INTRODUCTORY REMARKS

Professor Brian Fitzgerald [1]

Thank you Attorney General McClelland for opening this conference. Your remarks provide a good starting point for us as we move on over the next day and a half to consider the past, present and future of copyright law and policy.

At the outset let me say a few words about why this Conference, why now and why here?

The conference would not have happened if it was not for the excellent work that Benedict Atkinson produced as part of his LLM thesis at Sydney University and which he subsequently published as a book – *The true history of copyright 1905–2005: the Australian experience* (Sydney University Press). The book in my mind is one of the most important contributions to Australian copyright scholarship. It opened our eyes to the nuances of copyright in this country and did so in a concise and learned way with an interesting narrative.

Ben's hours of researching uncovered some interesting facts and threw light on the roles of a good number of people. When I read Ben's work I saw the name Leslie Zines.

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I also saw the name Adrian Sterling and the name John Gilchrist, and said to myself, "I know those people; I didn't realise that they had such an intimate connection with Australian Copyright Law".

I knew John Gilchrist as an academic at the University of Canberra who had come to do a PhD with me at QUT and Adrian Sterling I had met at the Fordham conference in New York over the years and knew of his connection with Australia. And Leslie Zines I knew as our esteemed professor of constitutional law at the Australian National University. But I did not realise that these people had had such interesting roles to play in Australian copyright history. I said to Ben, "I would like to be able to take your work, and those figures, those personalities, and put them together right back where a lot of this happened, in Canberra, and particularly at Old Parliament House (OPH)."

Ben was just as enthusiastic and with his help we have managed to organise this conference.

We did miss a couple of milestones along the way. We had hoped to run the conference in 2005 on the 100the anniversary of the Copyright Act 1905 (our first federal copyright Act) and having failed to get organised by that date we set our sights on the 40th anniversary of the enactment of the Copyright Act 1968. Again, we did not get it organised in time. We then set our sights on running this event as we are now doing on the 40th anniversary of the commencement of the 1968 Act, which was May 1969. We got there in the end.

The research that Ben undertook, and the venue here at OPH, bring us together in unique circumstances and give us an exciting platform upon which to consider copyright law and policy.

COPYRIGHT FREEDOM

What about the title of the conference – *Copyright Future: Copyright Freedom* – what does it mean? On seeing the flyer for the conference some people said to me, "copyright freedom, that is a little provocative". There is no doubt that copyright and freedom have been viewed as enemies in recent history, and I am not convinced that is the way it should be. I am not convinced that is what copyright law demands. To my mind, copyright ought to be about liberating us from ignorance, enriching our culture and therefore the idea of copyright and freedom existing side by side as partners is a natural fit not an aberration. The debates we have had over the last 10 years have certainly pitched copyright and freedom as the opposing ends of a fiercely contested spectrum. The time is right – right now – to put these two words together, copyright and freedom, and see how we can move forward.

As a focal point for our discussion I suggest we might consider the following as a fundamental principle or underlying purpose of copyright law: "Copyright should underpin freedom by promoting the optimal flow and dissemination of knowledge." And then ask how copyright law might facilitate this goal in the future? This is without doubt a significant challenge. In recent times we have seen some interesting developments which I would like to highlight. They show how people and institutions are giving definition to the notion of "copyright freedom" in the digital era.

IceTV

Let me start with the High Court of Australia and the recent case of *IceTV*[2] in which the High Court held that it was not an infringement for *IceTV* to copy the time and title aspects of a television program produced by Channel 9 and to use that in their electronic program guide (EPG). As lawyers will say it is a complex case and there are complex facts in issue but amidst the many judgements and arguments made in the case we get the message. The High Court says, in effect, that where there is a "merger", a term of art used in US copyright law, of content and expression, so that you can really only express something – such as the time and title of the television program – in one way, it's very difficult to say to someone downstream, "you should not be able to re-use the information." And that meets with common sense. Think of people in everyday life creating their own guides – whether it is in a retirement village or a mining canteen or wherever – for their community from an assortment of TV programs; creating their own programs and then being told, "Oh well, look sorry, that's an infringement".

