

Copyright, Culture and Private Power

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ABSTRACT *This article considers how copyright serves concepts of culture and development. It suggests that copyright's role in relation to culture is best characterised as instrumental rather than fundamental. An indicator of this instrumental approach is the commodification of the copyright interest. The article argues that this commodification has been used by corporate interests to build an edifice of private power. The end result of this private power over cultural output is the global homogenisation of that output.*

Keywords: copynght, corporate power, culture, development, trade.

Introduction

The theme of this article is a consideration of the extent to which copyright is about 'culture'¹ and the extent to which it is about matters which might be loosely grouped around notions of trade and economics. The article does not attempt to argue that these two themes are necessarily incompatible within a body of law serving the function of copyright law.² What the article does try to do is to show that the trade-related aspects of the Anglo-Saxon model of copyright law have facilitated the build-up of significant bases of private power over cultural output and that these bases of private power now threaten not just the cultural development function of copyright but the very idea of cultural development.

Culture and Development

The utilitarian/development justification for copyright is overwhelmingly familiar. A classic example appears in the Preface to the World Intellectual Property Organisation's *Guide to the Berne Convention for the Protection of Literary and Artistic Works*,³ which states:

Copyright, for its part, constitutes an essential element in the development process. Experience has shown that the enrichment of the national cultural heritage depends directly on the level of protection afforded to literary and artistic works. The higher the level, the greater the encouragement for authors to create; the greater the number of a country's intellectual creations, the higher its renown; the greater the number of productions in literature and the arts, the more numerous their auxiliaries in the book, record and entertainment industries; and indeed, in the final analysis, encouragement of intellectual creation is one of the basic prerequisites of all social, economic and cultural development.

The general idea, of course, is that the grant of copyright encourages the production of cultural works which is essential to the development process. The articulation of this

notion has now reached the status of a mantra and, befitting such a status, is chanted more often than analysed. Analyses which do exist tend to raise as many questions about this utilitarian rationale as they do about its competing (or accompanying—depending on who you listen to)⁴ natural rights rationale. These questions are not just about the efficacy of such rationales as a justification for the existence of copyright law,⁵ but also about the extent to which the content of copyright law appears to relate to them.⁶

Leaving aside for the moment the contribution of copyright law, something which is interesting about the utilitarian rationale is its assertion of a connection between the promotion of culture and the process of development. This connection has recently been subscribed to, in a context not directly related to copyright law, by the UNESCO World Commission on Culture and Development in its Report, *Our Creative Diversity*.⁷ In his Foreword the President of the Commission, Javier Perez de Cuellar, noted that:

New questions needed to be asked and old ones posed anew. What are the cultural and socio-cultural factors that affect development? What is the cultural impact of social and economic development? How are cultures and models of development related to one another? How can valuable elements of a traditional culture be combined with modernization? What are the cultural dimensions of individual and collective well-being?⁸

The Report aims to lay the groundwork for looking at these sorts of questions.⁹ In order to do this it had to grapple to some extent with the meaning of expressions like 'culture' and 'development'. Generally, the Report takes a broad approach to the definition of culture embracing (but not limited to) 'creativity in politics and policy-making, in technology, in industry and commerce, in education, in the arts, and in social and community development'.¹⁰ While it states that '[o]ur primary objective must be to extend the focus of 'culture' beyond the arts and heritage', it acknowledges that addressing the problems of cultural policy in relation to these areas is a good start. This is perhaps because arts and heritage are some of the more easily definable parts of the notion of culture. To the extent that these issues are being considered against the background of the role of copyright law, it seems appropriate to focus on that part of the definition of culture which concerns itself with cultural output in the form of the arts.

In relating this definition of culture to the process of development, the Report contrasts two concepts of development. In the first 'development is a process of economic growth, a rapid and sustained expansion of production, productivity and income per head (sometimes qualified by an insistence on a wide spread of the benefits of this growth)'.¹¹ In the second and alternative concept 'development is seen as a process that enhances the effective freedom of the people involved to pursue whatever they have reason to value'.¹² Economics is clearly what matters in the first concept. The sort of things which matter according to the second concept are:

...longevity, good health, adequate nutrition, education and access to the world's stock of knowledge, absence of gender-based inequality, political and social freedoms, autonomy, access to power, the right to participate in the cultural life of the community and in important decisions affecting the life and work of the citizens.¹³

The role of culture differs in relation to these two concepts of development. In relation to the first concept culture is said to be instrumental, whereas its relationship to the second concept is fundamental.

