Copyright, Guns and Money:
Copyright and Culture in the Digital Age
Colin Golvan

IN THE TEACHING of copyright, it is usually said that copyright is an economic right. In Arnhem Land, they think otherwise. In 1990, I attended a meeting of Aboriginal artists in Maningrida. These artists had been involved in a copyright infringement case concerning the unauthorised reproduction of works of art on T-shirts. The case had settled, and the purpose of the meeting was to discuss the division of the spoils. The case involved a number of artists and different infringements by the same infringer.

As counsel on behalf of the artists, I suggested to those present that the best way to divide up the settlement monies was on a pro rata basis: that is, the artist whose work had been copied the most would get the most money, and so on. This advice was noted, and I was asked to leave the room. This was not a direction that I was accustomed to receiving from my own clients. They said they wanted to discuss the matter without any professional input or intrusion. Some time later, I was called back into the meeting and informed that my suggestion of a pro rata share would not be adopted as it was culturally inappropriate, i.e. Western bullshit. Instead, each artist would share equally, no matter how extensive or otherwise the infringement of their work. I was told that this was desirable from an Aboriginal perspective because everyone had been harmed equally.

Occasionally — probably all too rarely (from a copyright perspective) — one is reminded of the cultural aspects of copyright.

The Big Copyright Picture
Taking the big copyright picture, one of the fundamental debates in contemporary copyright has been concerned with the setting of boundaries between the public and private domain. There is an easy connection to make between the existence of property-based monopolies and privilege. The leading rights owners and users in the world today are also among the leading companies of the world: Microsoft, News Corporation, Sony. These companies pursue the management of content as a policy, using information in the broadest sense of the term as the raw material of their commercial endeavours.

Publishing and bookselling are well established as multimedia businesses, with the shelves of even the finest bookshops displaying more and more CDs and DVDs. The interests of publishers and film producers are aligned within media houses, such that decisions to take on books for publication are undoubtedly influenced by opportunities to exploit the highly lucrative film and television markets.

We often take it for granted, but copyright is at the heart of a lot of big business, including business conducted across a world without boundaries. The big businesses I have in mind have significant technology infrastructures, based on software, hardware or telecommunications. They are hungry for content. Copyright governs key aspects of their infrastructure, as it does the content they need to maximise the opportunity of the infrastructure.

The economic consequences of this monopoly-type power can be seen at an international level. For example, the word-processing and data-management programmes and operating systems of Microsoft are basic tools of worldwide communication. Access to them requires payment of licence fees, which is part of ordinary business expense in the First World, and an unmanageable impost in the Third World. Microsoft’s programmes are not part of some benevolent grant to the world: they are private property and managed as such. Revenue is extracted where it is available, no doubt at varied rates, but, wherever there is technological infrastructure, there are licence fees to be mined.

This impost on the developing world has its defenders, most notably that person known by the disarming title of the US ‘Trade Representative, who, if the newspapers are any guide, travels the world threatening dire consequences if US copyright, patent and other rights are not respected. Countries such as China and Indonesia are expected to embrace Western copyright law systems, which are meant somehow to allow major US copyright owners to bring proceedings in these distant lands to prevent the unauthorised copying of software, music or films. If the system, as introduced, produces poor results or no result, the much-travelled Trade Representative will certainly, as has been done on many occasions, threaten death by a thousand trade cuts.

In recent times, we have seen the connection between the offer of ‘free trade’ by the US to Australia, in return for the alteration of key aspects of the Australian intellectual property system, including the extension of copyright term from fifty years after the life of the author to seventy years. This extension of term was largely intended to assist the film industry, not least Disney and Warner Brothers.
One can identify quite easily the legitimate concerns felt by US copyright owners faced with rampant piracy. They lose billions of dollars in revenue to piracy. But there is a context worth reflecting upon. The developing world has the First World put before it as the shining example of all things good and achievable, but hopes are dashed at the high-priced counters of the Disney and other such stores that trade in authentic First World products. The status symbols of the modern age are founded on trademarks. The clothing industry, for example, is notorious for the production of the same or similar products from the same factories bearing different brands with dramatic effect on customer perception and on price.

Access by students in the developing world to many of the key tools for intellectual development is often beyond reach. Schools cannot afford software. Students and teachers cannot afford books or access to the Internet (or, even more telling, their countries lack the infrastructure to provide adequate telephone cabling).

