

Copyright - Going too Far?

In the last three weeks, I have changed from being the copyright officer for two universities to a fisherman. Unfortunately, there's still someone around who wants to measure the whiting I catch...

And I am now a partner, with my wife, in a consultancy called 'Quarter Acre and a Cat Consulting'. That should tell you something about my attitude. We figure that the name will discourage the people we don't want to work with anyway...

At the beginning of my copyright involvement, some thirteen years ago, there were still castles to be stormed, wrongs to be righted and dragons to be tamed, ... although not a lot of fair damsels... At that time, you had a sense of a job to be done, a job that was possible to do, and that, even amongst your adversaries, there was a respect for the rules of copyright, and at least a general understanding of the philosophy underpinning those rules. And during those thirteen years, we did right some of the wrongs, and we did reach some understandings, and in general, made the lot of Australian universities a great deal easier in the management of their copyright responsibilities and obligations.

Now, as I leave the industry, I do so with a sense of profound disquiet at the way copyright is developing in the digital world, where the rights of users are being eroded, the rules are being changes, and greed is the order of the day.

In this address I will argue that:

- The nature and purpose of copyright law is being eroded through the regular extension of terms of protection.
- Fair dealing is being destroyed because knowledge can be commodified in a digital world
- Content protection, as exemplified by the music industry, ignored and takes away the fair dealing rights of ordinary people.

If we continue to extend the term of protection exclusively in the interests of content owners, we are going too far.

If we charge for all access to information, we are going too far.

And

If we trample on the rights of our citizens, we are going too far.

There are a lot of things that you don't worry about - that is, until they impinge upon your consciousness in no uncertain manner.

For instance, for most of my life, I was never worried about drains. Drains were the farthest things from my mind. They were not a concern, I never talked about them, I certainly didn't lie awake thinking about them. That is, until I bought a property in the Sunshine Coast Hinterland, where one night, it was an Anzac Day Eve, as I recall, we had 27 inches of rain, - that's about 700 mm in new money - in the space of about six hours. And then, too late, I worried about drains.

Now as copyright officer for two large Australian Universities, I worried about copyright quite a lot, because that was my job, but the majority of my colleagues worried about copyright not at all, because it hadn't touched their lives. But, it begins to. Not perhaps in a 27 inch deluge, but in a more insidious manner.

When I was invited to present this keynote, not only was I pleasantly surprised and honoured, but I immediately began a search for a science fiction story that I had read in my youth - a story about a world where copyright had gone mad, where copyright agents eavesdropped on the conversations of people in the street, and stepped forward and claimed payment every time a 'copyrighted' expression was used. So someone might say "I told you so" and if a copyright agent was nearby, the cash register would chime, and the agent of the collecting society would step forward for payment - ah, in this case, I think that particular royalty would go to a bloke called Hanrahan, a famous Australian rural doomsayer. Or it might have been my auntie, come to think of it...

Unfortunately, extensive Googling and email queries around the world failed to locate the story - incidentally and ironically, this is the first time the Web has ever let me down so completely - but a colleague who responded to my query on a discussion list suggested that today's scenario might be much worse, and possibly more like the following -

"Instead of a human inspector standing ready to hold out his hand for cash, some remote entity, human or otherwise would press a button, and the money would be taken out of the victim's bank account automatically. It would be like having a smart card installed into the unit that is strapped onto the person's body, or more likely in today's story, surgically inserted like a pacemaker. That way the device could not be removed without the person bloodying themselves considerably. Tampering would set off an alarm, and that would trigger another device which would paralyse the person until the law arrived and teleported them to Azkaban."

There's another science fiction story by Robert Heinlein, titled "If This Goes On". I might borrow that phrase while it's still possible, and say that "if this goes on" - that is, the increasing trend towards claiming ownership of material that has long been in the public domain, then we may finish up with communications that look like this - (Show PP slide here).

