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Kathy Bowrey, Can we afford to think about copyright in a global marketplace?”

This chapter is about the role of thinking and the spaces that are made for thinking about intellectual property.

I think that ‘we the people’, who are interested in exploring the politics, history and development of intellectual property, are so far from the action these days that there is a question about whether we can meaningfully participate in ways that might matter – in terms of having an affect on the laws that are being produced. We have travelled far from when academic lawyers were intimately involved in politics and, for example, actively participating in things like writing a nation’s constitution.

This is not a kind of middle-aged academic life crisis about one’s place in the world. Though I think there is always a question or two to be asked about the social and political significance of the legal theory work academics do. The problem that concerns me is a more specific one.

With globalisation we have seen the emergence of a lot of new communities and organisations that are driving the direction of intellectual property laws. These groups influence the realm of possibility for law making by nation states. They also impact on the capacity of citizens as legal subjects of nation states to act creatively, whether that be in terms of working in the arts or sciences or some other kind of endeavour. But the places where a lot of law work is now being done, and where frameworks for action are set in place, are not necessarily public spaces, and even those that are, are not public or participatory in the way that law making of modern nation states once claimed to be.

These are not spaces where lawyers generally are welcome – except by invitation. This is especially the case for the more academic lawyers, whose strength may lie in a more critical understanding of the development and rationale of the law, and perhaps coming to the discussion with more distance on the debate, tapping into an older pace of change and time. The time frames for discussion in these spaces are short, both in terms of the time allotted for discussion and in terms of the immediacy of the focus.

There is a lot of suspicion about whether academic types have any useful or relevant expertise. Attempts to bring broader questions about law into debates, and in particular the asking of deeper questions about agendas that are being set reflecting on the social, cultural or economic costs associated with choices that are being made, is often seen as divisive activity – as individuals trying to take over or corrupt the agenda, or as grandstanding, trouble making or, more simply, as getting discussion off the point.

1. THE NEW THEORY SPACES

The spaces where intellectual property law is being discussed and, in both a technological sense and a policy-direction sense, being made includes:

1. engineering communities like The Internet Engineering Task Force (IETF) and the World Wide Web Consortium (W3C) – responsible for developing technical standards for the internet;
2. open source communities and corporations like IBM, Sun Microsystems, Red Hat, Suse Linux, Novell – who establish global licensing conditions;
3. proprietary multinational corporations like Microsoft, Time-Warner, Walt Disney, Sony, Seagram, Bertelsmann, News Corporation, Viacom; and related industry organisations or, as some people prefer to call them, cartels, such as the Recording Industry Association of America, Motion Picture Association of America, Business Software Alliance – that create their own technological forms of regulation, consumer contracts, lobbying for rules, and litigating to change the status quo;
4. trade negotiators – whose work is largely conducted in secret on behalf of national governments, leading to agreements that direct national law reform agendas;
5. globalised lawyers and economists representing nation states in global forums like the Internet Corporation for Assigned Names and Numbers (ICANN) and the World Intellectual Property Organization (WIPO) and involved in negotiating other international agreements;
6. activists, users and consumers – who, by their communication practices and technological behaviour, indirectly influence legal policy and the legal strategies of others.

We are used to thinking that intellectual property theory is something done primarily by some academics and students. But this is a mistake.

2. DELIVERING THE MESSAGE

All of these groups are involved in changing the face of intellectual property in practice, and they are very aware of the ambit of their power for doing this. The groups have very different agendas and ambitions. Even within organisations and communities there are radically different politics, strategic alliances, and competing economic agendas. But the groups are similar in the specificity of their respective interests and focus, the preoccupation with achieving particular immediate goals, and a lack of concern for history or interest in opening up discussion about the longer-term implications of their own decision-making and impacts on others.

We share some of the modes of communication – email; professional papers; discussions and conferences; private consultancies and invitations; postings to online discussions and newlists. But we academics tend to be rather insular with our discourse, whereas they are peddling theory primarily for general public consumption. They have a bigger audience than academics generally.

These groups do theory differently to us. They are all very interested in what intellectual property can and cannot do for them. They adopt strong views on the merits and deficiencies of the current laws. They moralise about the interests served by the laws. They are politically active and use the media to grab attention. They

write press releases, actively lobby and work hard to have their views aired in business, technology and culture news lists and magazines, and the stories recirculate on radio, television and in newspapers.

So how do the groups mentioned above discuss intellectual property and deal with it? What do they think these laws are all about? How are they using theory?