It is not the obligation of copyright owners to subsidise the remedying of the inequities of the First World–Third World disparity, but, at the same time, knowledge-based disparities, like disparities in wealth, are increasing before our eyes. The imperative of access to copyright works in developing countries increases as the resources to procure access remain as unavailable as ever.

In the post-colonial period, to use a dated term, a new cultural dependency is being established, as the concept of the worldwide copyright market takes firmer hold. The revolt at street level can be readily felt, with rampant trading in pirated goods (particularly computer software, CDs and DVDs) often seemingly unchecked throughout the Third World, and very much so in our region. In the 1960s and 1970s Third World regimes used to nationalise industries to try to protect themselves economically. The intangible copyright right cannot be nationalised, but it can be very actively infringed (and no doubt with the tacit or ‘blind eye’ support of many governments, or at least the business acolytes of government, in the Third World).

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International Nature of Copyright

Copyright law today has its modern genesis in the Berne Convention, established nearly 120 years ago, which has increasingly embraced the copyright nations in a version of a unified system of copyright protection. The Convention has created norms in the approach to copyright. Copyright is by its nature international in focus.

National boundaries, insofar as they concern copyright, have been challenged, at least from an Australian perspective, by two key developments: the Internet (or the unrestricted and instantaneous international dissemination of copyright works); and the collapse of restrictions on parallel importation (being the importation of authentic copies of works from other than authorised sources). The second of the developments, which is of particular relevance to the market for books, shows the close, in fact direct, link between copyright and economics.

The restriction on parallel importation, enacted under Section 37 of the Copyright Act 1968, provided a régime for allowing copyright owners and their exclusive licensees control over the importation and sale of authentic products containing copyright works, including packaging and labelling. Thus, the market for imported books could be regulated by the rights owners. These restrictions have been removed (largely at the behest of the competition authority, which complained about the effect of the restriction in particular on distorting the price of, and access to, imported books). The result has been the reinforcement of the concept of one international market place for copyright works in place of many national markets, with a central office directly controlling the worldwide dissemination of copyright works (rather than many regional branch offices).

Thus, important new books by local authors can be published in a single English-language international edition, copies of which may be freely imported with no effective restriction. Booksellers can also import popular foreign titles without waiting for supply from local distributors. While there are formal requirements concerning the entitlement to import referred to in the Copyright Act, they are cumbersome and impractical, and not known to have been enforced. Consequently, for practical purposes at least, local editions of important foreign works may increasingly become a thing of the past.
Access to Knowledge
At a local level, a debate rages, with obvious cultural implications, about access to knowledge through library resources, major public collections of art and the Internet. Free access to knowledge is perceived widely as a right, like free public access to clean air or water, such as it is. Educational institutions, libraries and public galleries complain about copyright owners imposing unreasonable financial fetters on access to public collections through, for example, controls on photocopying.

In excess of $60 million per year is collected by Copyright Agency Limited, which manages such revenue from photocopying (mostly under statutory licences) on behalf of copyright owners (arising from around one billion individual pages of photocopying by educational institutions). Creators and investors in creativity (such as publishers) demand and are obtaining their return for effort, ingenuity and investment, and are increasingly realising such returns through the collective management of copyright.

Copyright owners demand, for example, that there be only the most limited photocopying without remuneration. Photocopying by tertiary institutions has been subject to remuneration arrangements pursuant to statute for some years, which has been the subject in recent years of much concerned comment by such institutions. But a lot of remunerable photocopying still goes on without control or payment, such as by private businesses. By a lot, I mean an unfathomable amount. The demand for payment unquestionably creates a fetter on access. But for their part, copyright owners seek to increase their opportunities for remuneration, and resist being left behind in the technological race that makes copyright works more available, or should I say more 'copiable', than ever before. Copyright owners insist that advances in copying and transmission technologies should not be to their disadvantage, and that they should not be prejudiced in asserting their copyright rights by the case for increased access made in an environment of rapid developments in technology.

The Challenge of the Internet
Looking to recent advances in computer technology, the downloading of content from the Internet raises a number of profoundly challenging questions, as the Internet in particular cannot be limited by national boundaries, and yet legal systems concerning the enforcement of intellectual property interests are fundamentally national in character. Can copyright owners invent a system of international collection, and how would it be managed? What of enforcement by reference to national laws? How does a copyright owner in Australia prevent copyright infringement on the Internet by unauthorised reproduction in Chile? Perhaps the time is approaching, if it has not already arrived, when the notion of copyright enforcement by individual copyright owners under national laws is under profound challenge, due to the internationalisation of copyright usage and the ever-rising cost of litigation itself. It is difficult to see how enforcement of copyright rights can be effectively managed other than by large corporate copyright owners or by international networks of collecting societies.

