

Chapter 14 – The Age of America

Administration and policy

The year 1984 not only inaugurated Australia's rebirth as an imperial auxiliary, beholden to the economic might of the United States. It also began a new phase in the Commonwealth's administration of copyright laws. In 1984, the Copyright Law Review Committee, an occasional committee of experts supported by the Attorney General's Department, presented its first report to the Attorney on the legal meaning of publication.

Until its abolition in 2005, the CLRC reported on 11 other occasions, making recommendations on diverse subject matter ranging from moral rights to simplification of the Copyright Act and Crown copyright. The Committee followed in the tradition of the Spicer and Franki committees, reporting – to much more confined effect – on matters of mainly domestic concern, and proposing legislative improvements. Separately, different Attorneys commissioned reports on new communications, copyright collecting societies and the competitive effect of intellectual property legislation.

This burst of activity reflected a larger dynamism, which grew out of the efflorescence of American power in international trade politics. In the space of a few years, from the beginning of the Uruguay Round of GATT trade talks in 1987, to the formation of the World Trade Organization in 1994, and the signing of WIPO's Copyright Treaty in 1996,¹ the United States inspired the transformation of international copyright law. After the last milestone, countries like Australia rapidly passed legislation recognising new copyright protections and remedies for infringement.

Role of the federal Attorney General's Department

In this period, the Attorney General's Department stepped out of the shadow cast by larger departments tending to the legislation, policies and international agreements vital to Australia's welfare. It presented

¹ Also the WIPO Performances and Phonograms Treaty adopted 20 December 1996.

itself as the sophisticated interpreter of international consensus on copyright principles, and, unwittingly, began to fill the role of Australian amanuensis to the United States, the power across-the-seas.

At the time of the Franki Report, about three lawyers of the Attorney General's Department tended to copyright policy matters. In 1968, the Labor MP Gil Duthie, praised the department's tiny band of copyright lawyers for their extraordinary achievement in bringing the Copyright Bill rapidly to fruition. In the years after 1984, the number of lawyers employed to administer the Copyright Act, and carry out various policy functions, multiplied. The intellectual property branch, later renamed the copyright branch, grew in size about fivefold.

In the eyes of government, it was a powerhouse of specialist expertise. Others chafed at the department's orthodoxy, which rigidly reflected the international consensus in favour of owners' rights. While departmental lawyers were exceptionally able in statutory interpretation and the analysis of legal principle, they were deficient in their understanding of the historical context in which principles emerged. They could not look beyond the narrow prescriptions of international copyright lawmakers, led by the US, to fathom how and why the laws of copyright really came to be made. As a result, their policy judgments were sterile and they discounted valid arguments against optimal interpretations of proprietary rights.

As copyright laws grew in complexity after 1984, as the trade concerns of the United States came to dominate international copyright discourse, as the global economy based on the supply and consumption of copyright products grew in value and prominence, a copyright sodality preached in Australia a doctrine of legislative necessity. According to the ACC, CAL, APRA, ARIA, the Business Software Alliance, the Motion Picture Association and so on, Australia must zealously reform and augment its copyright laws or perish in the desert of international disrepute.

It fell to the Attorney General's Department to translate international norms into domestic legislation, to mediate between the interests of copyright owners and users, to maintain the so-called balance between the interests of these protagonists in the copyright drama, and to position Australia to participate in the copyright world's American peace.

In the airless atmosphere of policymaking, the urge for conformity suffocated debate. Departmental officers diligently reported the views

of copyright user groups but they honoured above all the imperative declared by the United States Trade Representative: reform your laws to extend and protect the rights of copyright industries or suffer isolation, irrelevance and economic retardation.

Why they acted in this way is not hard to fathom. Lawyers are trained in exegesis not historical analysis. Those inclined to doubt received wisdom or the numinous character of legislation rarely find employment in government legal departments. The officers of the Attorney General's Department worked conscientiously and competently, trying to steer a middle course between opposed factions. But their thinking lacked the vital spark of originality and they endorsed historically inaccurate presumptions about the purpose of copyright.

Unconsciously, they favoured the idea that copyright law is designed to encourage production. To optimise output, new laws must refine, add to, and sometimes qualify rights as international agreements demand. The necessity for alteration outside international law, or the content of principles adopted, did not concern them. Implicitly, they accepted that copyright laws must increase to protect the interests of copyright owners, and those interests became their intrinsic concern.

This favouritism reflects nothing on the legal ability of departmental lawyers or their motives. The Berne Convention and later copyright agreements, once ratified, demanded legislative action to implement agreed principles. The Attorney General's Department could not support the undermining of agreed principles. But in the department's policy hothouse, arguments in favour of permissible qualifications to proprietary rights usually wilted.

Participation in international conferences and approach of Attorney General's Department

The participation of departmental officers in international copyright lawmaking reinforced the unwillingness to challenge conventional thinking, and interpret accords in new ways. Officers' attendance at international conferences, beginning in the 1960s, exercised a powerful influence in shaping the department's narrow interpretive outlook. This outlook represented something new in Australian policy thinking. Until the 1960s, Australia did not align itself to the thinking of the international copyright bureaucracy. Its representatives to conferences of the Berne Union were men of noticeable intellectual independence.

Sir William Harrison Moore, Australia's delegate at the Berne Union's 1928 Rome Conference, could count as academic disciples two future High Court judges, Latham and Dixon. An outstanding constitutional law scholar, much in demand during the Federation debates, he might, at a pinch, accept temporary subordinate status to Government Ministers. He felt no such obligation to anyone else. W J Dignam, KC, the High Commissioner to Ireland, also a constitutional law expert, represented Australia at the Berne Union's Brussels Conference in 1948.² In his report of the Conference, he openly criticised the policy and tactics of the British and various other delegations.

Afterwards, attitudes changed. Senior officers of the Attorney General's Department first represented Australia at the Stockholm revision Conference of 1967. From that year onwards, a shift to conformity not evident in the conference reports of either Moore or Dignam (or in their conduct at the conferences) is suddenly discernible. Very gradually, the weight of international conformism began to exert more and more centrifugal force on domestic activities.

Once the Attorney General's Department began to represent Australia internationally, a strong drive for harmonisation on the lines expected by copyright owners became inevitable. Conformity did not result only from the conservatism inculcated by legal training. The department's extreme orthodoxy in matters which admitted a variety of interpretations extended back to its beginnings in 1901, and owed something to the personality of its first head, the plain-thinking Robert Garran. Garran led the department for 31 years and impressed his own stamp of caution and pragmatism on its practices.³

Under his leadership, the department consolidated its hold over the management of intellectual policy legislation. It exercised administrative responsibility for copyright legislation from 1907, managing the registration of copyrights through a controlled agency, the Copyright Office. In the 1920s, matters of copyright policy were handled directly by the Attorney General John Latham and Latham continued to drive

² The Department of External Affairs, not the Attorney General's Department, held responsibility for Australian participation at the Conference. Hugh Gilchrist, an officer from DEA supported Dignam in Brussels.