You think that's not possible? Farfetched perhaps? Let me remind you that the Kellogg company is currently trying to assert trademark ownership over the recipe for chocolate crackles (a deed that should make every red-blooded Australian boy or girl seethe with anger); that Kembrew MacLeod, an American academic has allegedly trademarked the phrase "freedom of expression" and is attempting to restrain AT & T from using it in some of their advertising; that a Russian computer scientist, Dmitri Sklyarov, was arrested by the FBI and jailed after presenting a paper at the DefCon Conference, because he allegedly violated the terms of the Digital Millennium Copyright Act by discussing the decoding of copyright protection measures; that the estate of the composer John Cage sued a British band (I think called the Wombles) on the grounds that one of their tracks contained a 23 second pause, which the estate claimed infringed the copyright in Cage's "4 minutes 33 seconds", which is a piece of total silence; (this case was dropped, but they were serious) and that the traditional owners of Uluru, in the Northern Territory, are now licensing any use of photographs taken of the rock - that's right, if you go there as a tourist and later want to share your pictures by putting them on your website, or publishing them, then you'll be chased up for a fee.

Why am I quoting these instances? What am I getting at? What I am trying to show is that the nature and original

purpose of copyright law is being eroded, and that rights that citizens have enjoyed under copyright law are disappearing.

Copyright law and notions of ownership of intellectual property - that is, products of the human mind which can be protected and exploited by various pieces of legislation - trademarks, patents, plant variety rights, design acts and so on, are relatively new ideas. If you had lived in the time of the Roman Empire, you would have been gratified had you discovered that Virgil had appropriated some of your poetry and included it, without attribution, in his own collection of poems. You might have rushed about the senate, exclaiming to people "Isn't it wonderful, Virgil thought so much of my work he's claimed it as his own!" Notions of plagiarism would never have entered your head.

However, times changed, and with the development of the moveable type printing press in the West, a need was soon felt for laws to protect the investment of those who printed works, to give them some kind of monopoly over the works that they printed. So in Britain, you have the beginnings of modern common law copyright in what is known as "The Statute of Anne" in 1709, which gave exclusive rights to the guild of Stationers - the printers of the time - to print works that they had reached agreement with authors on, exclusively, for a period of 21 years. I should say that this granting of rights wasn't just governmental benevolence, the lords temporal and spiritual had grave concerns about the spread of literacy and information brought about by the development of the printing press, and the trade-off was that in return for their exclusive rights, the stationers had to agree not to print anything that was seditious, treasonable or critical of the crown or government.

And so the copyright law that we know today has its beginnings in censorship. Over the next few centuries, this law evolved, as the lords temporal and spiritual adjusted their thinking on education and access to printed information by the lower classes. This was an improvement, even if it was only seen as beneficial “that they might better understand the wishes of their betters”. In time then, copyright law became an instrument which gave a bundle of rights to copyright owners, and some rights to users of information. It’s important to remember that the rights of neither party were ever intended to be all-embracing.

So, what are the rights that underpin our use of copyright?

Generally the rights given to a copyright owner under the legislation are to make copies of the work; to publish the work; to make adaptations of the work; to perform the work in public; and, latterly, to communicate the work to the public - that is, to put the work online.

Users, on the other hand are given some rights to make non-infringing copies for the purposes of research and study, criticism and review, the reporting of news, and for judicial proceedings and the giving of professional legal advice. There are also special provisions for libraries and their users, and for educational use which also allow the making of non-infringing copies. These rights are generally known as the fair dealing provisions.

Part of the policy behind the creation of the fair dealing provisions is that of establishing and maintaining a balance between the rights of owners and users, so that the one is not abused, and the other not inhibited in drawing on information for the development of new works.

As Lord Mansfield, a British judge, said in 1785, “We must take care to guard against two extremes equally prejudicial; one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits and the reward for their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.” Note that ‘arts’ in this context has the meaning “science and the useful arts”.

The fair dealing provisions also aim toward the facilitation of an informed electorate; citizens having access to information so that they may make informed choices, and improve their lives.

Now, in this best of all possible worlds, where there is a balance between ownership and access, there is the doctrine of “limited time”, that is, the copyright owner enjoys their exclusive rights for a limited time, after which the work passes into the public domain, where other people may have unfettered access to it.

Without a public domain there is little opportunity for the creation of a Community of Ideas, and little or no research incentive.

The first United States copyright legislation gave exclusive rights to creators for a period of 14 years, with the option of renewing that protection for a further 14 years, but this involved the author actually making a renewal application, it wasn’t automatic, and failure to renew meant that the work would pass into the public domain.