3. TECHNICAL COMMUNITIES

For technical communities the legal focus has overwhelmingly focussed on debate about the way copyright and patent can obstruct open source innovation. But it is not a simple matter of dividing the computer engineering world into open source versus proprietary camps. There is not a clear free public domain/private profit divide. A lot of prominent open source corporations also freely discuss the need to maintain their patent portfolios. They claim patenting is an essential strategy to combat potential litigation by small start-up companies and other opportunists with broad patents, as well as for use in defending actions brought by large proprietary corporations. There are also issues about corporate responsibility to share-holders and concern about the need to be able to demonstrate protection of intellectual property assets, even though open source companies may have a different approach to commercialisation and licensing than proprietary companies. Describing these attitudes to law simply is not easy.

The IETF,¹ an organisation that develops internet standards describes itself as an open, self-governing community. Here ‘open’ refers to both the capacity for anyone interested to participate in agenda-setting and decision-making in Working Groups, and to the objective of the activity – that is maintaining the interoperability of the internet architecture. The primary objective is to recommend technological best practice, and although they have no direct power to enforce recommendations about how things should be done, systems administrators, internet service providers (ISPs) and the like, tend to treat the recommendations as if they were mandatory rules to be obeyed.

The IETF has seen a lot of debate about intellectual property policy.² They take a copyright-free and no in-confidence stance on postings to working groups and related activity to developing standards, because to do otherwise would conflict with their ethos of open and collaborative discourse. Patents pose a bigger problem. If patented technology is part of an internet standard, what might that mean for other developers? On the other hand, lots of developers work for proprietary companies. If patented contributions are ignored, you could be shutting out the best. Their current policy is not to shut their eyes to patented technology, but only to include it in a standard if the IETF can obtain an assurance that a reasonable and non-discriminatory (RAND) license will be available to users.

The World Wide Web Consortium (W3C),³ a member-based organisation that also recommends internet standards, prefers a royalty-free approach to ensure low cost

¹ See <http://www.ietf.org>.

² See IETF Intellectual Property Rights Notices: <http://www.ietf.org/ipr.html>.

³ See <http://www.w3.org>.

entry for new technology developers, and to try and keep the focus on the best technical solution, uncorrupted by mercenary interests.

Though both groups take differing lines on patenting, these internet engineering communities share a concern that law can create obstacles that hinder the development and use of the best technology. They do not get tied up with detailed discussions about why or when law can cause a problem. Law is understood a lot more instrumentally, probably reflecting the corporate background in which many of them come across law and lawyers. The references to law in theory – its origins and purpose – are really very abstract. There are often quite totalising claims being made about the interests that law serves. And these accompany very, very specific references to technical discussions about the merits or otherwise of a particular patent claim and the prior art, and lead to concerted efforts to get rid of the patent.

There is little space available for broader, or more contextual, in depth inquiries into law because there is generally resentment about the need to engage with law and its structures at all. These communities see their tasks basically as engineering/technical. They have a grasp of law as being legal and technical. They understand the economic realities that bring these two fields of expertise together. But they do not really want to linger at the interface any more than execution of their tasks obliges them to. Perhaps antipathy to law comes into the picture because the main reason they have to pay attention to legal claims is the reality of the coercive power of the state.

In open source communities and corporations there is more debate about the politics of intellectual property laws. But again it is not clear, especially when you put to one side the largest open source developers like IBM or Sun Microsystems with separate legal divisions, that the way these people see law, and the way we as academics see law, has much in common. Open source licensing is still advocated in some quarters as primarily an anti-property/anti-legal regulation position. The licenses are seen as supporting a law/free speech nexus, rather than a law/private property claim.

But for a lawyer, obviously these open source licenses are still parasitic on both the statutory definition of copyright rights and contract law if they are to be formally enforced. It is not really possible to sever the property power from the law, even though in spirit the licenses might embody a different commercial sensibility to the private interest/individualist norm of copyright. And in all the US litigation where the constitutional public domain side of copyright has been asserted, this argument has been trounced by the law's preferential treatment of private property. So the notion that open source licenses can embody a participatory form or practice of civic-based legal autonomy, severing the copyright ties to private property in pursuit of a technical form of free speech, seems legally questionable, especially in the current climate.

But this jurisprudential reality seems to be of little interest to many in the open source world. The presumption remains that radically new interests can be defined and a new copyright history made by innovative licensing. Whilst enforcement might ultimately mean reliance on the courts, there is a strong faith in social regulation within the community – a preference for biopolitics – to secure legal objectives. And, in most cases, courts have not been necessary to resolve disputes over licenses.

Sectors of the open source community are interested in theory, but really only of an ideological kind. Unless we are going to show how the coercive mechanisms of law can

be made to work for them – by filing things like amicus briefs, supportive of their free speech agenda – the open source community is not very interested. More complicated arguments are treated as pessimistic voices of doom by non-believers that, if allowed to circulate, will only create doubts and spread insecurities. Talking critical theory only undermines the project of open source identity building. Because the model of innovation is collaborative and community-based, a lot of energy is expended in maintaining and reinforcing the values and norms of the community. There is little interest in letting in people who are likely to disrupt that social project and cast doubts about the life and values of open source.