There is much work awaiting domestic and international copyright reformers in the coming years, as the wrestling match between rights owners and users enters a particularly willing and significantly transnational phase.
Corporatisation of Copyright

These contemporary developments clearly sit within an historical framework. The point of copyright protection has undergone a radical transformation through the course of the past 100 years. The individual copyright owner of note today almost inevitably cedes his or her copyright rights to corporations that exploit copyright. The twentieth century has seen what could be fairly described as the corporatisation of copyright, and a significant shift away from the dominant nineteenth- and early twentieth-century idea of copyright as a creator’s right. The major users of copyright today have vast transnational interests, such as the major publishing companies of the world, which transcend notions of national systems for the protection of rights.

Copyright collections at a national level are increasingly managed by sophisticated collecting societies (with extensive international associations), such as Copyright Agency Limited for photocopying, Screenrights in relation to video and digital recording by educational institutions, and AMCOS, PPCA and APR in relation to music. In the mid-1990s the federal government assisted in setting up a new visual arts collecting society, VISCOPY, which brought the poor cousin of copyright, the visual arts, into the collections stream. Large amounts of money are collected by these organisations for distribution to copyright owners, nearly all of which would remain uncollected without systems of industry-wide management. These organisations operate within international networks, providing reciprocal services to the members of associated organisations in other countries. They have enriched some individual copyright owners and provided a useful source of supplementary financial returns for institutional copyright owners.

Authors Left Behind

Of course, one should not lose sight of the genesis of this corporate activity — the creative endeavours of individuals — protected by copyright laws. Many of these individuals struggle as much as ever to make a living. It is one of the peculiar ironies of the modern age of copyright that the administrative and corporate infrastructures surrounding the copyright industries continue to grow ever larger and more prosperous, while creators, such as visual artists and writers (the source of the raw material of the copyright industries), struggle as ever. Certainly, those at the top of their creative fields have never been remunerated as well as they are today, but the gap between privilege and disadvantage amongst creators remains as conspicuous as ever.

Despite the many advances in the manner of exploitation of copyright over the last quarter of a century, it is remarkable to consider that studies on the welfare of creators show consistently that artists and writers are, relatively speaking, as poorly paid as ever. The consideration of why this is the case, and how this anomaly might be remedied, focuses attention directly on the negotiating skills and wherewithal of individual creators in dealing with users of their works.

Writers provide the raw materials for the publishing industry and all too often trade too cheaply with their rights. Publishers, while no doubt meaning to do the right thing by their authors, are not usually famous for being overly benevolent to their suppliers. Writers, particularly in the early stages of their careers, are invariably fearful about negotiating over the use of their rights because they do not want to lose the contract they have been offered. This undervaluing of writers’ efforts is a central issue in the failure of status and influence of writers, with the author’s passion for his or her work stopping at the keyboard.

The concern is not simply one of maximising financial returns. Effective contracting raises issues of the protection of authorial and even cultural integrity. Putting aside financial considerations, what of the pressures to maintain cultural integrity in the age of corporate copyright?

From an author’s point of view, the publishing contract provides a chance to manage the integrity of the text. This is often not a disputed issue. Publishers and authors share a common objective in this regard, in most cases, but there can be substantial differences about the alteration of text that raise real questions of authorial integrity. The issue here is the protection of the voice of the individual author. There can also be relevant issues of uses of subsidiary rights, such as merchandising, or even obligations to exploit rights granted under the agreement.

Cultural Significance of Copyright

Can it be said that corporate perspectives on copyright have impeded the growth and development of culture? Taking a literary perspective, with the possibilities for the exploitation of copyright rights being so extensive, does it influence a publisher’s judgment in preferring to publish one book over another that rights exploitation opportunities will favour the publication of one over the other? Has the rich marketplace for copyright returns made publishers focus more than ever on financial rather than cultural returns? The role of marketing in the business of book publishing is as dominant as ever, such that agents are familiar with the sales and marketing departments of publishing houses becoming involved with key publishing decisions, including most particularly the decision to publish a work in the first place.