In the short time since this original legislation, the term of protection in the USA has blown out to a massive life of

author plus 90 years, thanks to successful lobbying of legislators by powerful, influential and wealthy media and publishing interests. This has been done without any consultation with the other part of the balance equation, and when there was a recent challenge in the US Supreme court by a group of activists as to whether the congress had the right under the constitution to extend the term of protection, the court decided in favour of congress. Indeed, Jack Valenti, the CEO of the Motion Picture Association of America, has recently been arguing for the perpetual protection of motion pictures!

By way of explanation, if much of what I have to say draws on the actions of the United States in the copyright and Intellectual Property field, this is because much of what happens there affects the rest of us. Large numbers of small publishers have been taken over by US interests, the US dominates the motion picture industry, and the United States is currently in Free Trade discussions with the Australian Government. It's very likely that what happens in those discussions will have a considerable influence on Australian IP law, as the US negotiators are quite clear about whose law should prevail.

However, to return to terms of protection - in Australia, the current term of protection is life of author plus 50 years, but Australia is under some pressure from the World Intellectual Property Organisation to harmonise its law with that of the rest of the WIPO members, which would mean that Australia's term of protection could be expected to go to life plus 70 years, as this is the term of all of the countries of the European Union. So far, this has not been contemplated, but what will be decided or agreed to as a result of the free trade agreements must remain a concern.

Now, the end result of these extremely long terms of protection is that things take a very long time to reach the public domain. In fact, given the currency of information in today's world, you would have to think that 90 year old information would be of questionable value. Here I should explain that public domain in a copyright sense describes that state of affairs which comes about when the term of copyright protection expires, and others may use the work for their own purposes, without needing to seek a licence to do so. Patent attorneys and others attribute a different meaning to the expression "public domain", but that's its meaning in the language of copyright.

So, because the term of copyright protection has been extended several times, and seems likely to continue to do so at the urging of content owners, particularly the film industry, things are taking longer to reach the public domain. Why might this be a concern?

Well, let's talk a little about the public domain. It's one of the encouraged misconceptions of our era that the public domain is nothing more than a junkyard of unwanted and out of date information, which is picked over by scavengers, looking for things they can recycle. In fact, as David Bollier says, "the public domain consists of a great, invaluable bounty of knowledge, art and culture. Its value lies in the paradoxical fact that it is openly accessible to all. It is priceless, because the shared heritage that constitutes the public domain is indispensable to creativity. Disney drew on the public domain to create "Snow White", "The Lion King", and many of the studio's other productions.

And if we are not able to draw on that prior knowledge and art, to quote past creativity, to modify it as we wish, to

express it in new ways to new audiences, then future innovation is doomed.

So that's why I am concerned about the public domain, and the length of time it now takes for things to become accessible. What of the material that's already there? Well, a lot of that is being absorbed into databases, which look like being protected by sui generis legislation, that is, legislation peculiar to them. While I will discuss databases shortly, it's worth thinking about their potential for gobbling up the public domain.

Copyright law, strangely enough, has never given proper recognition to the public domain. It has almost always been taken for granted that the commons of knowledge and culture is a vast, self-replenishing resource as vast as the Atlantic cod fishery once was. One legal commentator averred that "under the general rule of law, once information is communicated to others, it becomes as free as the air to common use". He obviously did not anticipate the power of electronic technologies or the innovative imaginations of the content industries and their copyright lawyers. Increasingly, creative expression, knowledge and art are not "free as air" for all to enjoy, but are doled out in tight little bar-coded, copy-protected dollops of intellectual property, the size and quality of which are determined by the user's ability to pay. And sadly, the price seems to be being determined by those least qualified to assess its value.

Anyone of you who has been associated with the Web and the internet for some years will have noticed the change from sharing to selling which has occurred.

Time doesn't allow me to go on at great length about the public domain, but if you'd like to do some followup reading, there's a very useful website at the Center for the Public

Domain, and other useful background in Jessica Littman's "The Public Domain", the details are on the slide.

So that's the first of my concerns, that the public domain is being locked up and value attributed to its contents by those least qualified. I should acknowledge that there are a number of circumstances contributing to this lockup, and probably one of the major ones was the early responses by government to the concerns of content owners. As the Internet and the Web developed, content owners felt that they were losing control of their stock in trade, as it was scanned, copied and flashed seemingly uncontrollably to readers, viewers and users all over the world.