The Report acknowledges that the instrumental approach to culture is important for the very reason that economic growth is regarded as important. However, the Report notes that the economic approach is limited. Various 'development disasters' can be laid at the door of the economic approach, such as environmental degradation and the

introduction of oppressive authoritarian laws.¹⁴ Further, economic development cannot be regarded having turned the industrialised world into a nirvana, as is demonstrated by social deprivation and high rates of institutionalised unemployment.¹⁵ In rejecting the economic approach to development in favour of the alternative freedom of choice approach, the Report did not perceive itself as having left economics behind, but rather as having transcended it.¹⁶ The rejection of an instrumental view of culture in favour of a fundamental one means that culture is seen as not being just about the production of a saleable commodity, but rather as having a value in itself. According to this approach education, for example, is not seen as being merely about skills training, building up the industrial base and making money, rather it is seen as intrinsically valuable while also being capable of delivering economic benefits.

What are the consequences of embracing the wide freedom of choice approach to development and its concomitant fundamental approach to culture? One consequence obviously is that we value cultural output as an end in itself. A commitment to multiculturalism is also an important consequence.¹⁷ This commitment goes hand in hand with the need to control the exercise of power by way of cultural domination or hegemony. It seems reasonable to argue, as the Report does, that the exercising of the power which comes with cultural domination cuts down both collective and individual freedoms. Not only does this mean that the development goal of freedom of choice is not reached, it also puts that goal exponentially further beyond reach by discouraging creativity and diversity.¹⁸

The Contribution of Copyright

The extent to which our Anglo-Saxon approach to matters of development and culture regards culture as fundamental rather than instrumental is open to question. At the time of the Commonwealth Government's *Creative Nation* Report,¹⁹ commentators remarked on the way in which that Report 'weaves together art, technological innovation and economic opportunities'.²⁰ If the approach of copyright law to what might be described as cultural output is considered as being relevant to determining our mindset on the role of culture in society then it is very likely that we are flailing uncertainly between the instrumental and fundamental approaches. This is because the law of copyright seems to be caught in some sort of perpetual dilemma which mirrors the instrumental/fundamental division. Is copyright law about encouraging creativity and protecting the output of that creativity or is it about stimulating commercial exploitation of creative/cultural output? If it is about the former then it is likely that it bolsters the fundamental role of the aspects of culture to which it relates. If, on the other hand, it is about the latter then it is placing cultural output in an instrumental role.

It does not seem to be controversial to suggest that it is difficult, at least at first blush, to tell just what copyright is about in this context. Refreshingly, this does not really seem to have too much to do with the question of whether one opts for the natural rights rationale or the public benefit rationale.²¹ While the natural rights rationale seems to line up with a fundamental approach to the role of culture, the public benefit rationale is capable of serving either a fundamental or an instrumental approach. The position of the public benefit rationale all depends upon how one approaches the concept of development. If the notion of development in the public benefit rationale means economic development then the rationale appears to be subscribing to an instrumental approach, if it means something broader then the rationale's approach to cultural product must be a more fundamental one. It is worth noting in this respect that the passage from WIPO's *Guide to the Berne Convention*, quoted earlier, refers to 'social, economic and cultural

development'—although it may be that 'social' and 'cultural' have been included in order to reflect the position in countries which have adopted the *droit d'auteur* model of copyright law.

How do we go about trying to tell whether our model of copyright law takes a fundamental or instrumental approach to cultural output? A historical perspective might, at first blush, suggest the former. The transition from the book licensing system operating in Tudor England, which conferred extensive power on the Company of Stationers, to the Copyright Act of 1709 aimed ostensibly to restrike the balance of power between authors and publishers.²² The reality seems to have been that the Act was intended to resolve the conflict which erupted between the members of the Company of Stationers and the provincial booksellers after the abandonment of the system of press licensing.²³ Certainly in a number of respects the Act codified longstanding practices involving the Company of Stationers.²⁴ In any case, even if it can be argued that the Act was primarily about adjusting the balance between publishers and authors, it is arguable that any balance which was achieved has been gradually eroded.

Copyright and Culture

Rhetorically copyright (and intellectual property as a whole) has associated itself with concepts of genius, creativity and culture.²⁵ A closer look, however, reveals that copyright has often failed these concepts. An example of this at the general level might be the very low threshold of the 'originality' requirement in relation to literary, dramatic, musical, and artistic works.²⁶ It is relatively clear that the content of this requirement²⁷ derived from concerns that copyright should confer a monopoly over the form of rather than the ideas in a work and accordingly the notion of originality attached itself to differences in form.²⁸ Nevertheless, copyright law has been left in a situation where it grants monopoly protection to works which have little to do with creativity.