Unfortunately this also means that there are missed opportunities, not just for encouraging reflection within the open source communities. Because legal discussion is rather limited, there is a failure to connect with different technical communities that share similar concerns about the effect of intellectual property laws on progress and for the broader social ramifications of the laws.

There are obvious similarities in the calls for the importance of ensuring a strong public domain in computing, to calls for protecting the public domain in biotechnology and in regard to ensuring access to essential medicines. Developing countries see the links. But it is probably also the case that there are similar structural features in the megascience,⁴ largely conducted across developed countries, that has fed demand for changes to the model of innovation, presumed as sensible in the nineteenth century. The size, scale, tasking and modes of communication of these megascience projects defy the individualist and centralised control logics that underpin the old intellectual property laws. In political terms alliances could be formed to help make complaints from scientists from both communities about intellectual property laws appear less marginal, only relating to concerns of the left-fringe.

4. MULTINATIONAL CORPORATIONS

A number of recent books⁵ have outlined, in the context of globalisation, how closely furthering the national economic interest has come to be identified with supporting the wealth creation strategies of big business. As Braithwaite and Drahos's study summarised it:

Our data have demonstrated the unsurprising conclusion that many different kinds of actors have played important roles in the globalisation of business regulation. Some might read the data selectively as demonstrating the death of the nation-state. This would be an erroneous reading . . . if we asked the crude question, 'which is the type of actor that has had the greatest influence?', the answer is fairly clearly the

⁴ This is discussed by Peter Galison in relation to astrophysics in his 'The Collective Author', in M. Biagioli and P. Galison, eds, *Scientific Authorship. Credit and Intellectual Property in Science* (New York and London: Routledge, 2003), 325.

⁵ See for example, J. Braithwaite and P. Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000); P. Drahos with J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (London: Earthscan, 2002); J. Litman, *Digital Copyright* (Amherst, NY: Prometheus Books, 2001); S. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge: Cambridge University Press, 2003).

nation-state. If we ask which single actor has had the greatest influence, that answer is even clearer – the US state.

What has changed is the nature of state power . . . In the era of information capitalism and the new regulatory state, control from the nation's territory of abstract objects like patents is crucial to building the nation's wealth, as is embedding global principles of regulation that suit the wealth creators from the state's territory.⁶

For the multinationals, there is little to be gained by strong references to the heritage and origins of laws. The game is law reform and stronger laws to suit the new global markets. So theory is fabricated and trucked in, to the extent that it serves that agenda. Though the examples I want to talk about relate to Australia, I do not think the mechanisms described, concerning the way global law advances, are unique to Australia.

In Australia we have seen things like reports commissioned by the Motion Picture Association (MPA)⁷ – which somehow dropped the common reference to it being the Motion Picture Association of America in the acknowledgement – advocating a copyright term extension. The report states that this is supported by Australian collecting societies.⁸ The report presents Australian law as based in incentive theory. It quotes William Landes, Richard Posner and Marci Hamilton as supporting the need for quantitative economic data to determine the law. There is a pseudo even-handed testing of the economic assumptions pro and against extension and attempts to quantify the public domain. Curiously, the argument that extending the term reduces the public domain is rebutted on the grounds that the 'extra incentives provided (by extending the term) will enlarge the public domain'. And whilst, at the end of the day, the economists fall back to the safe ground that no definitive assessment of costs and benefits is possible – there will be costs, there will be benefits – in the interest of harmonisation we should extend our term. Oddly there is no reference to balance of trade issues, about which there are clear statistics, and which clearly show the direction and lack of benefits to Australia. There is also no reference to the economic analyses put in the Eldred case.⁹

Since when has Australian copyright law been based in incentive theory? The relevant constitutional power and the legislation certainly do not mention it. You would have to spend a lot of time looking for any case law that even implicitly refers to that. Australian jurisprudence is largely still couched in the language of protecting individual private property rights, without making any reference to a need to justify this. It is really rare for social rationales to appear unambiguously anywhere in Australian copyright law. I have never seen a copyright judgement refer to the need to balance economic costs and benefits as an efficacy test that legitimates the law. One of the

⁶ Braithwaite and Drahos, *ibid.*, 475.

⁷ The MPA represents seven international producers and distributors of theatrical motion pictures, home video entertainment and television programming. Its members are Buena Vista International Inc. (Disney, Touchstone and Hollywood Pictures); Metro-Goldwyn-Mayer Studios Inc. (MGM and United Artists); Paramount Pictures Corporation; Columbia TriStar Film Distributors International Inc. (Columbia Pictures and TriStar Pictures); Twentieth Century Fox International Corporation; Universal International Films Inc.; Warner Bros. (Turner, New Line, Castle Rock).

