

COPYRIGHT FREEDOM: CONCLUDING REMARKS

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In organising this conference it was my aim to put focus on the way in which copyright law might be used to incentivize both creativity and dissemination. In itself that is not such a revolutionary ideal. Creativity and dissemination have been the key components of copyright law since the Statute of Anne was first enacted in 1710.¹

Yet copyright law and the freedom to disseminate have become enemies, if not in the last one hundred years certainly in the last ten years. The notion of copyright ownership as a sovereign right to control dissemination has become a core part of copyright law subject to limitations, exceptions and statutory licences. But in a world where the networked environment is throwing up endless dissemination possibilities many of which are beyond the reach and comprehension of the copyright owner the sovereign right to control seems out of place and potentially damaging at a social and economic level.

One starts to wonder whether we can decouple creation/production from dissemination/use and imagine a digital utopia in which anyone can lawfully (re)distribute anything on the proviso that adequate revenues flow back to the appropriate parties. The Google Book Settlement for all its flaws is leading us in this direction.² Google in setting up the project challenged the control of the copyright owners in the name of more widespread dissemination and ultimately the settlement provides for a flow of revenue, a fair share of which did not exist before.

While the Google Book Settlement is evidence that new possibilities are not too far off, the pace at which the established industries have embraced the new technologies is slow and unacceptable. In this regard it is worth noting a recent file-sharing case in the US in

¹ The Statute of Anne (1710) was stated to be an “Act for the encouragement of learning ...” See also *Harper & Row, Publishers, Incorporated, et al. v. Nation Enterprises, et al.* 471 US 539 (1985).

² See generally: “Google Book Search Settlement Agreement” in *Wikipedia* en.wikipedia.org/wiki/Google_Book_Search_Settlement_Agreement.

which Harvard law professor Charles Nesson somewhat controversially sought to argue the fair use defence.

While rejecting the notion that peer to peer file sharing was covered by fair use, Judge Nancy Gertner, presiding in the case, explained that, “*a defendant who used the new file-sharing networks in the technological interregnum before digital media could be purchased legally, but who later shifted to paid outlets, might ... be able to rely on the defense.*”³ This reasoning raises some interesting questions.

To what extent are the copyright owners obligated to engage with new technologies (to exploit the affordances of Web 2.0) in going about their business? Is it fair for copyright owners to dumb down dissemination to the point of inefficiency for their own private (yet at times sub-optimal) gain? Followers of the sovereign right to control ethos will argue that the copyright owner can do what they wish – they are the ruler of their manor.

Yet, as Boyle, and others, have highlighted through analogies with environmental law,⁴ our legal system no longer accepts the unfettered exercise of real property rights in the face of negative externalities. Merely owning a factory no longer suggests a sovereign right to pollute the air or the waterway. To what extent can copyright owners limit or stifle the freedom to disseminate via digital networks by refusing to engage with it?

One hope is that the next ten years will see a period of uninhibited collaboration between the key stakeholders. How can we get the publishing, recording and film industries to join with the whiz kids of the Internet era to provide an environment where creativity can be disseminated to the broadest possible audience in the most efficient and effective manner? And what role for copyright?

It is hoped that market forces will draw these key actors together, but more could be needed. International stakeholder forums (convened by WIPO or the WTO) should be considered. Another approach would be to reconsider the role copyright law can play in incentivizing dissemination. Should copyright owners be obligated to engage more with new technology and if so how could copyright law accommodate such a concept? Nesson saw it as fitting in with the notion of an exception or a defence while others might see it as being raised in a discussion about the scope of the “exclusivity” of the

³ Memo of Justice Nancy Gertner in the case: *Sony BMG Music Entertainment v Tenenbaum* (2009) U.S. Dist Lexis 112845 (7 December 2009). pacer.mad.uscourts.gov/dc/cgi-bin/recentops.pl?filename=gertner/pdf/tenenbaumfairusedec7th09finalng.pdf at [8].

⁴ J. Boyle, “A Politics of Intellectual Property: Environmentalism For the Net?” (1997) 47 *Duke Law Journal* 87, www.law.duke.edu/boylesite/Intprop.htm Cf. M Geist, “Brazil’s Approach on Anti-Circumvention: Penalties For Hindering Fair Dealing” 9 July 2010 www.michaelgeist.ca/content/view/5180/125/.

owner's right.⁵ On the other hand should intermediaries be obligated to work with owners to find solutions? If necessary this could entail restructuring secondary liability rules.

In an era where information flow is seen as a key ingredient to social and economic life⁶ we need to shape a copyright law that accommodates social practices and builds prosperity on the back of dissemination. Taken slightly out of context the words of Brett Cottle Head of the Australian Performing Rights Authority (APRA) are apt to describe the sentiment: "It's not an issue of control or permission, it's an issue of fair payment for use."⁷

⁵ Competition or antitrust law also has the potential to play a role here: B. Fitzgerald, "Digital Property: The Ultimate Boundary?"(2001) 7 *Roger Williams University Law Journal* 47 eprints.qut.edu.au/7406/1/DigitalPropertyRWUJournalFinalFeb2002.pdf, as might taxation law.

⁶ See generally K. Dopfer and J Potts, *The General Theory of Economic Evolution* (2008) Routledge UK.

⁷ ABC Radio National, *Background Briefing: Internet Piracy* www.abc.net.au/rn/backgroundbriefing/stories/2009/2726710.htm .

A second order issue will be what "use" is and should be remunerable? Cf. *Review of the Intellectual Property Legislation under the Competition Principles Agreement*, AGPS, 2000 (Ergas Report) at 5: 'Balancing between incentives to invest in innovation on one hand, and for efficient diffusion of innovation on the other, is a central, and perhaps the crucial, element in the design of intellectual property laws.'; L Ray Patterson, 'Free Speech, Copyright, and Fair Use', *Vanderbilt Law Review*, Jan 1987, Vol 40 No 1.