Copyright law has also been guilty of considerable arrogance in its failure to take heed of the opinions and expertise of those supposedly most intimately affected by its operation, the creative artists. (This at least shows that it is consistent with many other areas of law.) The visual artist J. S. G. Boggs uses the famous Koons' 'String of Puppies' case²⁹ as one example of the law's failure to understand art.³⁰ As is well known, Jeff Koons used an image in a photograph of a woman holding seven puppies as the basis of a sculpture. He was successfully pursued for copyright infringement by the photographer on the basis that the sculpture was a three-dimensional copy of a two-dimensional work of art. One of Boggs' objections to this case is copyright law's failure to understand the fact that sculpture and photography are separate disciplines. Accordingly, it is false to treat them as though they were the same thing under the broad heading of artistic works. To Boggs, a visual artist, this treatment is just as meaningless as saying that a written description of the photograph is a breach of the photographer's copyright. To copyright lawyers the association of two pieces of visual art under the rubric of 'artistic works' may not seem so odd, but arguably this is because not knowing any better we have been sucked in by copyright law's system of illusory association.³¹ Perhaps it is time we listened just a little to the artists.

The 'String of Puppies' case also illustrates another way in which copyright fails in a fundamental approach to culture. Boggs in fact described Koons' sculpture as being a 'response' to the photograph.³² The idea of the sculpture as a 'response' was mirrored in Koons' legal argument that he was entitled to the protection of the fair use doctrine on the basis that his work was a parody for the purpose of criticising the banality of popular cultural images.³³ The fact that the fair use doctrine did not entitle Koons to

engage in an act of cultural pastiche and parody is of concern if one thinks that copyright law should be about the promotion of cultural activity and diversity at the fundamental level. It is of serious concern if one subscribes to the post-modernist view that modern cultural products are all about pastiche or parody or both,³⁴ whether consciously referential or not. What is happening here is that copyright is failing to secure what Peter Drahos has called 'the intellectual commons'.³⁵ This is because one way of safeguarding the intellectual commons is by strong fair dealing/fair use laws.³⁶ A diverse and vigorous cultural development of the sort envisaged by, for example, the World Commission on Culture and Development cannot occur without safeguarding the intellectual commons.

A final example of copyright's failure to address itself to culture as a fundamental value relates to the issues of indigenous cultural property and folkloric works. As already noted, the Report of the World Commission on Culture and Development is very much about the development of pluralistic culture. The Report explicitly ties this to the importance of securing the cultural rights of minorities and indigenous peoples. The problems in protecting indigenous cultural works under Australian copyright law are now well known. They include, in particular, difficulties with concepts of group ownership, issues about duration of rights and about the protection of distinctive styles of work.³⁷ Some of these issues are on their way to being addressed in Australia. Specifically, there are legislative proposals in relation to the protection of Aboriginal cultural works.³⁸ More generally, the introduction of a moral rights regime will address some of the problems in this area.³⁹ Nevertheless, a rather unsavoury odour hangs around copyright law as a consequence of its problems in relation to protection of indigenous cultural works. If the enhancement of indigenous culture is tied in with the process of development then what does copyright law's difficulty in adapting to protect indigenous cultural output say about its relationship with culture and development generally?

Copyright and Trade

Copyright may have failed culture at a fundamental level, however its role in relation to culture at an instrumental level has been much more successful. That is, copyright has been well used as an instrument for promoting trade in the cultural output which comes within its purview. The best example of this is probably the negotiation and conclusion of the TRIPs Agreement. The conclusion of the Agreement was, of course, driven by the United States. As Michael Blakeney has shown,⁴⁰ the US used two tools, in particular, to drive the negotiations. First, it took on the burden of convincing the GATT Council that intellectual property rights were relevant to GATT. As a result, in 1983 and 1984 evidence was submitted to Congressional hearings by US trade associations on the economic loss which the members of those associations suffered internationally as a consequence of the nonenforcement or absence of intellectual property laws.⁴¹ The second tool used by the US to drive the TRIPs process was the amendment in 1984 to section 301 of the Trade Act of 1974 to make intellectual property protection explicitly actionable under section 301.⁴² This was followed by the introduction in the Omnibus Trade and Competitiveness Act of 1988 of 'Special 301', enabling the US Trade Representative to put countries which failed to protect US intellectual property on a watch-list with a view to investigation and possible trade retaliation.⁴³