Governments, under pressure from content owners and publishers, reacted with various draconian pieces of legislation, which set the scene for the ever-tightening controls on content, and for a corresponding and perhaps unintended or unconsidered diminishing in the fair dealing or fair use provisions.

As I said at the beginning, If we trample on the rights of our citizens, we are going too far.

In describing the diminution of fair use, I am again referring largely to the United States as the source, not Australia, but as I said before, these things have a way of affecting us all, as we shall see.

Australia, I might say, has at this time one of the most enlightened and balanced copyright regimes in the world. Australian educators copy material for their students under licensing schemes which are fair to all, and Australian students themselves copy material for research and study under fair dealing provisions, secure in the knowledge that,

provided they stay within the prescribed quantity limits, they have no potential to infringe copyright.

Very few, if any other countries can claim to have such a generous policy. I have over the years, participated in various online copyright discussion lists, and am aware of the difficulties and uncertainties that face educators in other countries who wish to copy material and make it available online for their students - which reinforces my concerns about the potential of pressure from WIPO and the Free Trade agreements for Australia to harmonise with overseas copyright regimes.

However, to return to fair dealing and the US fair use. Here is an area where there the digital world has caused a seismic shift in the way these rights are able to be used.

As I mentioned earlier, fair dealing provisions exist in the copyright legislation of all the common law countries. In general, the fair dealing provisions allow the populace, the students, researchers, teachers, hobbyists and other ordinary citizens to take reasonable portions of works - literary, dramatic, musical or audiovisual - for the purposes of research and study, criticism and review, reporting of news, and the provision of professional legal advice and judicial proceedings.

In Australia, the provisions are quite specific, and fair dealings may only be done for those purposes just stated. In the United States, the corresponding legislation includes the word "such as" before the iteration of "research and study" etc, which opens the up the possibility of a greater range of fair use, but may also lead to a greater incidence of litigation, as copyright owners challenge various interpretations of

what might be a fair use, so the wider scope is perhaps not without its perils.

The 'reasonable portions' for fair dealing for research and study are defined in the Australian Copyright Act, the only one to do so, as far as I am aware. In general terms, they are 10% or one chapter of a book, or one article from any one issue of a journal.

So, who makes use of these provisions? Students, researchers, ordinary citizens, media organisations, reporters, politicians, lawyers, critics, journalists, authors, scientists, lecturers, teachers, writers - many many people for a variety of reasons.

Fair dealing provides us with a legitimate means of access to information. And in the days when we operated solely in a hard-copy print and photocopy environment, the notion of fair dealing was accepted, perhaps grudgingly, by content owners. Students of all ages and sizes could copy for their research, critics could copy and quote for inclusion in their reviews, news organisations could copy for the preparation and presentation of news, the ordinary citizen could go to their local library and copy a magazine article on compost-making, and so on. I think that content owners understood that this was part of the copyright bargain, that the legislation gave them statutory protection in return for some access to their works through fair dealing. And in the print/photocopy world, it was impossible to either quantify the amount of fair dealing copying, or to identify what was being copied. Content owners may not have liked it, but there was little they could do to control it.

But now we reach the point of change, the time when it becomes possible to go too far. And that point is marked by,

the advent of the World Wide Web. Certainly, prior to the web, information was being made available on the Internet, via ftp and Gopher sites, and text files sent a email, but the volume was not large, and the users were not many, relatively speaking, and the concerns of content owners were, at that stage, not so great.

However, once the Web arrived, with simple browser interfaces and a huge uptake by users, the game began to change, and change rapidly.

More and more information, both current and archival, is being digitised. Many research journals are now only available in digital form. Much historical and public domain material is being incorporated into online databases, which are developing their own forms of copyright protection.

If you want the most current information, the most up-to-date research, the latest news, where do you go? Of course, to the Web. Or if you are looking for some obscure information, what do you do? You google it. And the information you retrieve will be in digital form.

Now, unlike a paper-based book, or a printed journal, which is virtually untrackable once it's sold, digital information can be measured, tracked, tagged with digital object identifiers, contain anti-copying devices, and be either supplied or not supplied according to whether the person requesting the information fulfils the requirements of the supplier.

Increasingly, the requirements of the supplier are "enter your credit card number here" and the other associated details.

So, moving from the situation in the early days of the Internet when content owners were feeling that they had lost control of their works, and John Perry Barlow was proclaiming that

copyright was ungratefully dead, and information wanted to be free, technology has now enabled a much greater degree of control over that information than ever before.