³ The Australian Dictionary of Biography said that, "[a]s a lawyer Garran was in general far-sighted and meticulous rather than inventive. He was thoroughly aware that "constitutional law is not pure logic it is logic plus politics", and he favoured a pragmatic, commonsensical approach to its interpretation."

policy into the middle of the 1930s. Then responsibility for copyright policy matters passed to a departmental lawyer, Joe Tipping.

In the late 1960s, Lindsay Curtis managed a number of lawyers dealing with a variety of subjects, including copyright policy. Until this period, the department managed copyright responsibilities as an adjunct to tasks perceived to be more important, and expended partial energy on copyright policy. Perceptions started slowly to change. Curtis supplied Nigel Bowen, the Attorney General, with extensive advice during the preparation of the 1968 copyright legislation, sparking more awareness of the international character of copyright law, and the possibility for Australia to share the prestige of international treaty development.

Departmental differences and growth of distinctive copyright policy

It should not be supposed that the requirements of international law allowed only one way of making or implementing copyright policy. In the 1930s, for example, the Comptroller General for Customs⁴ and the Postmaster General's Department occasionally took issue with the perceived indulgence shown by Attorney General's Department towards some copyright owners. The Postmaster General's Department greatly resented APRA's aggressive negotiating tactics towards the ABC, and the effect of its financial demands on the radio industry's economic stability.

The Postmaster General's portfolio included responsibility for broadcasting policy and successive Ministers questioned the size of APRA's takings and its distribution policy. One former holder of the portfolio said in Parliament in 1939 that APRA "practically points a gun at the heads of those in charge of broadcasting." He went on to suggest that in response to criticisms, the Attorney General would declare his hands bound by the Berne Convention and pay no further attention.⁵

⁴ In the mid 1930s, the Comptroller General for Customs, responsible for enforcing import control restrictions, expressed irritation in an official note at the importunities of record companies claiming that suppliers were illegally importing records without authorisation.

⁵ Tension between the Postmaster General and Attorney prefigured differences between the communications and legal portfolios over copyright policy in the 1990s.

Experience probably justified this jaundiced view. Successive Attorneys in the period of the APRA wars commented that they could take no legislative or administrative action that undermined obligations under the Berne Convention. But neither they nor their department worried much about the domestic consequences of rigid interpretation of international legal norms. Until the commissioning of the Spicer Report and the preparation of the 1968 Copyright Bill, the department saw little reason to spend much time on policy deliberation.

Undoubtedly, the department supported the aims of the Berne Convention and saw a necessity for Australia to work towards implementation of revisions. Arguments and conclusions about policy were more provisional. Officers like Curtis seemed to rely on firm assumptions rather than unchangeable convictions.

Over time, however, assumptions hardened into certainties. In 1975, the department's copyright lawyers were open-minded about claims for photocopying remuneration. 20 years and more later, they would not dream of questioning the necessity for the statutory licensing system or the basis on which CAL collected photocopying remuneration.

By the 1990s, copyright policymaking in Australia resembled a game. The Attorney General's Department umpired the rival claims of owners and users, the two categories of interest group fighting over reform proposals. The representatives of each interest stood on either side of the net. Backed by possession of the exclusive rights and the weight of self-interpreted tradition, copyright owners towered above their opponents, superior in every aspect of play. Their opponents, out-muscled and desperate, scrapped around the margins of the court, losing most points.

It seemingly did not occur to the Government to consider options to redress the imbalance of power. Balance did not call for favouritism but recognition that the copyright user groups, lacking the resources of their opponents, often did not press their arguments with the depth and acumen their case demanded. Then a change of Government in 1996 brought a change of strategy. The new Liberal Coalition Government decreed that the Attorney General's Department must share policy responsibility for the Copyright Act with the Department of Communications, IT and the Arts.⁶

⁶ The Attorney General's Department retained sole responsibility for the administration of the Act.

Joint responsibility for copyright policy

On its face, the Government's decision seems a curious one. For the first time in the history of the copyright legislation, two departments exercised joint policy responsibility. The sharing of policy responsibility is both unusual and potentially dangerous. Government agencies frequently espouse subtly different principles. They often do not share sympathies. If conflicting principles and different sensibilities meet in practice, the result is likely to be stalemate.

In the 1930s, the Attorney General's Department cooperated with the Postmaster General's Department to align copyright and broadcasting policy. The two departments looked on APRA's activities with markedly different emotions. The Department of Communications, IT and the Arts, DOCITA, similarly felt differently from the Attorney General's Department about certain protagonists in the contemporary copyright policy drama.

Responsible, like its forerunner the Postmaster General's Department, for broadcasting policy, DOCITA wished to encourage the dissemination of information and the growth of communications. Inevitably, its officers viewed with disfavour the use of copyrights to restrict the flow of information to maximise revenue.

The explanation for the Government's decision to split copyright responsibilities perhaps lies in its reformist enthusiasm. Cabinet probably deliberated the wholesale transfer of copyright legislation to DOCITA, a portfolio with responsibility for the technologies with which most copyright industries were vitally interested. Tradition, far more than logic, supported the Attorney General retaining portfolio responsibility for the legislation. His department did not administer industrial property legislation,⁷ why should it retain responsibility for copyright legislation?

The proponents for change may have reasoned thus, but tradition proved a bulwark against a complete shift in portfolio responsibility. Cabinet agreed to piecemeal reform and split policy responsibilities while agreeing that the Attorney should retain administrative control of the Copyright Act. The compromise broke down eight years later, when the Government abandoned its radical experiment and granted the Attorney full policy control over the legislation.

⁷ IP Australia is responsible for patents, trademarks, designs and plant breeders rights legislation.

The splitting of policy responsibilities in 1996 produced a new approach to copyright policymaking at a moment of floodtide in international copyright law. The WTO's 1994 Agreement on Trade-Related Aspects of International Property Rights, and the 1996 WIPO Copyright Treaty and Performances and Phonograms Treaty, prescribed legislative standards that, if they were to be met, called for intense commitment. The TRIPS Agreement demanded the creation of new enforcement procedures, while the WIPO treaties provided, among other things, for the extension of copyright into the digital environment.

Australia now committed to substantive changes to its copyright legislation and implementation of the so-called "digital agenda". At the heart of the digital agenda lay the new right of communication to the public, which, once enacted, would allow copyright owners to control the transmission of copyright material over the internet. Together, the Attorney General's Department and DOCITA embarked on the road to reform, cooperatively and with mutual goodwill. In 2000, the two departments delivered Australia's biggest copyright reform since the passing of the 1968 Act, the *Copyright Amendment (Digital Agenda) Act*, which made the communication right a reality.