So if we are looking for rhetoric about copyright and trade we know where to find plenty of it. Of course, in this case rhetoric led to something more concrete in the form of the TRIPs Agreement itself. This Agreement might be argued to be the central normative force in global copyright law.⁴⁴ For those who would want to see copyright bolstering the fundamental rather than the instrumental role of culture, some comfort

might be taken from the fact that the Agreement refers to the trade-related aspects of intellectual property and thereby suggests that there may be some other aspects—but it is cold comfort. The truth is that, at least in the Anglo-Saxon model of copyright law, we had already gone a long way down the instrumental/trade-related road before the US did us the favour of bringing it all out into the open. We have done this by including within the exclusive rights attaching to copyright provisions which relate to the commercial exploitation of copyright while at the same time making copyright a completely alienable property interest.⁴⁵ In the global environment the particular exclusive rights upon which in this respect focus should be fixed are the commercial distribution rights, especially those which give the copyright holder control over imports⁴⁶ and rental rights.⁴⁷ We have, so far, avoided the inclusion in the main body of the Berne Convention much in the way of distribution rights as part of the exclusive rights of the copyright owner. This, however, does not seem to count for much when stronger distribution rights are contained in the TRIPs Agreement,⁴⁸ the 1996 WIPO Treaties,⁴⁹ and in the domestic legislation of many countries.

Unless we regard copyright as being just about trade or economics, then there is no overwhelmingly compelling reason why the integrity of copyright law requires these stronger forms of rights commodification. It may even be that copyright as a body of law would have greater integrity absent commodification.⁵⁰ Whether some degree of commodification is essential to the integrity of copyright law or not, the point is that we have allowed the process of commodification to take over copyright without really asking what the costs and consequences of this commodification are.

The Acquisition of Private Power

A consequence of commodification of copyright is the way in which it permits the build-up of private power over cultural output. In a nutshell, commodifiers are able to use distribution rights in order to isolate and control national markets for certain types of cultural product.⁵¹ However, the way in which the distribution rights attaching to copyright might be used by a multinational to carve up the market is a small part of a much bigger story about the way in which commodification can lead to global domination of the market for cultural output. The capacity to achieve a position of global power is a combination of the international nature of intellectual property rights, the fact that many of the corporations owning the rights operate on a multinational level, and the fact that many of the media and entertainment corporations are conglomerates which display a high degree of horizontal integration by operating in a number of different areas of cultural output. Some are also vertically integrated with a high degree of control over the entire distribution process. A local example of this type of power is the power which six international entertainment corporations appear to hold over the Australian market for contemporary music. The companies in question are CBS (Sony), WEA (Time Warner), Polygram (NV Philips), EMI (Thorn EMI), BMG (Bertelmanns Music Group) and Festival (News Limited).⁵² All of these corporations operate as international conglomerates, some with substantial media interests, and between them they control 70% of the world's music market.⁵³ Furthermore, in Australia they also have control of the distribution system—EMI and CBS do this by virtue of a joint venture, as do BMG and WEA; Polygram and Festival have subsidiaries which act as their distributors.⁵⁴ The specific copyright tool which they have used to orchestrate their oligopoly is their control over the import of works to which they own the copyright.⁵⁵

The position of power which is enjoyed by media and entertainment corporations such as these is self-reinforcing. By having such considerable power they are able to

acquire more. This is a consequence of the interdependence in most western economies between the public and private sector. Essentially, this interdependence is a result of the fact that the economic health of nations is dependent on the success of the corporate sector.⁵⁶ This puts corporations in the position to demand of government that it take steps to protect their interests and thereby to reinforce their positions of private power. It is important in this context not to forget that it was the US corporate sector that the US government was seeking to protect when it engaged in its various strategies to force the progress of the TRIPs Agreement.⁵⁷ Not only has the US government protected the media and entertainment corporate sector, its actions have allowed the sector to substantially increase their stranglehold over international cultural output protected by copyright.⁵⁸ The fact that the government is so willing to act in the interests of the corporate sector—even if for its own reasons—shows the power which the sector wields.⁵⁹ It is not unreasonable to suggest that the power of the private sector compares with that of government (if not exceeds it).⁶⁰ One significant difference is that the power of government, at least in democratic societies, is legitimated through accountability mechanisms such as elections and the rules of administrative law.⁶¹ The private sector has a free hand to use power in a way that government can only dream about.