⁸ See Allen Consulting Group, 'Copyright Term Extension. Australian Benefits and Costs', July 2003. Available from www.allenconsult.com.au.

⁹ There is a useful critical summary of the report in Lessig's blog at <http://www.lessig.org/blog/archives/001522.shtml#001522>.

hazards of writing critical jurisprudence about Australian case law is that theoretically it is quite impoverished. You really have to delve to find any meat to deconstruct or debate, though it is relatively easy to find contradictions, inconsistencies and misstatements of Anglo history. It is difficult to find justifications and intelligent discourse about the development of the law. However it is hard to dispute that what jurisprudence there is, is grounded in protecting individual private property rights. It does not abound with discussion of economic costs and benefits.

5. EMPIRE

The timing of the MPA's and the collecting societies' report coincided with the beginning of negotiations over the Free Trade Agreement with the US. The US has commented widely about their desire to change aspects of our copyright laws. One of the US objectives is to:

seek to enhance the level of Australia's protection for intellectual property rights beyond TRIPS in new areas of technology, such as Internet Service Provider liability.

Another is to:

seek to strengthen Australia's domestic enforcement procedures, such as increasing criminal penalties so that they are sufficient to have a deterrent effect on piracy and counterfeiting.¹⁰

American references to the supposedly 'weak' Australian laws were reported in the press in 2003. But there was no local response reported. In the second media briefing, US Chief Negotiator Ralph Ives says:

In many areas, the US and Australia protect those types of intellectual property the same, and in other areas we maybe use a different approach but achieve the same objective. That's the type of discussion we're currently having. But the fundamental objective, I think both countries have, is to provide a high level of protection for intellectual property.¹¹

The text of negotiations and the submissions made by Australian stakeholders to the government about copyright law are not publicly available. Comments by the Trade Minister, Mark Vaile, that 'when we agree to it, we will not be undermining our ability to deliver good public policy in a number of areas, given the uniqueness of Australia and Australians'¹² did not allay many fears. Charles Britton, of the Australian Consumer's Association, has since noted: 'The word "balance" does not

¹⁰ R.B. Zoellick, Speech to U.S House of Representatives, 15th November 2002.

¹¹ http://www.dfat.gov.au/media/transcripts/2003/030523_ausfta.html.

¹² ABC Radio, PM Program, 13 November 2003.

appear anywhere in the free trade agreement. And the only reference to users is in the context of obligations and not rights.’¹³

Traditionally the public policy issues related to copyright and the complexity of formulating its ‘balance’ of interests were seen as creating special circumstances that prevented copyright-related trade being bundled with that of other goods and services. Some, including Canadian commentator Michael Geist, have suggested that US interest in including copyright in free trade agreements only came about because of global reluctance to implement DMCA-like provisions (provisions similar to the Digital Millennium Copyright), under the auspices of compliance with the WIPO Copyright Treaties.¹⁴ Perhaps strong copyright provisions in an Australian free trade agreement would serve as the new global template. Or, as some suspicious Australians have recently begun to ask, maybe the point was to enhance further owner’s control over distribution and import those beefed-up provisions back into the USA.

The Free Trade negotiations have also coincided with our three-year review of the digital agenda copyright laws. Now this review might have seemed like a good idea originally, given the pace of change that was expected, but in fact in the three years since the new laws there had been surprisingly little change in the delivery of copyright content by the entertainment industries. Despite an incredible demand for online music services for over five years, there were still none available in Australia when the review began. Our online music services only appeared, and with very little fanfare, in December 2003. There has been a reduction in digital broadcasting services in the past few years, although at the same time there remains continual hype about the exciting developments coming soon in the press.

The background to the digital review documentation notes the Attorney General as saying that ‘we wish to ensure that an appropriate balance is maintained between the rights of copyright owners and the rights of copyright users under the Copyright Act.’

However, this motherhood statement was translated into objectives that have no consistent reference to balance and the rights of users as an objective of the review.

Review attention has been drawn to a consideration of far narrower concerns. These are expressed in the terms of pursuing efficiencies, practical enforcement, certainty and ongoing operations. There is a reference to consider the right of cultural and educational institutions to access material on reasonable terms, but these are also merely the concerns of corporate stakeholders. The private law firm conducting the review on behalf of the Government determined that a consideration of matters like the need for a broadly-based fair use right in Australia was beyond the terms of reference.

‘A high level of protection’, to use the words of the US Chief negotiator, was the shared objective of US and Australian intellectual property laws. And, seemingly, without the need for US directions to the digital agenda reviewers about the issue, attention to the rights and interests of users and consumers has been displaced. These ‘stakeholders’ have been cast out, perhaps as the casualties of the previous policy war

¹³ The US-Australia Free Trade Agreement and Intellectual Property – A Symposium, Baker & McKenzie Cyberspace Law and Policy Centre, University of New South Wales Law Faculty, 28 April 2004.