Goodwill did not, however, mean the absence of controversy, nor did it produce unanimity in the interpretation of obligations or opinions about correct formulations of policy. In a real sense, the Government's action in splitting policy responsibility rescued the digital agenda legislation from the increasingly narrow conceptualisations and rationalisations of the Attorney General's Department, which, by the mid 1990s, reflexively supported the will of the copyright industries and the USTR.

Concentrating its gaze on the bargains and accords of the WTO and WIPO, the department never consciously chose to adopt the formulas, slogans and principles invented in boardrooms and political offices across the United States. But TRIPS and the WIPO copyright and performances and phonograms treaties were emanations of US volition. By uncritically joining in, then promulgating, the international consensus, the department accepted American vision of how domestic copyright policy should be made and implemented.

Role of DOCITA

DOCITA, less hidebound by the deadweight of legal scholarship, begged to differ with the vision endorsed by the Attorney General's Department. Like its ancestor, the Postmaster General's Department, it filled the role of copyright gadfly, biting and annoying its lumbering sister agency, stabled at the Robert Garran Offices one kilometre down the road. More importantly, the officers of the Intellectual Property Branch at DOCITA succeeded in doing what their counterparts at the Attorney General's Department had for some years failed to do: they critically interrogated the arguments of the whole coterie that compromised the great beast of copyright self-interest.

Their outrageous presumption stemmed from the naïve confidence of relative youth and the willingness of the Communications Minister, Richard Alston, to support questioning of the central canon of the case for maximum owners' rights – the idea that in the digital domain, copyright owners should not be subject to the limitations and exceptions that otherwise applied to copyright transactions. According to the argument, in the digital environment, fair dealing, library exceptions and the other devices for increasing dissemination would cause havoc to owners' rights.

Digital technology permitted rapid, mass reproduction of material and the communication of copies. According to copyright owners, in the digital realm, any qualification of owners' rights would work like a virus, multiplying diminutions of the owners' entitlements. Curiously, the argument turned on its head the old principle that copyright law must expand to enable the owner to control the applications of new technology. Now, proponents seemed to argue, the law must contract to allow owners to prevent misuse of technology.

Alston's departmental officers regarded the argument with scepticism and listened to the contrary claims of the copyright user groups, such as libraries, with more consideration than they were used to. The contrary argument held that if in the digital domain the exclusive rights operated truly exclusively, opportunities for free access to information on the internet would increasingly diminish, destroying the idea of a great worldwide communications exchange.

Alston's portfolio included responsibility for broadcasting, film and media policy and also the regulation of internet commerce. Unlike the Attorney General, he was required to pay attention to commercial users of copyright material, who, though they might also be

copyright owners, needed to ensure that the pathways of digital communication were not choked by impassable hedges of proprietary rights. So he supported vigorous questioning of arguments for maximum rights and endorsed the extension of copyright exceptions into the digital environment.

Dismantling import controls

At the same time, he pressed for the overthrow of the vestige in the Copyright Act of British mercantilist oppression, the import monopoly. Restrictions in the Act prevented Australian retailers from importing non-pirated copyright product without the consent of the copyright owner. The controls, first created in the 18th century, and carried into the British Copyright Act of 1842, were designed to allow British publishers to control the supply of books throughout the Empire.

Progressively extended, they allowed record, film and software companies to regulate the import of their products into Australia and prevent domestic suppliers from importing the same product from cheaper foreign sources, such as wholesalers in the original market. Control of supply meant control of price and, depending on the commercial decisions of the copyright owner, restrictions on consumer choice. The Labor Government attacked book import restrictions in the early 1990s, but it wilted before the counter-attacks of the publishing industry and legislation passed in 1993 barely impinged on industry practice.

The Coalition Government, elected on a platform of economic reform, proved more determined, turning its sights on the recording industry. Legislation passed in 1998 amended the Copyright Act to allow distributors to import non-pirated sound recordings without the owner's consent. This reform, achieved in the teeth of ferocious industry opposition, represented possibly the purest blow delivered to vested interest in the history of Australian copyright legislation. It resulted, as intended, in lower retail prices and greater choice. Its other salutary effect could hardly be underestimated, for the passage of legislation signified that reform uncorrupted by the claims of sectional interest is achievable.

Amidst the seemingly unceasing elaborations of rights that confine rather than liberate, even one such small departure from the prevailing will to enclosure suggested a remarkable possibility: the venous breathing organism of copyright is mortal and therefore subject

to limitation. The Government, naturally, ventured no such outlandish view. It looked pragmatically at the possibility of reform and slowly and inconsistently tried to dismantle other import restrictions. In 2003, further legislation permitted the parallel importation of computer programs, but controls continued to apply to books, periodicals and films.

The digital agenda reforms and the aftermath

New legislation

The attitude of the Attorney General's Department to questions of copyright policy can be gauged from the fact sheet it published in 2001 to explain the *Copyright Amendment (Digital Agenda) Act* passed the previous year. The document described the reform as if it were intrinsically justified, a measure to help realise property's total dominion in a fugitive world of abstractions:

The development of new communications technologies has exposed gaps in copyright protection under the Copyright Act 1968 (the Act). For example, the Act currently only grants copyright owners limited, technology-specific transmission rights, e.g., the right to broadcast only extends to 'wireless' broadcasts, and the existing cable diffusion right does not extend to sound recordings or television and radio broadcasts. Further, copyright owners currently do not have effective rights in relation to the use of their copyright material on the Internet.

The fact sheet elucidated no further. The reader looking for justification searched in vain. So far as could be discerned, the department looked on copyright law as the expression of fathomless Providence manifesting a will that must be obeyed. Thus spake Providence: owners are without sufficient rights, let them have rights. Hearing these words from the copyright divinity, the lawyers of the Attorney General's Department set about their salvific work with fear and trembling, or at least earnest certainty. Alston's department, not convinced about copyright's supernatural nature, took a different view. For this reason, the amending legislation extended existing restrictions on owners' rights into the digital environment. The fact sheet grudgingly disclosed that:

Users of copyright material, such as libraries and educational institutions, are concerned about being able to maintain reasonable access to copyright material in a digital environment. Carriers and Internet service providers (ISPs) are worried about

facing uncertain liability for copyright infringements which are committed by third parties whilst using their facilities.

As the fact sheet reported, the digital agenda legislation changed the Copyright Act in five ways. It created a new exclusive right of communication to the public, carried into the digital environment exceptions to the exclusive rights of copyright owners (including educational and other statutory licences), introduced new enforcement measures, limited and clarified the third party liability of internet carriers and introduced a statutory licence scheme for the retransmission of free-to-air broadcasts. In so doing, it created a regulatory framework for internet transactions, the effect and benefits of which only later historians can fully judge.