The Significance of Private Power

How does this copyright-facilitated aggregation of private power affect society and its development process? Returning, first, to the example of the contemporary music industry and the way it operates in Australia, according to Ann Capling, even though the big six corporations control 70% of the global market for music, they only release around 20% of this music in Australia. Not only does this mean that these corporations act as a cultural filter, controlling what we can hear, it also means that the music offered for retail sale has ‘about as much cultural diversity as a Macdonald’s menu’.⁶²

The domination by these global entertainment corporations of the Australian market facilitates the globalisation of a mass culture of mediocrity in a number of ways. It ensures, for instance, the prevalence of the top sellers to the detriment of other less mainstream overseas music. ... The import restrictions also make it much more difficult for local Australian performers and composers to get airplay within Australia. Pop and rock account for close to ninety per cent of the Australian music market and, with the exception of a handful of Australian acts which have won an international following, this market is overwhelmingly dominated by North American and British artists.⁶³

And, of course, Australia is hardly likely to be the only market where this happens. The processes which produce cultural homogeneity and mediocrity are global.⁶⁴

It is not just the music industry where the corporate sector controls what filters through to the rest of us. The economic power of publishers has, in its wake, conferred a broader power on publishers to determine what sort of things we are likely to read. Richard Abel is eloquent on this topic:

Book publishers decide which manuscripts to accept; form contracts dictate terms to all but best-selling authors; editors ‘suggest’ changes; and marketing departments decide price, distribution and promotion. Sometimes publishers go further. ... The Japanese publisher Hayakawa withdrew a translation of *The Enigma of Japanese Power* because the Dutch author had written that the Burakumin Liberation League ‘has developed a method of self-assertion through ‘denunciation’ sessions with people and organizations it decides are guilty of discrimination’. Anticipating feminist

criticism, Simon and Schuster cancelled publication of Bret Easton Ellis's *American Psycho* a month before it was to appear.⁶⁵

Ironically, in attempting to publish the monograph, *Speech and Respect*, the text of his Hamlyn Lectures, in which the above passage appears, Abel himself was to feel the brunt of his publisher's attempt at censorship.⁶⁶ He has subsequently identified this as an attempted exercise of private power to control speech.⁶⁷

So the media, entertainment and publishing moguls control and homogenise what we get to see, hear and read. There is more, however. The sector also asserts control over the use of material assumed by most people to be in the intellectual commons. The irony is that the reason people assume such material to be in the commons is that the copyright owners have force-fed it to us as receivers of the mass culture disseminated by the mass media. The more powerful the copyright owner the more dominant the cultural image, but the more likely that the copyright owner will seek to protect the cultural power of the image through copyright enforcement.⁶⁸ The result is that not only are individuals not able to use, develop or reflect upon dominant cultural images, they are also unable to challenge them by subverting them.⁶⁹ This is certainly unlikely to reduce the power of those who own these images.

This seems to be a good point at which to return to the World Commission on Development and Culture's concept of development as being about the enhancement of effective freedom of choice of individuals. As may be recalled, some of things which matter to this concept of development are 'access to the world's stock of knowledge, ... access to power, the right to participate in the cultural life of the community'.⁷⁰ The edifice of private power which has been built upon a copyright law which seems to care more about money than about the intrinsic worth of the cultural product it is protecting has deprived us all to some extent of the benefits of this type of development. 'The private appropriation of the public realm of cultural artifacts restricts and controls the moves that can be made therein by the rest of us.'⁷¹ It seems worth noting briefly that increases in duration of copyright protection, such as the recent increase in the European Union countries,⁷² are hardly helping.

Things look no better if we focus on the World Commission on Development and Culture's fundamental approach to culture, which is the handmaiden of its wide concept of development. As previously noted, a fundamental approach to culture means valuing cultural output as an end in itself, a commitment to diversity and multiculturalism, and the control of power in the form of cultural domination.⁷³ Not only has copyright failed to effect these very things in relation to cultural output, it is arguable that it has effected their opposite. In other words, copyright law's approach to culture is not fundamentalist. Since copyright law dictates the treatment of at least some types of cultural product, its failure to take a fundamentalist approach to culture may be regarded as a significant reason for our failure to achieve development in the wide sense. What is more the unaccountable and self-reinforcing power of the media and entertainment conglomerates means that this process of development failure is accelerating.

Conclusion: What Do We Do Now?

The private power of the corporate sector—and in the context of this article, the entertainment and media corporations—is a fact of life as we know it. At this stage in the history of the industrialised world there is little that can be done to break it down. In any case it is likely that any attempt to do so would cause massive economic and social destabilisation. There are two things, in general, that might be more sensibly done. One

is to remove some of the props on which the power rests so that it loses some of its ability to self-perpetuate and grow exponentially. The other is to look for ways of making private power more publicly accountable.