Now, people would say to me "that's technically an infringement but it is tolerated use" and the whole concept of tolerated use is an interesting one. Some American academics, particularly Professor Tim Wu, say there is a lot of copying that goes on out there that owners are not worried about, or they tolerate because it is in their best interests.[3] There is no indication in *IceTV* that the High Court was saying that copying time and title information was tolerated use. To the contrary the Court is saying that this is unremunerated use, a use that you are able to freely make of this particular information. While the High Court has not expressly endorsed the merger doctrine recognised in the United States it goes very close when one considers the essence of what the High Court is saying in the two judgments in the *IceTV* case: "if you can only say something in one way, there is a real question about infringement and proving infringement".

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[2] *IceTV Pty Limited v Nine Network Australia Pty Ltd* [2009] HCA 14.

[3] Tim Wu, "Tolerated Use" (2008) *Columbia Law and Economics Working Paper No 333* papers.ssrn.com/sol3/papers.cfm?abstract_id=1132247

IceTV is an articulation of what I might call copyright freedom. At the level of doctrine the High Court is providing the contours of an Australian version of the "merger doctrine". The idea that certain parts of "intellectual infrastructure"[4] must be able to be reused without fear of infringing otherwise the dissemination (and innovation) rationale of copyright is stifled. At a deeper level the High Court hints at but does not expound on its theory of copyright. Ben Atkinson has reminded me of the seminal work of Lyman Ray Patterson in this area[5] and Sam Ricketson has written on this topic many years ago[6] – the idea that copyright is designed to protect against unfair competition (which I would extrapolate to mean) not remuneration for every conceivable use. The scope of remunerable use is a key consideration in evaluating the level of copyright freedom.

GOOGLE BOOK SETTLEMENT

The other development that I find fascinating is the Google Book Settlement.[7] Love it or hate it this event is revolutionising copyright law as we know it and will give us insights as to how things might work in the future. My colleague Larry Lessig has already expressed his concerns with the operation of the proposed Google Books Settlement (GBS). I agree that the GBS needs more work but let us not overlook some of the key aspects of it.

Lessig has been famous for the mantra that copyright is a permission based concept, that is, you cannot do anything without the copyright owner's permission. Google, a very big, powerful company that has entered the copyright politics arena in the last few years, is, starting to change the way we think about copyright and that idea of a permissions culture. In undertaking the Google Library Project[8], the company took

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[4] Brett M Frischmann, *An Economic Theory of Economic and Commons Management* 89 Minn LR 917 (2005); Peter Lee, 'The Evolution of Intellectual Infrastructure', *Washington Law Review,* Vol 83, 2008.

[5] L Ray Patterson, "Free Speech, Copyright, and Fair Use", *Vanderbilt Law Review*, Jan 1987, Vol 40 No 1

[6] S Ricketson, "Reaping without Sowing: Unfair Competition and Intellectual Property Rights in Anglo-Australian Law" [1984] UNSW Law Journal 1

[7] In 2005, the Authors' Guild and American Association of Publishers launched an action against Google for breach of copyright. The action followed commencement of Google's Library Project to scan books in the collections of five of the world's great libraries. In 2008, the parties agreed a preliminary settlement creating a compensation fund of $125million for authors and publishers and creating a books rights registry. However, the settlement fairness hearing has involved a large number of interested parties speaking for and against the settlement, and the dispute continues.

[8] The project began in 2004. Initially, Google agreed with the libraries of Oxford, Harvard, Michigan and Stanford universities, and the New York Public Library, to digitise the books in

that approach that "we do not need to seek permission; we see something that's innovative, we see something that we can make money out of, we see a new opportunity, we're going to go and do it". Then the copyright owners say, "No, we are going to sue you, you do not have our permission". Google all along has maintained that it is engaging in "fair use" and does not need permission to undertake this activity. Litigation ensues and we now have a proposed settlement.