Exit DOCITA

One truth about the legislation is easily discernible. Though the amendments could mostly be said to fulfil copyright's divine plan, the meddling of DOCITA imparted the stain of sacrilege to the ritual of remaking the copyright law. By fighting for exceptions to owners' rights, DOCITA aroused the wrath of the copyright daemon. Copyright owner groups, channellers of this fierce spirit, demanded its propitiation.

The Government offered DOCITA, the author of so much cosmic disturbance, as a sacrificial victim. In 2004, it revoked the department's joint custody of office copyright policy, returning the copyright legislation to the exclusive ministrations of the Attorney General's Department. But the various proxies of industries and associations were not appeased. They insisted that Australia demonstrate obedience to the cosmic will, preferably by deleting from the Act the exceptions to the communication right.

The Government reluctantly admitted that the collective willpower of user groups and the public prevented it from taking this desirable step. However, the path to deliverance instantly suggested itself. What better way to pacify an enraged copyright spirit than by offering new rights that augmented the temporal manifestations of its power? The United States now helpfully guided the Government on the road to liberation, freeing it from the curse brought on the nation by DOCITA's impieties.

Restrictions on user rights

Under a free trade agreement with the US that took effect in 2005, Australia agreed to amend the Copyright Act in ways calculated to please copyright proponents. Among other things, the agreement required Australia to extend the term of copyright by 20 years, change the definition of material reproduction to encompass temporary copying that facilitates the playing of infringing material, protect electronic rights management information, introduce new criminal provisions and impose restrictions on the circumvention of technological protection measures.

Though the Government initiated inquiries to determine the extent to which users should be permitted free electronic access to copyright material, 100 years after the first federal Copyright Act, Australia enjoyed little of the legislative freedom exercised by the great parliamentary generation of 1905. In 1905, legislators knew of the Berne Convention and shared a conviction that the rights of authors must be recognised.

They felt no need to follow the letter of the Convention and they considered themselves to be setting precedents far ahead of the copyright statutes of Britain and its other possessions. They were characterised above all by a spirit of independence that inspired them to deprecate the backwardness of British policy, attack publishers and declare the United States a pirate nation plundering the works of foreign writers. That spirit vanished within seven years, but for a short time an emancipated generation could make copyright policy without deference to Westminster or Berne.

From the time of the 1912 Act, uniformity was the catchcry of policy but adherence to the Berne Convention, and the intermediary provisions of British imperial law, created a psychology still distinct from that manifested by contemporary lawmakers. When Parliament passed the 1968 Copyright Act, few doubted that Australia must comply with the requirements of the Convention but the international law seemingly offered latitude to work out domestic arrangements without excessive foreign interference. No-one guessed that in 30 years the content of copyright laws would form an integral part of trade negotiations and underpin the trade ascendancy of a single nation.⁸

⁸ And the group of other net exporters of intellectual property.

No-one guessed either that the dynamic influence of the United States on international copyright law-making would cause the length of Australian copyright legislation to grow radically in size. At the close of 1980, the year in which Parliament passed the most significant amendments to the copyright legislation since its passage in 1968, the Copyright Act numbered 112 pages. Twenty five years later, the Act numbered 516 pages. By 30 March 2007, the reprinted legislation, which now included amendments implementing the US-Australian free trade agreement, had grown to 678 pages.

By 2005, the thinking of Australian policymakers and bureaucrats seemed almost indistinguishable from that of the USTR. The Attorney General's Department, and its partner in policy servility, the Department of Foreign Affairs and Trade, examined questions of fair use but their officers were quite unable to separate Australian national interest from US trade interest. The dazzle of power supplies only a partial explanation for their failure. The truer cause of the collective myopia is the lawyer's tendency to examine form not substance, to swim on the surface and not dive to the depths.

Government lawyers really believed that the TRIPS Agreement and WIPO Copyright Agreement, and the complex bi-lateral trade agreements negotiated by the US with countries around the globe, obeyed an irresistible internal logic that must be followed. They were right only to the extent that Australia, if it acceded to multilateral agreements, or signed unilateral ones, could not resile from implementing them. But the failure to interrogate the logic of the agreements, to see what economic motives lay behind them, resulted in a surrender of independence that would have shocked the generation of 1905.

By 2005, obtuseness and the politics of economic power determined Australian copyright policy. Policymakers, learnedly explaining the obligations of international law, obediently agreed – in the interests of the nation – to Australia's status a tributary of the American hegemon. The greatest irony is that 100 years earlier, Australian politicians attacked with great vehemence the copyright policy of the United States, and even proposed legislation to strike at American publishers.

The Age of America – copyright, trade and imperial hegemony

Conditions in the copyright world after its acceptance of the American peace seemed to fulfil the mysterious words of St Mark's gospel: "For he that has, to him shall be given, and he that has not, that also which he has shall be taken away from him." That this was so owed nothing to divine ordinance and everything to calculated human action.

The availability of international copyright enforcement procedures using the processes of the WTO, and worldwide acceptance of the protection standards enjoined by the TRIPS Agreement and the WIPO treaties, entrenched America's economic advantage. Countries like Australia, which hoped to barter trade concessions with the US at the WTO, and in bilateral trade agreements, eventually discovered an unpleasant truth: like Rome and Britain before it, the United States typically negotiates from a position of implacable strength.

To the US, more was given, and from Australia, more was taken. Hoping to secure greater access to protected agricultural markets, Australian negotiators, the trade minister and the bureaucratic devotees of American power, agreed to the legislative demands of the USTR. The free trade agreement signed in 2004 helped to maximise the copyright owner's advantage but the advantage lay with the exporters of copyright products: the US copyright industries. As they grew stronger, the US prospects of Australian agricultural exporters seemed to vanish like Canberra's morning mist.

The strangely lopsided bargain struck in 2004 mirrored similar pacts agreed to by the United States and other supplicant nations hoping to coax reciprocal benefits from the world's copyright powerhouse. Nothing stopped the march of US power or the progress of its copyright industries. Harnessed brilliantly and ruthlessly by the USTR, the international trade system fortified the comparative advantage of the US in the production of intellectual property.

How did the age of America come to pass? What did it reveal? What did it portend? The answers to these questions cast light on the larger question. For what purpose were copyright laws made in the English-speaking world, and for whom?

Economics and politics

The US ascendancy in the production and export of copyright products is powerfully illustrated by annual national trade statistics. In 2005, the US copyright industries, the movie, television, software, publishing and music industries, contributed nearly US\$820 billion to national GDP. If the contribution of related industries, such as the retailers and distributors of copyright content, is included in the calculation, the total contribution rises to nearly \$1.4 trillion, over 11 per cent of GDP. In 2005, the copyright industries recorded foreign sales of over \$110 billion, ahead of nearly all other industrial sectors, including aeronautics, pharmaceuticals, agriculture and manufacturing.