As this article has attempted to argue, the excessive commodification of copyright has been one of the foundations of the power of the media and entertainment sector. Other aspects of copyright law which tend to bolster this power are the weakness of the fair use/fair dealing exemptions, especially in relation to parody, and the duration of commodified copyright. All of these are issues that fall within the direct purview of intellectual property academics, practitioners and policy makers. It is also important that we start thinking across the artificial boundaries of different areas of law. The Report of the World Commission on Development and Culture recommended the promotion of media competition, access and diversity at an international level.⁷⁴ It also suggests an international clearing house for national media and broadcast laws.⁷⁵ These types of things are essential to reducing the power which the media and entertainment corporations exercise over cultural output. This means that being serious about making inroads into private corporate power means thinking about the role of media and competition law. However, this very small leap across boundaries is not enough on its own. If we want to legitimate the power of the corporate sector then we have to introduce mechanisms of accountability. The area of law that needs work here if we are to have accountability in any structured and comprehensive fashion is, of course, corporate law. Thinking across intellectual property law, media law, competition law and corporate law sounds like a tall order, but it has been the failure of legislators, regulators, lawyers, academics and other commentators to do just that which has brought us the present era of cultural homogenisation and domination.

Notes and References

1. Culture is, of course, a contested concept: see Jane M. Gaines, *Contested Culture: The Image, the Voice, and the Law*, BFI, London, 1992.
2. Although this may well be the case.
3. WIPO Publication No. 615(E), 1978.
4. See J. Waldron, 'From authors to copiers: individual rights and social values in intellectual property' *Chicago-Kent Law Review*, 68, 1993, pp. 841–887, at pp. 850.
5. See e.g., the excellent discussion in Waldron, *ibid.*
6. See e.g., F. Macmillan Patfield, 'Legal policy and the limits of literary copyright', in P. Parrinder & W. Chernaik (eds), *Textual Monopolies: Literary Copyright and the Public Domain*, London University, London, 1997, pp. 113–132.
7. World Commission on Culture and Development, *Our Creative Diversity: Report of the World Commission on Culture and Development*, 2nd edn, UNESCO Publishing, Paris, 1996.
8. President's Foreword, *ibid.*: <http://www.unesco.org/culture_and_development/ocd/foreword.html>
9. *Ibid.*
10. *Op. cit.*, Ref. 7, Ch. 9: <http://www.unesco.org/culture_and_development/ocd/chapter9.html>
11. *Op. cit.*, Ref. 7, Introduction: <http://www.unesco.org/culture_and_development/ocd/intro.html>
12. *Ibid.*
13. *Ibid.*
14. *Op. cit.*, Ref. 8.
15. *Ibid.*
16. *Ibid.*
17. The World Commission on Culture and Development puts it in the following words: 'The basic principle should be the fostering of respect for all cultures whose values are tolerant of others.'