So what happens to fair dealing? It's under a great deal of threat. Because content owners can control the use of their works, they want to do so. The meaning of the original bargain and balance is being lost. Or if not lost, the ignored and undermined. Content owners are ignoring their obligations under the fair dealing provisions.

Access to information in the form of electronic journals and databases is also able to be controlled by subscription, licence and contract agreements, which also have the potential to ignore or circumvent or contract out of such rights as users may have under copyright legislation. This includes rights that libraries may have to use on behalf of their clients.

The Australian Copyright Law review Committee has recently published a report called "Copyright and Contract", which examined whether contracts ought to be able to exclude rights which exist under the Copyright Act. The committee's major recommendation was that certain provisions, notably the library exceptions and the fair dealing clauses, ought not to be able to be contracted away. Although the committee membership was composed of people from both sides of the equation, both owners and users, the recommendation has not been well received by the content owner group.

Their attitude has been clearly expressed by Michael Fraser, CEO of The Copyright Agency Limited - collecting society which acts on behalf of print copyright owners. Michael accepts the idea of fair dealing in the print world, but

believes it should be abolished in the online environment. Given the direction we are heading, where more and more of our information is accessed and delivered digitally, and less becomes even available in print, it is not difficult to see that such a call presages a complete demise of fair dealing in the not too distant future.

Similar attitudes exist in the United States and in the European Union, particularly with their Database Directive, which effectually locks works up forever.

In copyright law, the property rights granted to authors are balanced by the right of public access to the work and its preservation in the public domain once the term of protection has expired. Copyright's primary purpose is to serve the public - to facilitate the flow of ideas and learning.

So the primary objective purpose of copyright law is not to reward the author, but rather to secure for the public the benefits from the creations of authors. I am here paraphrasing the words of the United States Congress in the formulation of their original copyright legislation - However, the content/copyright industries have equated intangible copyright works with physical property, and so, incorrectly in my view, portray copyright as an unlimited permanent right to control all access to, distribution and use of a copyright work.

I think the dangers to our students, teachers, researchers, citizens and the like if fair dealing were to be abolished are reasonably obvious; but what of the wider social consequences of the total commodification of information?

1. ***The Community of Ideas will become a Marketplace.***

I am a participant in the community of ideas. This community's sharing of knowledge has the power to generate new knowledge. If knowledge is commodified, you have to pay for it. If you pay for it, you think that the transaction is complete. **THE SPIRIT OF RECIPROCITY IS LOST.** Knowledge consumers will continue to buy, but they will not pass the knowledge on. The generative engine that was the community of ideas will run down, and transmute into a self-limiting marketplace.

2. *Research incentive will be replaced by inhibition.*

Fair dealing allows us to build on the work of others - "standing on the shoulders of giants" as Sir Isaac Newton said. Price will inhibit. The limitations on access to knowledge will inhibit. The loss of an open forum for discussion will inhibit.

3. *Some Commodifications will be immoral.*

Not all knowledge should be controlled. For example, medical knowledge, folklore and great works which underpin culture such as Shakespeare and Tolkein, the Bhavagad-Gita, religious teachings, and information necessary to survival.

4. *Only the Wealthy will have access to Knowledge.*

I have entitled this 'the wealth effect'. Items of the highest value will become accessible to fewer people, and their means of access will be their ability to pay.

So I think you can see the problem. Here's just a few examples of what might not have happened in a world without fair dealing and a public domain. - see opposite.

I'd like to comment now on the music industry and content protection and to link that to the concerns already expressed about fair dealing.

Let's consider how things might have been if there was no fair dealing, if all information had been locked up, with no options for access, but instead, a user pays model, with terms of protection extended indefinitely. Not one advertisement, greeting card, cartoon, song, or film showing St Nicholas, as a white bearded, red-coated elf would exist had not Thomas Nast first depicted the saint in that fashion.

Likewise not one advertisement, greeting card, cartoon, song or film showing St Nicholas using a sled drawn by a team of eight (or nine) caribou would not have existed had the poem "A visit from St Nicholas" first existed.

Here are a few more examples:

J.R.R. Tolkein's novels "The Hobbit" and "The Lord of the Rings" would not exist at all without a great deal of English, German, and Norse mythology. In a world of perpetual copyright rigorously enforced since the beginning of human language, there might be very little mythology at all, since the works of the mind would never be considered shared.