Most importantly, in the same period copyright industries accounted for nearly 13 per cent of real total national economic growth. Industry statistics disclose that in the 20 years after the passing of the US Copyright Act in 1976, the industries' contribution to US GDP grew by over 240 per cent. Official and private reports projected that growth of the GDP and export contribution of the copyright industries would continue and far outstrip that of any other industrial sector.

When the International Intellectual Property Alliance, a coalition of copyright industry representative groups,⁹ released its annual economic survey at the US Capitol in 2007, the Republican Representative Lamar Smith outlined why the US government took intellectual property policy seriously.

What is clear from this and previous studies of the copyright industries is that their contribution to this country's economic growth continues to increase in size and importance. These statistics call upon our own government and governments throughout the world that also experience the rapid growth of their IPR sectors to redouble their efforts to nurture these industries through adoption of modern legislation that takes into account changes in technology and through vigorous enforcement.

Copyright industries are uniquely dependent on governments' willingness to enforce good laws, particularly as globalization expands and internet and broadband penetration escalates rapidly around the globe. Indeed, as our citizens and creators look to the great potential of a world of e-commerce, the legal and secure transmission

⁹ Its members are: Association of American Publishers, Business Software Alliance, Entertainment Software Alliance, Independent Film and Television Alliance, Motion Picture Association of America, National Music Publishers' Association, Recording Industry Association of America.

of valuable copyrighted content over the Internet will be at the centre of continued growth and productivity in the US economy. Yet this continued growth is in danger. We should not forget that unchecked piracy of copyrighted materials, both here and abroad, threatens both US growth and US jobs.

At the same time, the head of the Motion Picture Association of America, Dan Glickman, a former Democrat House Representative explained how industry statistics influenced trade negotiations.

When I was a member of Congress, this is the sort of information I would use to help me understand an issue. When the US Trade Representative sits down to negotiate with China about IP issues, this is the sort of information she draws on. That's why we do this.

A few months earlier, the Deputy US Trade Representative, Karen Bhatia, addressed a meeting of the National Academy of Recording Arts and Sciences in Washington. She noted, for the benefit of her music industry audience, that the US accounted for about 40 per cent of the US\$34 billion global music market. The US copyright industries, she said, were at the “forefront” of US export growth. The trend was “not going to slow down ... as more and more developing countries grow their middle class and themselves become integrated in the global economy.” She then explained the “three components” of US trade policy: 1. Market access 2. Rules for secure e-commerce 3. Intellectual property protection. Discussing the third component, she said:

First – it's incredibly important. Given the United States' strength in IP-intensive industries, having in place laws, systems and regimes that protect US intellectual property abroad is perhaps the most important trade enforcement challenge we face. And – I should note – having in place such laws, systems and regimes should be important to our trading partners, many of whom are themselves trying hard to develop their own IP-intensive industries.

She highlighted the successes enjoyed by the USTR, including the signing of free trade agreements including ‘rigorous IP commitments’,¹⁰ and concluded by explaining the US’s determination to continue to press for high standards of copyright protection and enforcement.

And so we will not stop. We will continue to advance our agenda. As we do that, I hope that we can count on all of you in the music industry to continue your strong

¹⁰ “We have successfully negotiated rigorous IP commitments in the FTAs we have concluded, and we remain committed to keeping international standards for IP high.”

support for free trade. Your voice matters. The success of the free trade agenda is not something any of us should take for granted ... we believe that free trade is worth the effort to defend and advance, on behalf of the nation's economy and the American workers, farmers and businesses that depend on the prosperity of our economy.

As Bhatia's speech showed, the Office sometimes needs to inveigle and rally even its natural supporters. It is not an invincible force omnisciently securing a global US trade hegemony. Its policy does not enjoy the unified support of the US polity and the USTR does not regard trade bargaining as an easy process with predictable results. Trade officers seem truly to view trade concessions that appear evanescent to foreigners as the harbingers of domestic hardship. Bhatia gave no indication that the USTR saw the US's overwhelming comparative advantage in key sectors – such as intellectual property – as a predictor of one-side bargains. From the USTR's perspective, the US must fight for free trade (or more accurately, free trade advantages) tooth and nail.

The genesis of US copyright trade policy

For all that, hindsight suggests much more than the semblance of design and forethought in the USTR's campaign for the international harmonisation of copyright standards and the global acceptance of strict enforcement protocols. In carrying out this program, the Office worked together with the US copyright industries explicitly accepting the assumption – expressed in the comments of Lamar Smith and Dan Glickman – that the interests of the industries and the nation were indivisible.

The beginnings of cooperation, and the genesis of the USTR's copyright trade policy lie in the 1970s. In that decade, many policymakers were demoralised by flooding Japanese imports, inflation and the rising evidence of US economic decline. The seemingly unstoppable growth of the Japanese electronics and computer manufacturing industries suggested to some Americans that their country would soon be supplanted as the world's leading producer of sophisticated technology. Apparent decline, however, masked the beginnings of remarkable economic metamorphosis.

The US remained, at the end of the 1970s, by far the world's dominant economic power. But reforms designed to liberalise the financial system, and an emphasis on the so-called knowledge economy opened the way to greater economic ascendancy. So far as the political rise of

the copyright industries is concerned, the transformative surge resulted from collective private action and the achievements of one sector in particular – the software industry. US overlords in the copyright world thus came from the same source that created the panopoly of exclusive rights throughout the world: calculated economic self-interest.

The staggering success of the software industry, or any other industry, did not depend on maximal intellectual property rights, but extensive proprietary rights undoubtedly worked in favour of IBM and newer giants like Apple and Microsoft. In 1970s, the computer software industry staked its claim for domestic copyright protection, and then looked abroad, demanding that countries like Australia follow the US pattern. The rise of the software industry, and the PC revolution, testified to the value of lobbying for proprietary rights, leading other copyright industries to perceive the value of co-opting government to achieve economic goals.

Although industry and government cooperation to create a framework for the international enforcement of intellectual property rights began in the 1980s, 1976 is the watershed year of the American copyright age. In 1976, the US legislature passed a new Copyright Act, which replaced the statute of 1909. The new Act recognised copyright in computer programs and introduced the schema of protection familiar to signatories of the Berne and Rome Conventions. For the copyright industries it represented an apotheosis, albeit incomplete, recognising the range of economic and distributive rights that would allow the industries to exert iron control over the production and dissemination of material. Thus empowered, they were ready to carry the fight for draconian enforcement of rights to Congress and then across the seas.

The 1980s

The US government listened with friendly ears to demands for a strategy for rights enforcement in foreign jurisdictions. In the early 1980s, the calls came not only from the copyright industries but the immensely powerful pharmaceuticals and biotechnology sectors. The leaders of industry enmeshment with government were the companies Pfizer and IBM, and they were joined by companies such as Monsanto and mainstays of the entertainment industry like Warner Communications. In 1984, the formation of the International Intellectual Property Alliance created an insistent new voice heard regularly since in the offices of Capitol Hill and the USTR.