If we stand back and look at this case study we start to see that we have gone beyond a permission based notion of copyright to a benefit-share model of copyright where Google have said, "we are going to do this, we started out to do this, and we will still continue to do this, but what we are happy to enter a commercial deal with you to share the benefits". People can debate how good or bad that commercial deal is, but it seems to me that the Google Book Settlement represents a fundamental shift in the way we are going to start thinking about copyright in the future. More and more, as I would advocate, and people will no doubt disagree with me, we will move towards an access-based model, rather than a control-based model.

To make the point more succinctly let me say this. Google as a key player in copyright politics has moved the goal posts somewhat. This is where the notion of copyright freedom finds further articulation. Google in this case are in a battle and leading the charge on who controls the redistribution of copyright material. Tradition tells us control is held by the copyright owner – the control model. The digital networks of the 21st century suggest access is the key to dissemination, innovation and wealth in the 21st century. As business evolves to meet this new dynamic one anticipates the need for copyright to be able to accommodate widespread dissemination practices. This is another aspect of copyright freedom.

THE RIGHT TO NETWORK *VS* THE RIGHT TO PRIVATE PROPERTY

The last thing that I would like to mention in terms of this idea of copyright freedom is the idea of the network and innovation in the network. The network, as we call it in the broad sense of the word, is crucial, and if we are not careful in the way we strategise about litigation, and the way we position our business models, if the network is made slower and less effective, we are going to harm the potential for innovation, and the potential for creativity. There is a real question mark over the impact we are going to have on networks and innovation.

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their collections, in order to facilitate public electronic access to the five collections. Fifteen other university, or university-affiliated, libraries have joined the project.

Many people have made this argument over the last ten years; that when we think about copyright, and when we think about regulation in general around the network, we have to appreciate that there is a fundamental interest not only in private property, but also in the right to network, if you like, the right to be able to use the one of the most incredible networks that we have ever possessed, to be able to innovate, to be able to create, and to be able to do new things.

It is very difficult to work out how we put copyright together with instantaneous worldwide communication and viral distribution and all of the affordances of Web 2.0, but that is one of the great challenges that lie ahead. One of the exciting things about bringing copyright and freedom together (again) is to show us, and focus our attention on what might be able to be done.

THE CULTURE OF THE LAWYERS

Copyright freedom has a broader dimension and an interesting dynamic to navigate.

In my mind copyright and freedom are metaphors for the established and the new wave of copyright lawyers (respectively) and we could go even further and say for business or more broadly social interaction.

Let me stick to the lawyers to make my point.

We have a proud tradition worldwide but especially in Australia of scholars and industry leaders who have spent over 40 years building a tremendous edifice that we know today as copyright. These people spent years and years building a legal framework that can support creative people and creative industries, and they are very proud of it.

I have seen this most recently as part of a copyright reform group – Copyright Principles Project – that has been convened by Professor Pam Samuelson of the University of California, Berkeley. Over a three year period twenty people have come together from "all sides of the fence" to make proposals about the future of copyright law. Lawyers from software companies, practice, film studios, and libraries joined with academics from the leading law schools.. When we meet I see an interesting dynamic. We have the people who built the structure, the people who really see this as their craft, and are very proud of it, and to some extent, they represent a copyright tradition. But on the other hand, we have a brash new generation of people who come forward and say, "you built a great structure, but guess what it's wrong, it's got these problems with it", and the other side bristles, but acknowledges, "you know, I think we can do it better". If metaphors help one side represents "copyright" as we it know it today and the other side represents the call for "freedom" in the network era. Now how can we – like Pam has done – get those two groups together more often and more productively

because that is the future of the copyright. I hope we have done that with this conference to some extent.

Take time to listen to and appreciate what is being said over the next two days. We have an interesting line up of speakers and a tremendous group of participants. The venue is remarkable.

Thank you to all who have made this event possible.