¹⁴ M. Geist, ‘Why we must Stand Guard over Copyright’, *Toronto Star*, 20 October, 2003.

– with what costs? The whole document is about consulting private stakeholders, preferably for the supply of economic data.

Now you might expect this specific kind of approach to law to underpin Free Trade talks. The usual constituency of a trade minister is big business – only big business. But the actual constituency of copyright law interests is a fair bit broader than that. It also includes small business, artists and other creative types, the education sector, users generally and consumers.

And even in relation to the Free Trade talks, as the Australian film industry has been arguing quite vocally, Australia has broader interests than simply trade liberalisation. Diana Crane has suggested that:

Cultural policy can be viewed as the stage where power struggles are waged on the national and international levels to set global policies and priorities for cultural globalisation and to resist threats to the dissemination of national or regional media . . . A country's success in responding to the pressures of cultural globalisation has major consequences for the future of the country's culture.¹⁵

The digital agenda review does not make reference to any cultural aspects of copyright law. It refers to the importance of 'economic perspective'. However, note that the reference here is only to a single school of economic thought, attributed to Richard Posner. So, again, in Australia we have the suggestion that our copyright law should be read through the eyes of a particular American school of economics.

There is theory in the reform programme. But it is a very poor research strategy to adopt one narrow theory from a range of possible approaches – one that is disconnected from the history and development of our law, but popular with a major trading partner – and then ask for a supply of data, to be independently verified by the review's own economists, to prove the chosen theory to be true.

In *Empire*, Michael Hardt and Antonio Negri argue that,

It seems to us, in fact, that today we participate in a more radical and profound commonality than has ever been experienced in the history of capitalism. The fact is that we participate in a productive world made up of communication and social networks, interactive services, and common languages. Our economic and social reality is defined less by the material objects that are made and consumed than by co-produced services and relationships. Producing increasingly means constructing cooperation and communicative commonalities.

The concept of private property itself, understood as the exclusive right . . . becomes increasingly nonsensical in this new situation. There are ever fewer goods that can be possessed and used exclusively in this framework; it is the community that produces and that, while producing is reproduced and redefined. The foundation of the classic modern notion

¹⁵ D. Crane, 'Cultural globalisation from the perspective of the sociology of culture', International Symposium on Cultural Statistics, Montreal, 2002 at 11. http://www.colloque2002symposium.gouv.qc.ca/h4v_text-crane_an.htm.

of private property is thus to a certain extent dissolved in the postmodern mode of production.

. . . Private property, despite its juridical powers, cannot help becoming an ever more abstract and transcendental concept and thus ever more detached from reality.

A new notion of the “commons” will have to emerge on this terrain . . .¹⁶

I do not understand why they make the assumption that the new economy, and the demise of private property as the foundation of the law, leads to the emergence of a commons. If you look at what is making an impact on the law making of nation states, the only commons that is taking hold in place of the traditional references to private property is the common language of Posnerian economics, especially in Australia.

I do not actually think it is a conversion of hearts and minds amongst lawyers that is leading us up this path. I think there are some true believers. But in the main, the interest in theory is servile and instrumental. Some Americans put this on the agenda and, as in other policy areas, we deal with it. Mainly we deal with it for short-term gains that have little to do with the health of the cultural sector. It is a concession made in return for strategic positioning and leverage on other trade issues that the public understands have more immediate, observable consequences.

The Australia–US Free Trade Agreement capitulated on a copyright term extension, ISPs liability, access to subscriber information where infringement is alleged and the import of DMCA-style anti-circumvention provisions.¹⁷ An exchange in the Australian Senate between Opposition senators and Australian Chief Negotiator, Stephen Deady, over the copyright term extension reveals something of the spirit of those negotiations:

Senator CONROY – Was any analysis undertaken on the impact of this particular change? I appreciate this was a bit rushed at the end and it was pretty cold over in Washington, but did you get a chance to look at the consequences of this?

Mr DEADY – We have not done any particular work on this question of copyright extension. . . . It is an on-balance question. The costs are difficult to really measure.¹⁸

The government had previously commissioned an inquiry, which included a detailed economic analysis of a term extension. The Intellectual Property Competition Review Committee could find no empirical evidence to support an extension of the copyright term. Accordingly, the Committee recommended that there would be no justification to change the existing copyright term.¹⁹

¹⁶ M. Hardt and A. Negri, *Empire* (Cambridge, Mass.: Harvard University Press, 2001), 302.

¹⁷ See generally chapter 17, Intellectual Property Rights. Available from: http://www.dfat.gov.au/trade/negotiations/us_fta/text/index.html.

