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## ***Copyright law reform : dealing with the unfamiliar***

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### ***The familiar - is new really new?***

How many people have

- seen a photograph?
- taken a photograph?
- developed a negative?
- printed a photograph from a negative?

Even without the benefit of direct experience, most of us have some practical understanding of these things.

What about the working of an audio CD? Word processing software? 2D & 3D Modelling packages? CD Rom? Multimedia? World Wide Web? Netscape Navigator?

Much of the difficulty in dealing with new technologies stems from the lack of a common frame of reference for understanding the technology. Technology can change our whole experience of information:

the content; the technological knowledge required to access information; the types of environment in which we use the technology; the way products are costed and how we pay for things; the additional equipment required to access, store and use information.

Some new technology, such as the Audio CD, changes the delivery mechanism for a familiar kind of product. However other technology changes more than this - it changes what it is that you can deliver.

When this happens, law reform involves much more than simply adapting existing law to new technology. Law reform is involved in building a social context for the technology at a time when there is no consensus about what this context involves.

This problem is quite apparent to those trying to come to terms with the current pace of technological change and the confusing opinions about the significance of new technologies. However an exploration of the way copyright law has dealt with earlier technologies serves to remind us that the problem is not entirely new.

### ***Photography***

It took just over 100 years to develop unambiguous copyright provisions for photography. At first the photographer was seen as a mere technician with no special claim to a copyright. In legal discussion it was argued that the picture was really made

by the sun rather than the “author”, and that photography was so mechanical that copyright should not apply at all.

It was not until the experience of photography had become commonplace that it was understood that photographs are of variable quality reflecting both aesthetic and mechanical judgment. This led to the *Copyright Act 1968* (Cth) awarding copyright to the “taker” of the photograph - a solution that more readily accords with an amateur, than a professional, understanding of the art of photography.

### ***Audio CD and digital audio***

In the mid to late 1980s there was a flurry of writing decrying the danger of digital audio technology such as digital audio tape [DAT] and compact disc digital audio [CD-DA]. Writers warned that musicians were soon to be superseded by computer samples, artlessly strung together by “digital pirates”, out to make a quick buck.

Within less than a decade these cries now seem overwrought and exaggerated. Why is it that such a major technological change as digital audio could be so easily and quickly accommodated?

### ***In Music***

Remastering raised new issues of authenticity in recordings. Sampling raised questions about how small a part could be taken, reused and still represent a whole, other recording. Both remastering and sampling led to new ways of costing works and recirculating old works. However whilst digital audio involved a significant change in the treatment, recording and storage of sound, the technology failed to fundamentally disrupt existing understandings of music and of copyright. Compared to photography, there was a clear understanding of the issues and interests at stake.

In music, there was a long established history of dealing with new instruments and methods of producing music; new music styles or genres; collaborative works; reducing music to component efforts (lyrics, score, performance, recording, broadcasting rights). The mathematical notation of music has quite often been seen to parallel the digitisation process, breaking a work up into small, defined elements or bits. This may also have contributed to the ease of the industry’s transition to digital technology.

### ***In Law***

In law, there was little question as to whether copyright should apply to digital audio and to whom copyright payments were owed, where the sample was easily recognisable.

Digital technology also brought with it new ways of masking the original source of a sample and obscuring the interest of the original copyright owner. However it is only when discrete contributions can be discerned and ascribed an owner, that copyright has much of a role to play, whatever the media form.

### ***Photography and Music compared***

In photography there were never clearly defined contributions or segmentation of the creative processes involved. Despite the early attempts to reduce photography to a

matter of technique, unlike music the photograph resisted capture or forms of notation. The negative, even though being a key to a photograph, has never been seen as equivalent to a musical score or lyrics.

## ***Computer works***

Are computer works a compilation of efforts that add up to more than an aggregate of smaller parts?

The difficulty with computer works is the lack of consensus in approaches to the technology. How you define a computer work very much depends upon what interests you have as : consumers of computer works, educators, generalist or specialist application writers, system operation packagers, hardware suppliers, component manufacturers, service providers, distributors or resellers. Points of view are unlikely to coincide.

Without an accepted hierarchy of efforts or interests, attempts to capture the essence of the technology in a legal definition will prove difficult. Given this environment it is not surprising that the Copyright Law Review Committee's recent publication *Copyright Reform: A Consideration of Rationales, Interests and Objectives* (1996) identified contemporary copyright issues and interests with such a high degree of generality.

## ***Some broader issues***

If a new technology cannot be integrated into an established framework it will be difficult to reach a consensus about what interests the new technology involves, as a matter of law. Law reform has to create a framework by addressing the broader policy issues at stake, without being too specifically tied to any particular technological process or interest.

### ***• Pay for use***

Is the purpose of copyright to make every use of another's work subject to a fee?

If so, is there an automatic right to use another's work, so long as you are prepared to pay? What principles should be the guide for payment?

If not, who can be expected to pay for which kinds of use?

Should you be expected to pay for any access to a work or only if you actually use a work? What constitutes a "use" of a work? eg. WWW browsing caches a copy of a work to your computer, should this be a "use" of that work for which a fee is payable?

### ***• The rights of access to information***

Who has a right to control the circulation of information? - the creator? the distributor? the government? the consumer?

What obligations should there be to ensure that information does not fall foul of copyright, defamation, obscenity or privacy laws? Who owes this obligation and to whom?

Who has the right to render information private or secret eg. through encryption?

Should the government have access to it, and if so, subject to what controls?

### ***• Protocols and standards***

Who decides on the ways information is stored and shifted around and how does that affect the type of information generated, stored and retrieved?

Who will define and thereby control any future ways of collecting ‘tolls’ for information and how will money be distributed as a result?

Is global harmonisation of protocols and standards in the national interest?

Is arbitration, rather than laws and litigation, a preferred means of resolving trans-national disputes?

### • *Competition*

If you create an industry standard, should you be entitled to a fee for every use of your work? eg. Do CERN and NASA have an interest in internet material because of their work in developing HTML and so on? Does Netscape, by creating a standard way of formatting and accessing information, have any interest?

Should competition policy with respect to access to information be the same as that applying to information content?

Does the need for technological interoperability render the distinction between “access” and “content” illusory?

### *Anticipating change*

Where there is no established framework for understanding a new technology, law reformers have the opportunity to create one. The issues are comprised of complex and contentious moral, political and economic judgments. Further as with the drug law debates, there are many entrenched interests and complications involving international pressures and the requirements to conform.

Anglo Australian copyright law reform is made all the more difficult because of the historic avoidance of elaboration of copyright principles, that started with the uneasy denial of a common law basis to the law. Further unlike U.S. law, we have no constitutional principle that states that the purpose of intellectual property rights is to offer an inducement to authors and inventors to create and disseminate intellectual works.