To put the issue in an unsettling context, does the business of publishing first-time novels by promising Australian writers or works of poetry (and the cultural wellspring...
tapped by giving emphasis to such publishing — as seen in the heyday of Australian publishing during the 1970s and 1980s, particularly led by Penguin) seem all the more marginal for the fact that there are greater financial returns than ever to be had in publishing ’popular’ writing (and pressure from shareholders to chase those available returns)?

A small number of bestselling writers can be enough to sustain worthwhile publishing businesses. They make more money than has ever been the case from such writing. Their success puts the paltry returns from new writing into perspective and may have served to bury it. Much of this success, as it happens, derives from the shrewd and sophisticated management of rights in a ’rights-aware’ age. More than ever, large publishing businesses are gearing themselves to focus on the management of rights. Some of them are part of media conglomerations with associated companies engaged in film and television production, and the publication of newspapers and magazines. Films of books sell books; books sell film tickets — and so on.

The publishing market is a highly competitive international market. This is well demonstrated by the international book fairs that dominate world publishing calendars. The Frankfurt, London, Bologna and US Book Fairs are vast events, which set the eyes glazing with the sheer amount of work being published at any one time. The journey of the book from one of thousands of stalls at Frankfurt to the bedside table of the reader is one of the truly remarkable journeys in modern copyright.

While works in English are at a conspicuous advantage, they have to compete with one another in the main publishing markets of the world, as well as with works in translation (the sheer scale of the German, French and Spanish language publishing provides one of the more extraordinary experiences of a visit to the Frankfurt Book Fair), and then with the vast array of other products that make calls on the recreation time of consumers. Marketing is unquestionably the key ingredient in the business of making certain books stand out from the massive pack.

**Creators Retain Responsibility for Cultural Integrity**

For all of the concentration of effort on the market for the exploitation of copyright and the sale of works themselves, it is the lonely and unremunerated creator who unquestionably retains primary responsibility for the protection of cultural integrity. Creators and their patrons can destroy their own markets by paying insufficient attention to the integrity of their work. The excesses of marketing can drain the consumer’s sense of wonderment at the creator’s ingenuity. The instantaneousness of access to newly released works and the expectation of rapid loss of interest after a period of intense exploitation contribute to a shortening of the attention span. Films, music and books come and go in a flash. Books occupy shorter shelf time in bookshops than has ever been the case. Films are released into cinemas for just a few weeks, then are backlisted into video shops and cable release. The sheer haste and relentlessness of the contemporary marketplace for the expression of ideas must surely be having a major impact on the attention span of the ever-challenged consumer. We unquestionably need to slow down.

Copyright owners have a fundamental obligation to be attentive to the responsible exploitation and management of their rights. They need to give careful attention to their copyright, for financial reasons certainly, but also for reasons of artistic and even cultural survival. Abandoning the cultural controls made possible through copyright is tantamount to abandoning the very sense of integrity that inspires the creative spirit.

Creators often have one contract to get it right, with the initial passage of rights to a publisher, music company, or television or film producer. Once control over the integrity of a copyright work is lost, the creator has parted company with the impetus that has inspired the work and possibly the impetus to inspire works in the future. An improperly or thoughtlessly exploited work is a millstone around the author’s neck, an embarrassment that sometimes may only be redressed by turning one’s back on the mismanaged work or attempting to revive the creative spirit in the next work.

The importance of this first contract for the exploitation of a carefully honed copyright work cannot be over-emphasised. Enormous prosperity, wealth and power passes to the acquirers and users of copyright. The licensing or assignment contract provides what may be the only opportunity for the creator to get the most out of a work in financial terms as well as having some say over the future exploitation of the work. In the case of authors, there are the particular issues of management of text and appropriate attribution, as well as participation in approaches to exploitation (including the giving of full effect to the author’s enthusiasm for full exploitation, rather than the banking of rights, as can occur in a busy publishing house).

Moral rights, which protect rights of attribution and integrity, offer some chance of extending the creator’s negotiating muscle after that first contract, but the moral rights recently introduced into Australia’s *Copyright Act* have an important rider of the capacity for consent to waiver, which can be — and is — easily extracted by powerful publishers and other users of copyright flexing their negotiating muscle. The introduction of moral rights has at least drawn attention to issues of integrity and attribution as matters of substance when dealing with rights.

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Creators have the task of getting the best out of their assignment or licensing contract. In most cases, it is a stumbling exercise overwhelmed by self-doubt and ignorance. Lawyers have their own special role to play here (as do literary and artists’ agents), reinforcing the creator’s confidence in his or her own work. Loss of control is often an underestimated consideration in the checklist of things that can go wrong for the artist.

