball', *New York University Law Review*, vol. 71, 1996, pp. 1681–718.

Slater, Don, *Consumer Culture and Modernity*, Polity Press, Oxford, 1997.

Sohn, Gigi B, 'Don't Mess with Success: Government Technology Mandates and the Marketplace for Online Content', *Journal on Telecommunications and High Technology Law*, vol. 5, 2006, pp. 73–86.

Tushnet, Rebecca, 'Legal Fictions: Copyright, Fan Fiction, and a New Common Law', *Loyola of Los Angeles Entertainment Law Journal*, vol. 17, 1997, pp. 651–86.

UK, Board of Trade, Copyright Committee, *Report of the Copyright Committee*, HMSO, London, 1952.

Vise, David A and Malseed, Mark, *The Google Story*, Delacorte Press, New York, 2005.

Wang, Harry, *Digital Rights: Content Ownership and Distribution*, Parks Associates, Texas, March 2005.

'Who Owns the Media', *Stop Big Media*, <http://www.stopbigmedia.com/chart.php>

Williams, Daryl, 'Copyright and the Internet: New Government Reforms', speech delivered at Murdoch University, Perth, 30 April 1998, [http://www.ag.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Speeches\\_1998\\_Speeches\\_Copyright\\_and\\_the\\_Internet:\\_New\\_Government\\_Reforms](http://www.ag.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Speeches_1998_Speeches_Copyright_and_the_Internet:_New_Government_Reforms)

## Notes