¹⁸ Foreign Affairs, Defence and Trade Legislation Committee 2004, Estimates, at 16. Available from: <http://www.aph.gov.au/hansard/senate/commtee/S7431.pdf>.

¹⁹ Intellectual Property Review Committee, Final Report (2000), available at <http://www.ipcr.gov.au>.

Senator COOK – Were you aware of the Australian Intellectual Property and Competition Review Committee’s recommendation on this point when we agreed to it?

Mr DEADY – In negotiating this whole agreement – certainly this IP chapter – we were working with our colleagues in the department of communications and Attorney-General’s. We were given a mandate by the government to take this thing forward. The copyright extension was an issue that the Americans put on the table. It was an issue that went right through the negotiations. In the context of the overall deal and the balance that was struck, the government decided to agree, as part of the FTA, to align our copyright term more closely with the United States term. That was a decision on the balance of the agreement with the United States.

Senator COOK – I am not blaming you, Mr Deady, because you cannot be expected to have read every damn thing and you are in a position where you need to be advised on some of the finer details of some of these things. My question was: were you aware of that recommendation when we reached this agreement?

Mr DEADY – I was not aware of that recommendation, but that is not to say that members of the team were not. I assume they probably were. As I said, we had experts from the various agencies. But I think, in terms of the negotiations and in terms of the process we were going through in relation to the FTA, these were decisions that were taken as part of the overall package. The government agreed, as part of the overall deal, to this extension. So I am not sure of the relevance of a recommendation that there should be some review before this decision was taken.²⁰

It is interesting to note that in relation to the changes to ISP liability for copyright infringement by subscribers, Peter Coreneos, CEO, Internet Industry Association, noted that there was extensive consultation with his organization and members but ‘they were basically presented with a *fait accompli*’.²¹ Likewise, David Herd, Screen Producers Association of Australia, has noted that:

We just wanted to get on the record that, despite the fact that the national interest analysis talks about the consultation that was undertaken with the sector, we agreed that there was a lot of talking, but what we saw at the end of the agreement is way past what the sector was consulted about. In fact the deal that was done in Washington earlier this year is not what the sector supported and it was not discussed with the sector at all by the Department of Foreign Affairs and Trade.

²⁰ Foreign Affairs, Defence and Trade Legislation Committee, Estimates, 2004, at 19. Available at: <http://www.aph.gov.au/hansard/senate/committee/S7431.pdf>.

²¹ The US–Australia Free Trade Agreement and Intellectual Property – A Symposium, Baker & McKenzie Cyberspace Law and Policy Centre, University of New South Wales Law Faculty, 28 April 2004.

Mr WILKIE – Were sector representatives invited to Washington to be part of the negotiations?

Mr HERD – No. And that, as we say in our submission, stands in stark contrast with what we believe the level of consultation was with the American cultural sector.²²

One is led to the depressing conclusion that in the current climate in Australia, intellectual property policy is not necessarily driven by intellectual property policy. It has to accommodate logics that relate to deals made for peripheral reasons. There is no space for any consideration of theory and for coherent policy direction. There is no discernible cultural policy. But there is still a space made for particular global owner interests to assert their preferences.

But I still blame the lawyers. There is a subterfuge that comes with the harmonisation argument that I resent.

6. GLOBALISED LAWYERS

The problem with the harmonisation argument is the suggestion that global law making is about the formulation of essential norms and principles. Yes, we have agreements that list minimum standards that create legal obligations to be complied with. But the reality is that these are rather empty norms. They are deliberately made vacant because of concern that to fill agreements with any more specific content would lead to them not functioning as a reflection of global exchange, but as simply a global proxy for US commercial interests. Nation states, other than the US, would rather not agree to that.

And as we have seen, bilateral agreements can supplement the necessary detail.

But globalised lawyers are then using references to the vacant norms to legitimate the more specific detail enacted in the bilateral agreements, and to smooth the entry of those foreign demands into local intellectual property laws. They generate discourse that suggests not only that this harmonisation work has to be done, but suggest ways of accommodating the international norms that have little regard for the local jurisprudence. Instead, the preference is to fabricate a new global jurisprudence that is deaf to history and to discussion of critical issues that might bring to the surface local cultural concerns about the direction of the law. With the copyright work largely paid for by the large media owners, the local lawyers act as agents of the nation-state, facilitating law reform that assists local penetration into new communications markets. In Australia this is likely to result in copyright laws that mimic the US in terms of owners' rights, but absent any of the US users' rights and reference to the balancing of these two concerns. We do not have fair use rights or home recording rights. Our collecting societies have said that as soon as it is technically feasible with home digital recording technologies, they will be hooked into the appliances in our lounge rooms, bedrooms, cars and offices with the meter running.