The responsible management of copyright works dictates that more than ever—in a world tending towards centralised markets for ideas, knowledge, entertainment and recreation—artists need to exercise particular care to manage the individuality of their expression (as protected by copyright). As I have tried to emphasise, I believe that it is very much the creator’s responsibility. Badly managed art is bad art. This point is well made in the Aboriginal context.

The central issues raised by this essay, being the right to possess forms of knowledge and the obligations flowing from this right, are exemplified well by the Aboriginal art conundrum, as an ancient art form meets a dynamic marketplace.

Aboriginal art is part of the corpus of knowledge of age-old communities. The notion of individual ownership, while widely practised at a market level, is not consistent with tribal or clan notions of communal ownership. The community ‘owns’ all the productive output of its members, and artists and others who deal in community rights do so as custodians or trustees on behalf of their people. This point was emphasised by Justice von Doussa of the Federal Court in the 1998 case of Bulun Bulun v R & T Textiles, which recognised a fiduciary relationship between tribal artists and their clan groups—to properly manage their important works in the interests of these clan groups (which the judge identified as beneficiaries). When copyright comes to bear on the situation, the proposition of individual ownership is imposed as a veneer on more complex relationships of ownership and management. Such is the expedient nature of our copyright law as applied in the Aboriginal setting.

However, the concept of copyright, or the right to restrict the use of forms of expression of knowledge, is a fundamental part of the organisation of human society. Aboriginal customary law incorporates ideas of ceremonies, stories and dance belonging to particular communities, and with no use to be made of them without appropriate tribal permission (under sanction of spearing—something like the tribal equivalent of what is referred to in the Copyright Act as conversion damages). The sense of ‘caring for culture’ has undoubtedly added to the regard in which Aboriginal art is held.

Ancient Hebrew societies have required that rabbinical authority sanctions the form and content of the recounting of the Five Books of Moses for use in prayer. Every torah scroll (containing the Five Books) is prepared to an exacting and age-old formula, with highly trained scribes hand drafting every word in the most painstaking exercise in cultural preservation. Strict rules also apply to the recounting of the Koran and the liturgy of the orthodox churches. The main belief systems of many cultures are based on the ‘rule of the book’. There is, by contrast, no more potent imagery of the passing of orderly society, or of the end of belief and values, than that of the Nazis burning books in the courtyard of Humboldt University in Berlin (the academic home of Albert Einstein no less).

Respect for the ‘form of expression’ is at the very heart of religious belief and practice. The essence of the Creator is captured by the speaking of a word or by the uttering of a phrase. Respect for properly managed copyright is a hallmark for civilised society. It is getting the balance right that is so demanding, and this raises many challenges for the creators and users of literary, artistic and musical works.

Jerry Lewis in Wonderland

A parting tale from my contact with traditional Aboriginal people about fragile social structures and copyright.

Almost my very first brief as a barrister required me to travel to Garmendi outstation in central Arnhem Land to take instructions from the artist Bulun Bulun for the copyright infringement action involving T-shirts, the case I mentioned at the outset. I arrived in Garmendi after a long day flying from Melbourne to Darwin, and then Darwin to Maningrida, and then travelling by road from Maningrida to Garmendi. It was about seven p.m. when we arrived. Bulun Bulun asked if my entourage had brought any tucker. We had prepared for the trip (including an overnight stay at Garmendi), and had bought some tins of baked beans and spaghetti. Bulun Bulun said we should throw that rubbish away. Almost on cue, a flock of magpie geese flew overhead, and Bulun Bulun shot a bird from the sky, which dutifully came thudding down within inches of the camp barbeque. As night fell, the bird was broiled. I was given the best bits to eat, as the guest of honour—the giblets and other bits I was glad I could not see properly by the flickering light of the hot coals.

It was a magical night. The Aboriginal people talked about their land. All was in harmony. I felt a deep sense of calm and timelessness, until, with dinner over, the power generator was turned on and we watched old American sitcoms using a beat-up television and VCR. There was no escaping the clutches of Jerry Lewis’s copyright, or should I say the copyright of Paramount or Warner Brothers. It was a reminder of the pervasiveness of copyright exploitation, with no corner of God’s earth left untouched.

The message is: guard the creative spirit well, with authority and conviction. Authors should enter into contracts with as much thought and conviction as their work warrants. Reserve stupid contracts for stupid art.