A pair of Australian scholars has shown that the industries channelled their influence mostly through the powerful Advisory Committee on Trade Negotiations, a body established to ensure that trade policy reflected industry needs.¹¹ In the early 1980s, Pfizer's CEO, Edmund Pratt, became chair of the ACTN, and assisted by IBM's chairman, John Opel, a committee member, he established an intellectual property task force that made recommendations which formed the basis of the US's intellectual property trade strategy. These business visionaries, and Jacques Gorlin, a Washington lawyer who conceived the idea of linking IP rights with the GATT negotiations, lit the way forward.

Implementing their strategy, the US pressed for international agreement on stringent, enforceable intellectual property standards, negotiated bilateral agreements to fill the lacunae in protection, and rigorously policed international compliance with IP standards. In the 1980s, changes to trade legislation transformed the Office of the USTR into an agent of the industries. Trade concessions available to designated developing countries were revoked if they did not effectively curtail piracy and counterfeiting. The Special 301 WatchList, introduced in 1988, continues to provide a running log of nations under USTR surveillance for alleged failure to implement regulatory or enforcement obligations. The US threatens, and can impose, trade sanctions for deemed non-compliance under Special 301.

With the formation of the WTO in 1994, the proselytising of the ACTN and IIPA, the lobbying of various industry groups, the compliance of trade negotiators, and the cooperation of the EC and Japan, finally resulted in the schema devised 15 years earlier. The WTO's General Council oversees three subsidiary councils, one of which is responsible for TRIPS, and also supervises dispute resolution. Under the rubric of TRIPS, the USTR monitors international compliance with intellectual property standards, and threatens delinquent nations with sanctions under Special 301 or action under the WTO's dispute settlement procedures.

¹¹ John Braithwaite and Peter Drahos have published a number of works on the alignment of IP objectives with US trade policy. See e.g. *Global Business Regulation*, Cambridge University Press, 2000 and *Information Feudalism: Who Owns the Knowledge Economy?*, Earthscan, 2002. Much of the detail in this chapter on government-business links in US trade policy relies on their research.

Individual agency and industry motivations

The American age, symbolised in political terms by the importance accorded by the WTO to intellectual property norms and their enforcement, is thus the remarkable achievement of business leaders working to achieve economic ends through formal political means. Their successful co-opting of politicians and politics is not the least of their accomplishments. Perhaps their greater success lies in the simplification of reality to present a message now treated as self-evident by most copyright policymakers: piracy of products produced or exported by the US copyright industries is not merely a violation of international law but a moral evil that threatens creativity and therefore continued production.

US ascendancy in the production of copyright material testifies to the unceasing ingenuity and energy of American capitalism and an ever-present American cultural genius. US leadership in the politics and economics of copyright, on the other hand, is not the automatic consequence of creative pre-eminence. To a significant degree, it results from calculation and intelligent forethought.

Deliberation, planning and coordinated action were necessary for the copyright industries to begin to achieve their economic goal of defeating global piracy. This goal is directed towards revenue maximisation and is not usually fuelled by serious concern that piracy threatens the existence of the industries. The creation of a global framework for attacking piracy is the latest, and most extraordinary, product of a propagandising tendency evident throughout the history of copyright law.

This tendency can be discerned in the calculated use of the political process to mould the law to deliver a benefit (authors' rights advocates and all the copyright industries) or protect against perceived harm (the phonographic industry). The political language of political propagandists is often moralising, perhaps because industry representatives preaching ruin and desolation believe the horror they describe.

Alternatively, they may rely on hyperbole to conceal limitations in their arguments. At any rate, they usually make their arguments with skill, persuasiveness and sometimes an element of judicious cunning. Thus US advocates speak of copyright piracy as theft, ignoring the possibility that organised copyright infringement is usually a response to price discrimination.

Copyright history manifests another tendency which American indignation over piracy confirms. Copyright proponents are motivated by economic needs not moral qualms. In Australia, APRA and CAL exalted the moral entitlement of copyright owners to remuneration yet both organisations sought unrelentingly to squeeze the most revenue from the fattest, slowest partridge in the pear tree.

The recording industry, which angrily denounces pirates for destroying the livelihoods of artists, happily built its early profits on pirate (that is, unauthorised) recordings of the works of composers and lyricists. Publishers and record companies defended distribution monopolies as bulwarks against the supply of pirated product felt no concern about using the monopolies to fix prices. The greatest irony, however, lies in the moral fever of the US as it spreads its message of copyright necessity throughout the world. For the copyright policeman was once a pirate.

A pirate nation and the Australian response

US practice in the 19th century

The United States, although an observer at all conferences of the Berne Union, did not become a party to the Convention until 1989. For most of its copyright history, its domestic law did not recognise the principle of reciprocity that is the basis of international copyright relations. US law provided that copyright only subsisted in works printed or made in the United States. Consequently, any books printed overseas could be copied in the US and the copier would own the copyright.

In the 19th century, Britain and its possessions¹² regarded the United States as a piratical market, and the indifference of the American polity to loud appeals for reform aroused great indignation among politicians and publishers. During his first American reading tour in 1841, Charles Dickens attacked American copyright practices. His zeal backfired: the American press, including a young New York news editor called Walt Whitman, wrongly charged him with disliking America. Few Americans took any notice of his views. The United States, wanting to keep prices low for readers, and provide advantages

¹² Including Australia, although damage to Australian authors was slight and the Australian public might have welcomed the importation of cheap American editions.

to the local publishing industry, happily disregarded foreign opprobrium – even the fulminations of Australian politicians.

Throughout the 19th century, US publishers printed the works of foreign authors without compensation. Even a treaty agreed with Britain at the end of the 19th century allowing for international copyright did not lead to total reciprocity. For most of the 20th century British editions were marked 'Not for sale in the USA'. But the United States remained oblivious to foreign criticism. To British authors and publishers, America loomed darkly across the Atlantic, the great pirate nation. But they were helpless to strike back and quite unable to secure remunerative access to the world's greatest publishing market.

The country's history as a copyright pirate stands in ironic counterpoint to its present status as global copyright enforcer. Today the US threatens economic sanctions against importing nations that fail to institute the copyright standards decreed by the WTO or enforce rights rigorously. Its prosecutorial zeal is not limited to developing nations. The US lists countries on the Special 301 WatchList in a three-tiered hierarchy: countries in tier one may be threatened with trade sanctions and the threat may after a period translate into sanctions. Australia has been listed in tier two on a number of occasions.

A symbolic blow

In the 19th century, few Americans saw practical value in international copyright. American practice, though it had little effect on the fortunes of Australian authors, aroused considerable scorn and criticism in Australia. In 1905, Australian politicians (whose present day successors willingly accept American strictures on the evils of copyright piracy), felt strongly enough to urge a symbolic blow against the great infringer.