- Respect goes beyond tolerance and implies a positive attitude to other people and a rejoicing in their culture': *op. cit.*, Ref. 11.
18. *Op. cit.*, Ref. 11.
 19. Commonwealth of Australia, Department of Communication and the Arts, *Creative Nation: Commonwealth Cultural Policy*, Australian Government Publishing Service, Canberra, 1994.
 20. P. Drahos, 'The visual artist in the global information economy', *Communications Law Bulletin*, 14, 3, 1995, pp. 1-3 at p. 1.
 21. Although it may cast some further light on the general bankruptcy of both rationales.
 22. See W. Holdsworth, 'Press control and copyright in the 16th and 17th centuries', *Yale Law Journal*, 29, 1920, pp. 841-858, at pp. 850-851, 855-856.
 23. See M. Rose 'The author as proprietor: *Donaldson v Becket* and the Genealogy of Modern Authorship', in B. Sherman & S. Strowel (eds), *Of Authors and Origins: Essays on Copyright Law*, Clarendon Press, Oxford, 1994, p. 25.
 24. See e.g., Michael Blakeney & Jill McKeough, *Intellectual Property: Commentary and Materials*, Law Book Company, Sydney, 1987, p. 12.
 25. '[T]he life of the law is not logic, and the fact that there is no test of talent or genius does not prevent the resonance of those ideas from influencing the rhetoric which sustains intellectual property doctrine as a whole': Waldron, *op. cit.*, Ref. 4, p. 853.
 26. See in more detail Macmillan Patfield, *op. cit.*, Ref. 6, pp. 118-121.
 27. As laid down in, e.g., *University of London Press v University Tutorial Press* (1916) 2 Ch 601, 608 per Peterson J.
 28. See R. Chartier, 'Figures of the author' in Sherman & Strowel, *op. cit.*, Ref. 23, p. 15.
 29. *Rogers v Koons* 751 F Supp 474 (SDNY 1990), *aff'd*, 960 F 2d 301 (2d Cir), *cert denied*, 113 S Ct 365 (1992).
 30. J. S. G. Boggs, 'Who owns this?', *Chicago-Kent Law Review*, 68, 1993, pp. 889-910, at pp. 898-900.
 31. Boggs later notes that 'the visual arts have not fared as well in societies born of the English aesthetic, where literature is the supreme form of expression': *ibid.*, p. 905.
 32. *Ibid.*, p. 898.
 33. On the issues and problems posed for copyright law by Koons' artistic contribution, see K. Bowrey, 'Copyright, the paternity of artistic work and the challenge posed by postmodern artists', *Intellectual Property Journal*, 8, 1994, p. 285, esp. pp. 311-316.
 34. This is somewhat of an oversimplification. See further e.g., Linda Hutcheon, *The Politics of Postmodernism*, Routledge, London, 1989; & O. Polan, 'Postmodernism and cultural analysis today', in E. A. Kaplan (ed.), *Postmodernism and Its Discontents*, Verso, London, 1993, pp. 45-58.
 35. Peter Drahos, *A Philosophy of Intellectual Property*, Dartmouth, Aldershot, 1996, ch 3; see also, P. Drahos, 'Community and creativity: the role of copyright', *Copyright Reporter*, 13, 1, 1995, pp. 4-7.
 36. It is doubtful that our fair dealing laws can be described as strong: see further Macmillan Patfield, *op. cit.*, Ref. 6, pp. 123-125; F. Macmillan Patfield, 'Towards a reconciliation of free speech and copyright' in E. Barendt (ed.), *The Yearbook of Media and Entertainment Law 1996*, Clarendon Press, Oxford, 1996, pp. 199-233 at pp. 222-232; see also Waldron, *op. cit.*, Ref. 4, pp. 859-860. *Campbell v Acuff-Rose*, 114 S Ct 1164 (1994) may be regarded as a step in the right direction.
 37. See e.g., M. Blakeney, 'Protecting expressions of Australian Aboriginal folklore under copyright law', *European Intellectual Property Review*, 9, 1995, pp. 442-445. On the issue of copyright's failure to protect distinctive styles of work and the way in which this demonstrates the law's failure to understand visual art, see also Boggs, *op. cit.*, Ref. 30, pp. 895-898.
 38. See Commonwealth of Australia Attorney-General's Department, *Stopping the Rip Offs: Intellectual Property Protection for Aborigine and Torres Strait Island Peoples*, Australian Government Publishing Service, Canberra, 1994.
 39. See T. Aplin, 'Aboriginal art and moral rights law', in A. Pederson, *Bur-ran-gur ang: Women and the Law*, University of Western Australia, Perth, 1995, pp. 22-25.
 40. Michael Blakeney, *Trade Related Aspects of Intellectual Property Rights*, Sweet & Maxwell, London, 1996, Ch. 1.
 41. *Possible Renewal of the Generalised System of Preferences—Hearing Before the Subcommittee on Trade of the US House of Rep Comm on Ways and Means*, 98th Congress 1st Session (1983); and *Unfair Foreign Trade*