²² Joint Standing Committee on Treaties 2004, at 63–4.

7. COMMON SENSE

So what about activists, users and consumers? How have they been reacting to these political changes associated with globalisation?

Brendan Edgeworth has argued that:

The re-characterisation of the legal subject from citizen to consumer, to citizen as consumer, also represents a shift in emphasis in the substantive content of citizenship rights . . . the new arrangements give priority to particularistic and individualistic rights to purchase goods and services for the satisfaction of preferences in the package of rights expressive of citizenship.²³

Edgeworth is primarily referring to changes in the management of the welfare state and to the servicing of material needs. However his comment that citizens are now conceived of as consumers could equally be applied to the contemporary conception of our creative and inventive needs as citizens.

With modernity we, as citizens, were expected to be respectful of the intellectual rights of individuals – but as copyright law conceived it, we all housed, in theory, an intellectual capacity to be an author, as well as to consume the products of such endeavours. Legitimation of intellectual rights in works remained tied to the state's interest in protecting individual private property rights. In the early twentieth century provisions for new subject matter (like sound recordings, film and broadcasting) accommodated the commercial interests of corporations; but protection of those interests was still tied to interests in the underlying literary, dramatic and musical works that could remain individually owned until the relevant interests are contractually assigned to the corporation. Postmodern explorations of this connection preoccupied copyright theory for much of the 1980s and 1990s.²⁴

With globalisation at the end of the twentieth century, the legal priority of the state has changed. The state expresses little genuine interest in our individual capacity to contribute. With the new laws, the overwhelming presumption is that production is primarily the activity of the corporation, and legal protection is only directed to that end.

8. CITIZENS AS CONSUMERS

The propaganda activity of the recording industry, asserting the faces of individual artists to front the push for stronger protection and litigation, was necessary political action. They had to combat our disbelief. We already knew that our laws had little to do with the rights and interests of individual citizens anymore.

²³ B. Edgeworth, *Law, Modernity, Postmodernity: Legal change in the Contracting State* (Aldershot: Ashgate, 2003), 137.

²⁴ See generally K. Bowrey, 'Who's Writing Copyright's History?', *European Intellectual Property Review*, 18/6 (1996), 322–9.

Did you notice that in the ‘Don’t steal music’ campaigns we were not asked to speak out in support of the artist’s creative endeavours per se? We were really only ever asked, as sycophantic fans, to line up in our rightful place as consumers of the images and product.

The conspicuous absence of the individual from contemporary copyright law can even be seen in unexpected areas such as moral rights. Though recent in Australia and only able to be asserted by individuals,²⁵ the law moderates the individual’s rights by making provision for ‘consenting’ to various acts²⁶ and ‘voluntary’ industry codes²⁷ that codify reasonable uses that can be made of works.²⁸ The freedom of the individual creator to control uses made of their work ends at the door of the corporate publisher and distributor.

Citizens, stripped of their active, productive capacities, are left only with their power as consumers. We, as citizens, are now supposed to express identity not through making, but through selecting and displaying, branded products, and passively consuming arts and entertainment services that corporations market to us. The state is active in maintaining this limited form of global citizenship. Hence consumer rights and competition law issues can still be raised in legal fora. They are part of the new citizenship.

The assertion of anything more challenging, like peer-to-peer and related technologies that express different goals and identities, is, however, strongly disciplined by the state and the courts. Thus in recent Australian litigation against students who ran an MP3 file sharing website:

Their story, as told in the media, is one of castigation and control. Law in this case disciplined by use of the criminal sanction – albeit in the form of suspended sentences. No doubt the ‘leniency’ was due to the demeanour of the offenders. Tran told the press after his conviction ‘I strongly discourage anyone else from doing this as well’.²⁹

Here even though the conflict was ultimately managed in traditional legal forum – the legislature and courts – it is impossible to make sense of that activity without reference to the media coverage of the drama. The imagery that came with the news stories, and the advertising pushed out told everyone all they needed to know about the legal story. And whilst there were academic legal commentators like Jessica Litman, Michael Geist, Larry Lessig to name just a few prominent ones, you could argue that in the public imagination, it was more about making and combating propaganda – lurid stories, inflated predictions, and selling law as culture. Short, opinion pieces with their potted histories in the music and technology press served this audience well. For a time the subject of copyright law – where it came from, whose interests it serves, what its future was – was fashionable talk. You had to have

²⁵ The Australian moral rights provisions are set out in Part IX of the Copyright Act 1968 (Cth). s190 creates rights for individual authors of all copyright ‘works’ and for films.

²⁶ ss195AW;195AWA.

²⁷ ss195AR;195AS.

²⁸ The problem is not strictly an Australian one, nor entirely recent in the making, see I. Castles, ‘New Zealand Moral Rights Law: Did Something Get Lost in Translation?’, *New Zealand Business Law Quarterly* 8 (2002), 26-48 at 26.