Their particular concern with this issue is surprising. In 1905, modern pirated editions of Henry Lawson were appearing on the American market but the problem of American piracy mainly affected British publishers. The idea that the fight would be better left to the British to prosecute does not seem to have crossed the minds of Australian legislators. Far removed from the emanations of disgust crossing the Atlantic, they were outraged at the slight to Britain's commercial interest.

Australians probably suffered more from the commercial practices of British publishers than the production of cheap editions by American publishers. In any case Britain had ratified American practice in an 1891

Treaty between the two nations, with the result that protests made out of loyalty to Britain were meaningless. Politicians may have thought that the US law prejudiced nascent Australian publishers who could not – unlike their larger British counterparts – afford the costs of printing editions in the United States, and so were unable to secure American copyright. But even this argument, although strictly true, was unrealistic.¹³

A number of parliamentarians demanded a stiff response to US practice. They shared a simple aim: let the legislation impose, in the words of William Webster, a Labor MP, “a duty on American books, which would place on American authors a disability equivalent to that now placed on Australian authors who wish to register in America.” Their philosophical reasons were equally succinct. As Webster said, they wanted to “secure fair play in America, and to do justice to Australian authors.”

When Andrew Fisher, later Labor Prime Minister, pointed out that the British authorities were “yearly making representations” to their US counterparts, he received a terse reply from Richard Crouch, a Protectionist MP. “Unfortunately,” said Crouch, “Imperial Governments, for the most part, belong the Manchester school, and they push their free-trade views to such an extent, that they are not prepared to defend British authors and publishers. They are opposed to a policy of retaliation ...”

The anti-Americans were evidently not acquainted the views of Senator De Largie, expressed when the Senate considered the American question a few months earlier. Given the choleric nature of their opinions on the subject this was just as well. His calculations were utilitarian. A country like Australia, he said, with no native publishing industry to speak of, and a constituency of readers, not writers, would be best served by ignoring foreign copyright in the same way as the Americans had done. “I question whether we shall be consulting the public interest by passing such a Bill. For many years the United States

¹³ The greatest threat to the viability of Australian publishers was not restricted access to the US market but the profound imbalance in commercial strength between the under-capitalised local firm and its powerful and long-established British rival. Imperial legislation prohibited Australia from importing US editions direct from America, cutting off access to a large range of cheap books. And Australia itself obligingly ended all hope of access to American editions by banning their importation under the Customs Act.

has had no copyright law in the same sense as this. The result was that in America, books for which £1 would have had to be paid in the United Kingdom could be purchased for about 2s”.¹⁴

The anti-Americans were tilting at windmills. As Littleton Groom, the Protectionist Minister for Home Affairs, pointed out, the 1905 Australian Copyright Bill imposed on foreigners exactly the disability considered to be at the root of the American problem – that of making local printing and publication conditions for the grant of copyright.¹⁵ And a decision to impose penalties on Americans would hurt Australians more than Americans. The anti-Americans were not abashed. When asked whether 80 million Americans would take any notice of the opinion of four million Australians, George Reid, leader of the Free Traders and former Prime Minister, said, “[t]hey might do so. But in any event the four million people have a right to look after themselves in a manly way.”

The anti-Americans failed, but they made their mark as men of independent mind.¹⁶ Many took a robust view of Australia’s standing on a matter of principle, a view similar to that which sparked Britain’s 1875 Royal Commission into copyright – the belief that a self-governing nation (Canada) possessed the right to enact legislation potentially in conflict with imperial legislation. To these assertive spirits, Groom pointed out that penalising Americans in Australian legislation would conflict with the rights of Americans under the *International Copyright Act 1886* and might therefore be *ultra vires*.¹⁷

¹⁴ When Senator Symon reproached De Largie that the US practised piracy he replied that so long as the result was that books were cheap he was not concerned.

¹⁵ Defending the Copyright Bill, Groom referred more than once to British drafting precedents. Hugh Mahon, the Labor Member of Coolgardie burst out: “I do not suppose that all the intelligence in the world reposes in the mind of the British Parliamentary Draftsman.”

¹⁶ H Mahon, Member for Coolgardie, *ibid*, p.7250.

¹⁷ In reply, George Reid was unequivocal about the Commonwealth’s right to exercise unhindered its power under section 52 of the Constitution: “I think that rights granted under an Imperial Statute have nothing to do with an Australian law. The idea that they have requires to be suppressed.” In the Upper House, Senator Givens said section 51(viii) allowed Australia to legislate freely.¹⁷ “I do not hold with the idea that the Commonwealth Act should be subservient in the smallest degree to the Imperial Act.”

Conclusion

A new creation born from demands embodied in a Swiss treaty, and the hectoring of industries, is not one that excites the imagination. Yet the bloodless annexation that created the modern system of copyright law is, in some ways, as significant as the dramatic conquests that made possible the empires of Rome, Spain and Britain. Like the enduring sovereignties of mind and spirit created by those powers, the copyright system is likely to last and to concentrate economic and social power in the hands of the lucky few – the owners of copyright, and the nations that export copyright material.

Examining the history of copyright law is important because knowledge of the historical record allows policymakers to more accurately assess the truth of claims made by the importuners for legislative change. The historian's interpretation of the record is implanted with bias and supposition, yet, even so, the interpreter reveals truths: what relevant people said and did, and the results of their words and deeds.

Copyright law is a hybrid, human, factional creation that emerged from the efforts of individuals, groups, industries, and latterly, nations, to secure economic benefits and to protect themselves from economic harm. Often, the beneficiaries of copyright protection opposed each other. All were self-interested. The law did not result from the plan of legislators who intended to create a balance between the interest of owner and user, or to optimise social welfare by maximising productive incentive. The makers of the copyright system sought private economic advantage, and paid little heed to considerations of social welfare.

Modern explanations of the purpose and function of copyright law are mostly false hypotheses. They justify proprietary rights that entrench the economic advantage of a minority and the social disadvantage of the majority. During the 20th century, copyright discourse mostly reflected the values of owners and concentrated on the necessity of expropriation. As legislation conferred on copyright holders possessory entitlements similar to those enjoyed by the owners of land and tangible things, attitudes to abstract property became increasingly devotional. Those baulking at expropriation were called trespassers, thieves, pirates. Then, as modern developments in liberal economics began to infiltrate government, politicians began to pay some attention to public needs. As the century ended, advocates asked why copyright material, encrypted, locked, foreclosed by law, stayed out of

the reach of those consumers who lacked the means to pay the price fixed by copyright owners.