- Practices, Stealing American Intellectual Property: Imitation is Not Flattery*, 98th Congress 2nd Session (1984): both cited in Blakeney, *op. cit.*, Ref. 40, p. 2n. For a discussion of the evidence adduced to demonstrate economic loss of US traders see Blakeney, *ibid.*, p. 2.
42. Blakeney, *op. cit.*, Ref. 40, p. 4.
 43. *Ibid.*, p. 5.
 44. Although the Berne Convention has made a recent comeback with the WIPO Copyright Treaty 1996 and the WIPO Performances and Phonograms Treaty 1996.
 45. For a brief comparison of the Anglo-Saxon, *droit d'auteur*, and socialist models in this respect, see L. Owen, 'Publishers and copyright in Europe: a comparative survey', paper presented to the *International Workshop on Legislation for the Book World*, Warsaw, 13–15 November 1996: <<http://culture.coe.fr/clt/eng/eculiv0.9.html>>.
 46. E.g., Copyright Act 1968 (Cth), section 37.
 47. E.g., Copyright Act 1968 (Cth), section 31(1)(c) and (d). See also Articles 11 and 14(4) of the TRIPs Agreement, which enshrine rental rights in relation to computer programmes, films and phonograms.
 48. See Ref. 47.
 49. WIPO Copyright Treaty 1996, Article 7: <<http://www.wipo.org/eng/diplconf/distrib/94dc.htm>>; and WIPO Performances and Phonograms Treaty 1996, Articles 9 & 13: <<http://www.wipo.org/eng/diplconf/distrib/95dc.htm>>.
 50. For a discussion of this issue see, e.g., Gaines, *op. cit.*, Ref. 1, and Waldron, *op. cit.*, Ref. 4, esp. p. 854.
 51. This is the likely effect, e.g., of recent amendments to the Canadian Copyright Act: see News Release, Government of Canada, 'copyright reform bolsters Canadian culture', 25 April 1996: <http://xinfo.ic.gc.ca/ic-data/announcem...news-releases/1996/english/e_04_25.html>; News Release, Government of Canada, 'copyright reform bolsters Canadian culture', 25 April 1996: <http://xinfo.ic.gc.ca/ic-data/announcem...news-releases/1996/english/e_04_25.html>; A. Keyes, 'Do Proposed Canadian amendments bolster Canadian culture?', *Intellectual Property Journal*, 10, 1996, pp. 353–361.
 52. A. Capling, 'Gimme shelter!', *Arena Magazine*, February/March 1996, p. 21.
 53. *Ibid.*, p. 22.
 54. *Ibid.*, p. 21.
 55. *Ibid.*, although if the Copyright Amendment Bill (No 2) 1997 (Cth), or some variation on it, becomes law then this right will be removed or restricted in relation to compact disks in Australia.
 56. See further F. Macmillan Patfield, 'Defamation, freedom of speech and corporations', *Juridical Review*, 1993, pp. 294–308 at pp. 299–300.
 57. See the text accompanying Refs. 40–43.
 58. See also Capling, *op. cit.*, Ref. 52, p. 23; Drahos, *op. cit.*, Ref. 20.
 59. In Australia the oligopoly controlling the contemporary music industry appears to have been instrumental in maintaining a legislative environment favourable to its continued existence: see Capling, *op. cit.*, Ref. 52.
 60. See further, e.g., A. Chayes, 'The modern corporation and the rule of law' in E. S. Mason (ed.), *The Corporation in Modern Society*, Atheneum, New York, 1959, reprinted 1980, p. 25.
 61. See further F. Macmillan Patfield, 'Challenges for company law' in F. Macmillan Patfield (ed.), *Perspectives on Company Law: 1*, Kluwer Law International, London, 1995, pp. 7–15.
 62. Capling, *op. cit.*, Ref. 52, p. 22.
 63. *Ibid.*
 64. See also D. McGraith, 'Anti-copyright and cassette culture': <<http://www.galivant.com/dm-cgr.htm>>.
 65. Richard Abel, *Speech and Respect*, Stevens and Sons/Sweet & Maxwell, London, 1994, p. 52 (footnote omitted).
 66. R. Abel, 'Public freedom, private constraint', *Journal of Law and Society*, 21, 1994, pp. 374–382.
 67. *Ibid.*, p. 380. Nevertheless, Moon has criticised Abel for his lack of concern 'about the abuse of private power': R. Moon, 'Richard Abel's *Speech and Respect*', *Journal of Law and Society*, 21, 1994, pp. 383–395 at p. 392.

68. A good example of this occurred in *Walt Disney Prods v. Air Pirates*, 581 F2d 751 (9th Cir, 1978), *cert denied*, 439 US 1132 (1979); and see the discussion of this case in Waldron, *op. cit.*, Ref. 4, p. 883.
69. See also the discussion of *Rogers v. Koons* in the text accompanying Refs. 29–35; M. Chon, 'Postmodern "progress": reconsidering the copyright and patent power', *DePaul Law Review*, 43, 1993, pp. 97–130; D. M. Koenig, 'Joe Camel and the First Amendment: the dark side of copyrighted and trademark-protected icons', *Thomas M. Cooley Law Review*, 11, 1994, pp. 803–846; Macmillan Patfield, 'Towards a reconciliation of free speech and copyright', *op. cit.*, Ref. 36, pp. 219–222.
70. See Ref. 13 above and accompanying text.
71. Waldron, *op. cit.*, Ref. 4, p. 885.
72. This was as a result of Council Directive 93/98/EEC, 1993 OJ L290/9.
73. See Refs. 17 and 18 above and accompanying text.
74. *Op. cit.*, Ref. 7, International Agenda, Action 5: < http://www.unesco.org/cultureand_development/ocd/agenda/implem.html >
75. *Ibid.*