²⁹ M. Hardie, ‘Floss and the Crisis – Foreigner in a Free Land?’, *Sarai Reader*, Crisis/Media (2004) at 384–97.

an attitude about copyright law and keep up with the latest development. But that fad has since passed, in a mainstream sense.

What today's consumers, users and activists know about copyright law is only the experience of manipulation – generally the experience of being an object of legal regulation – of being cajoled, patronised, disciplined and punished. And if you have an interest in Kazaa, you are pretty good at law-as-manipulation yourself.

Consumers, users and activists have no reason to believe that law can wield power differently. Whether it is because of cynicism about power, despair or just a short attention span, there is little interest in legal theory. They have little knowledge of alternative directions in law ever existing. How legal theorists can meaningfully communicate with such a disinterested audience is quite a challenge to address.

9. IS CRITICAL THEORY LOST IN SPACE?

In 1993 Neil MacCormick argued that, 'Wherever there is law, there is normative order; wherever there is normative order institutionalised, there is law. Law is about institutional normative relations between normatively recognised persons of sorts. Law is about rights and duties and, therefore, liberties and no rights.'³⁰

But in relation to the new global technical forms of law, the institutions abstain from the formulation of legal norms, positive statements of rights or duties. The norms of the international law making bodies and bilateral treaty makers are also consciously left vacant, so they can be flexibly and locally inscribed to accommodate the shifting political wills of the times.

For the past thirty years critical theory has been preoccupied with deconstructing the security, rationality and authority associated with the modern way of ruling. The focus for us as researchers has been clear. Our game was to play with the history of the politics behind the law – to complicate what others presented as self-evident truths; to highlight the contingencies hidden by the law; to draw out inequities and sociological falsehoods; and all this often motivated by a desire to speak for those who were structurally disadvantaged and otherwise unlikely to be heard. This has led to concern for the relationship between culture and law. As Sarat and Kearns summarise it: 'a critical cultural studies of law must not only expose the history and political complicity of ideas of law and culture, but, according to (Rosemary) Coombe, it must also de-reify them. Doing so means ending the divorce of law and culture from "creative practice and human agency"'.³¹

Whilst I share the sentiment that law should not be divorced from culture and that we, as scholars, should explore creativity and make space for human agency, I am not sure with globalisation that there is a reification of ideas and values that is readily available for critical analysis anymore. Or that academics in today's universities are necessarily all that well placed to provide a relevant analysis.

³⁰ N. MacCormick, 'Beyond the Sovereign State', *Modern Law Review*, 56/1 (1993), 11.

³¹ A. Sarat and T.R. Kearns, 'The Cultural Lives of Law', in A. Sarat and T. Kearns, eds, *Law and the Domains of Culture* (Minneapolis: University of Minnesota Press, 2000), at 11.

10. DOCUMENTING THEORY

Sure we can document the ongoing list of horrors. We can make glib asides to our students about the gossip behind this or that development. We can take sides in this or that dispute. The question is, can we do anything more than that? Can we do anything to open up the discussion and bring to the law broader reflections on directions and consequences?

Peter Goodrich comments that the influence of intellectuals lies with their role as mediators between structures and practices, ‘The intellectuals reflected . . . upon the structures, patterns or material and historical forces that had produced them.’³²

He notes that today, ‘This means initially understanding the effect of new technologies of communication upon the transmission of symbolic capital and latterly challenging, subverting or deconstructing institutional, corporate and state interests that they represent.’³³

11. VIRAL THEORY NETWORKS

With globalisation and distributed communications networks we have also seen the rise in importance in private, decentralised, unaccountable distributions of power. As academics we can also use these networks, to the extent that the others that share these spaces will let us – that is, inject ourselves like viruses into the organs, and see if we can spread our ideas. We can use the media that is more clearly at our own disposal – continue to write articles, books, have conferences, ‘blog sites’, email and gossip. But in asking if we can afford to think about copyright in a global marketplace, the problem is that the primary audience for our work should not really be ‘us’. So the question copyright academics need to ask is not ‘What does it matter who is speaking?’³⁴ but, rather, ‘If a copyright academic speaks, is anyone listening?’

³² P. Goodrich, ‘The Perspective Law of the Ego: Public Intellectuals and the Economy of Diffuse Returns’, *Modern Law Review*, 66/2 (2003), 294 at 297.

³³ *Ibid.*, at 298.

³⁴ In the 1980s and 1990s this question became linked to theoretical readings of copyright influenced by the work of Michel Foucault, ‘What is an Author?’, *Textual Strategies: Perspectives in Poststructuralist Criticism*, J.V. Harari, ed., (Ithaca, NY: Cornell University Press, 1979), 141.