For example, the musical, "Godspell"

It would not have existed at all without the prior existence of the Gospel According to S. Matthew. It would not have existed in its present form without the prior existence of the following song lyrics:

- "Day by Day", attributed to Richard de Wycke (1197-1253)
- "Turn Back O Man", by Clifford Bax (1886-?). This lyric was written by Bax at the request of Gustav Holst, who wanted a new set of words to go with the

hymn-tune “Old 124th”. It can therefore be supposed that “Turn Back O Man” would not have existed without the prior existence of “Old 124th”.

- “We Plow the Fields and Scatter”, by Jane M Cambell (d. 1878). This lyric in turn is a translation/abridgement of a German poem by Matthias Claudius (1740-1815). By definition Ms Cambell’s translation/abridgement would be unlikely to have come into existence had not Claudius’s poem first existed.
- “When wilt thou save the people?” by Ebenezer Elliot (1781-1849).

So you can see how even music depends on prior art.

The music industry has been reeling from the effects of digital technology and the World Wide Web. The ability of users to digitise songs into MP3 files, and exchange them via file-swapping software such as Napster, and more latterly Kaaza, has, the industry alleges, made huge dents in their profits. And naturally, they are reacting. The industry’s attempts to use copyright law to redress the balance in its favour are frequent and ongoing.

There are a number of arguments to advance to say that file-swapping is not the root cause of the loss of income for the industry; there are issues such as the reduction in their inventory, the rising cost of CDs, the perceived lack of value of CDs by music lovers and the increased range of choices for the consumer entertainment dollar, but this is not the forum for that debate, I advance it because I want to set the scene a little more sharply.

In the aftermath of September 11, 2001, the United States congress was rushing through a bill, at that stage referred to

as the USA Bill - I think it later became the Patriot Act - which was to give police, the National Guard and the military increased powers to deal with terrorist situations. It is alleged, and the evidence I saw on the Web was pretty convincing, that the music industry attempted to take advantage of the grief, confusion and urgency of the situation in attempting to have some clauses added to the bill, which, had they been passed, would have given music industry representatives the right to access and inspect the contents of the hard drive of any PC if they suspected it contained illegal MP3 or other music files. Fortunately the clauses were discovered and removed. The clauses I saw were unbalanced, with no clear definition of how suspicion would be justified, or how proof would be established. As I said this is alleged to have occurred, I know the industry was very concerned with file-swapping at the time, and my Internet sources were reliable.

More recently, the RIAA has used court action to force an ISP in the United States to reveal names of some of its clients who were using the network to run a file-swapping service, has taken the life savings of four US university students as compensation for their file-swapping activities, has used the Australian Federal Police to arrest and charge three university students in Sydney with 'music piracy', that is, allegedly operating a music file-swapping service for profit. In this case they allege the operation caused losses of over \$60 million. Some quick calculations of download and server time indicate this is an implausible figure, but the students face heavy fines and possible jail terms if convicted; and finally the music industry, through its MIPI (Music Industry Piracy Investigations) organisation has investigated a number of Australian University Networks and subsequently taken three of those universities to court, demanding full access to their networks so that they might

make a full investigation of music files held on the universities' systems.

As far as I am aware, the court has granted MIPI the right to access the systems, subject to very stringent privacy and confidentiality controls. At this stage I believe the details are still being worked out.

These events are just the tip of the iceberg when it comes to the music industry's activity in the copyright field. It is also constantly lobbying legislators for harsher penalties and more copyright protection.

In addition, many of the major labels are now producing consumer music CDs with on-board copy protection. Some of this protection is so intrusive that it is sometimes impossible to get a disc to play on any machine at all! Some of the copy protection is aimed at stopping consumers from playing CDs on their computers and hence creating swappable MP3s, whilst other copy protection prevents the user from making a tape copy to play in their car or their Walkman, an activity which is a fair dealing in the US.

So an effect of this copy protection is to render even legitimate copying impossible. That is, in normal circumstances, it may be a fair dealing for a student or a researcher to make a copy of some music from a CD for the purposes of research and study, or another permitted purpose under copyright law, but this kind of copy protection then, prevents a citizen from exercising their fair dealing rights. Again, an unconsidered consequence of the music industry's anti-piracy measures, which puts a bar on creativity and research. In effect, it is taking away a right which the consumer has under law, without so much as a

by-your-leave. I am not sure whether this is an offence, but it's certainly another blow at fair dealing.