Politicians, however, did not allow the concern for consumer welfare to disturb official orthodoxy about the purpose of copyright legislation. The copyright law exists, according to most copyright proponents, to guarantee production. Without the incentive supplied by property rights, creators and industries would cease to produce and disseminate copyright material. In the new century, this theory continued to underpin legislative policy. Despite claims that legislation functioned to serve public and not private interest, governments legislated to permit far-reaching digital rights management practices, and restrictive copy protection and technical protection measures. Conversely, laws forbade circumvention of most types of protection.

Copyright owners cast themselves in the role of victims. From 1999 onwards, entertainment conglomerates pursued legal action against a string of peer-to-peer file sharers engaged in unauthorised copying of copyright material.¹⁸ They also revived distribution controls through the use of technology.¹⁹ Although copyright owners did not invariably succeed in litigation, legislative developments pointed to a future in which courts must in most cases find in their favour.

In 2005, the US Supreme Court found that companies supplying peer-to-peer software could be held liable for infringement by users.²⁰ Although observers were divided over the effect of the judgment, some considered that if courts relied on the logic expressed by some judges, copyright owners could ultimately prevent the sale of any technology that makes possible copyright infringement. Legislation inspired by the US copyright industries placed owners in a position to more effectively control the digital reproduction and distribution of copyright material, and the use of copyright products.

Courts and juries struck punitively at individual defendants. Between 2003 and 2007, the Recording Industry Association of America sued

¹⁸ *A&M Records Inc v Napster Inc* 239 F Supp 3d 1004 (9th Cir 2001), *MGM Inc v Grokster Ltd* 545 US 913 (2005), *Arista Records Inc et al v Limewire Inc* filed August 2006, NYDC.

¹⁹ See Brian Fitzgerald, "The Playstation Mod Chip: A Technological Guarantee of the Digital Consumer's Liberty or Copyright Menace/Circumvention Device?", *Media and Arts Law Review* (2005) Vol 10, No 1, 85-98, esp. discussion of the High Court's approach to defining circumvention in *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58.

²⁰ *MGM Inc v Grokster Ltd* 545 US 913 (2005).

26,000 people for the alleged use of music file-sharing software. Jammie Thomas, one of the thousands sued, refused to pay an out-of-court settlement. On 4 October 2007, a federal jury in Minnesota ordered her to pay US\$220,000 to six US record companies for offering songs online through a Kazaa file-sharing account.²¹ The damages awarded were equivalent to about five times Thomas's annual salary.²²

In the developed world, the malign consequences of courts permitting copyright owners to create "copyright jails",²³ or, in other words, to exercise near total control over the dissemination and use of copyright material, are principally, though not wholly, economic. Unconstrained, producers will continue their time-honoured and slothful practices of overcharging and undersupplying, and of raking fees for the non-commercial use of copyright material.

By reviving, in different guises, a device invented to guarantee the profits of British publishers – distribution controls – they will increase profits by restricting the uses of copyright products. Even so, although inefficient production, supply and pricing causes social detriment, most consumers in the developed world can secure access to copyright material by paying a price premium. Though they may be unable to buy products priced too high, or not supplied because producers choose to ignore demand, they will secure access to much of the material they consider necessary to satisfy their needs.

In the less developed world, the would-be consumer is more unfortunate. Price discrimination and supply restrictions (including limited electronic access) can place copyright material out of the reach of those for whom the material may be not merely an optional consumable but a vital source of knowledge and education. When restricted access results in national disadvantage, trade policy that insists on maximum rights for copyright industries creates a type of

²¹ *Virgin Records America Inc et al v Jammie Thomas* USDC (Minn) 2007

²² The judge ruled that the jury could convict Thomas even if not presented with proof that her computer ran file-sharing software at the time record companies detected the infringement, or that she used her computer keyboard at the time of infringement. The judge also advised jury members that the offering of files for downloading determined guilt: if they agreed that the defendant made files available, then in the absence of proof that another person downloaded files, they could find her guilty of file-sharing.

²³ See Brian Fitzgerald, "Copyright vision: copyright jails" in www.onlineopinion.com.au, 26 October 2006: "Let us not build Australia into some sort of copyright jail; let us prosper in the new economy with copyright vision."

moral hazard injurious to nations – on the moral level, to the advantaged trading party, and on the material level, to the disadvantaged party.

The disposition of property rights limits or increases social equality. If the citizens of less developed countries are unable to purchase copyright products or gain access to copyright material, they cannot hope for equality with their counterparts in the developed world. Nor can their nations create the cultures of creative capability that developed nations, the United States in particular, proclaim will result from the spread of intellectual property norms across the globe.

For the less developed world, copyright absolutism and the strict enforcement of IP rights, are the harbingers of permanent disadvantage. The developed world's unwillingness to truly acknowledge the special needs of the less developed countries, manifest in the swift repudiation in the 1960s of proposals for special access rights – involving the creation of something akin to a Third World copyright – entrenches the detriment. Nor are developed nations likely to modify fundamental policy. The economic benefits of copyright are too great. By one measure, the annual output of the US copyright industries is greater in value than the total output of the Australian economy.

The 2004 “Geneva Declaration on the Future of WIPO”, instigated by Argentina and Brazil, enunciates a program for reconsidering WIPO's conventional approach to the development of international intellectual property law. But whether international forums can persuade the international copyright industries to reconsider economic imperatives, or the United States its trade policy assumptions, is doubtful.

Even so, the Age of America, though the creation of copyright industries, spreads catchcries of dissent from within the copyright system. Yearning to be free from the system's constraints, some capitalists demand rights to control and distribute copyright information. The inventors of search engines, self-styled “access” corporations, companies chafing at government control of saleable information, and competitors hostile to others' proprietary rights, clamour for change. Outside the United States, China, and perhaps India, both eager to use communications technology to create national advantage, may destabilise the assumptions of the USTR and international copyright lawmakers.

As the example of the United States shows, dynamic capitalist economies in the primitive stage of development are not friendly to ideas of property that constrains growth. Over time, however, such economies, as they produce goods that can be labelled copyright and sold for profit, learn to like possessory entitlements. Even the concerns of capitalists disgruntled by the limitations of copyright can probably be accommodated. Throughout the 20th century, copyright lawmakers showed a genius for syncretism and the copyright system may find a way to embrace the renegades who demand the freedom to assist the flow of information.

Property relations determine social equality and welfare. Without property, liberal society is impossible. The history of the 20th century testifies grimly to the social misery created by State ownership of productive resources. But concentration of property ownership in private hands produces inequality. The history of copyright is a history of legislators creating rules that allow a few to control valuable subject matter.

Conceptually, the owners of copyright are landlords, controllers of property for a lifetime and 70 years. Those who purchase and use copyright material are renters. Because of the rules of modern copyright law, the landlords' holdings are vast. The renters are many and they pay inordinately high rents. Some – many, if the poorer countries are taken into account – cannot afford the rent, and are excluded, often permanently, from the liberal and productive benefits of access to copyright material.