This is, in effect, Digital Rights Management, or DRM. It's arrived. And the Music Industry is one of the first entities to use it. And being digital, the rights management will be done by computers.

What do computers do best? They obey rules. And what do they do worst? Allow latitude, make exceptions. Computers don't know when to look the other way. This is already causing problems as you can see from what I've been saying about copy protection. It will undercut the basis of our intellectual and creative lives.

For us to talk, argue, try out ideas, build up thoughts, assimilate and appropriate concepts, we have to grant all sorts of leeway. That's how ideas breed. If any public space needs room to play, and a certain freedom from the rules, it's the intellectual commons, the community of ideas.

And it's not only music that is using DRM to protect works and inhibit or disable copying. DRM is appearing on software, journal subscriptions, databases, newspaper articles, and certain operating systems...

Each time, each instance potentially deprives the user of his or her fair dealing rights. Without consultation, and indeed without concern, these rights are taken away. Content protection has gone too far.

So, to conclude:

As the term of protection increases, our public domain diminishes. It's already gone too far. The term of protection was originally designed to reward authors, and later, to a

limited extent, their heirs. As most copyrights no longer belong to either the authors or their heirs, having been sold to publishers, this notion no longer carries any weight.

As fair dealing is increasingly denied or subverted by copy protection mechanisms, commodification and digital rights management, so our access to ideas and information on which we can build diminishes.

As our legislators respond to pressure from content owners for increased copyright protection and harsher penalties, so the balance between users and owners rights is skewed, and respect for copyright law is lost, and we are all disadvantaged.

For too long, the users of copyright have had little or no say in the formulation of copyright law. Nearly 100 years ago, when a Congressional committee met to decide on how copyright law might deal with pianola rolls, new at the time, no-one from the music was invited!

Has it gone too far? Of course it has.

What can you do?

I leave you with the words of Senator Robert Byrd, who, whilst he refers to the power elites in Washington, has a message which needs to be heard equally as well in Canberra, Mumbai, Johannesburg, Brussels, and everywhere else.

“There is a power which can serve as a check against abuses by a government or by government officials and that power is the power of the informed citizen - one who has read enough, who understands enough, who has developed

a base of knowledge against which to judge truth or falsehood. Participation in the great debates of our time must not be relegated to the power elites in Washington. An informed citizenry has to participate, ask questions, and demand answers and accountability to make a country like ours work.”

Thankyou.

Monday, July 7, 2003

Slide 1.

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Slide 2.

“If this goes ** [1] we’ll have to mind our ps and ** [2]
 The copyright ***** [3] will try to own the language. I hoped
 to d*dge [4] the issue by remaining silent, but after 2 days I
 had a notice from John Cage’s lawyers that I had infringed
 his copyright in 2880 successive performances. What a
 b****r! [5]
 W*****s of the world, u***e! [6]

1. Phrase copyright estate of Robert Heinlein.
2. Copyright Mother Shipton’s Almanac
3. Do I need a class action form the CLs?
4. Trademarked by a car company.
5. Copyright another car company.
6. Removed on advice from the administrators of the estate of Karl Marx.

Slide 3.

Center for the Public Domain

<http://www.centerpd.org>

'The Public Domain' - Jessica Littman
Emory Law Journal vol 39 (1990) p. 965

Slide 4.

If we continue to extend the term of protection exclusively in the interests of content owners, we have gone too far.

If we charge for all access to information, we have gone too far.

If we trample on the rights of our citizens, we have gone too far.

Slide 5

“There is a power which can serve as a check against abuses by a government or by government officials and that power is the power of the informed citizen - one who has read enough, who understands enough, who has developed a base of knowledge against which to judge truth or falsehood. Participation in the great debates of our time must not be relegated to the power elites in Washington. An informed citizenry has to participate, ask questions, and demand answers and accountability to make a country like ours work.”

Senator Robert Byrd.

Slide 6.

Copyright -
Going Too Far?

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Slide 7.

The Community of Ideas will become a Marketplace.

Research incentive will be replaced by inhibition.

Some Commodifications will be immoral.

Only the Wealthy will have access to Knowledge.