

2013

From vault to honesty box: Australian authors and the changing face of copyright

Francina Cantatore

Bond University, fcantato@bond.edu.au

Follow this and additional works at: <http://epublications.bond.edu.au/blr>

This Article is brought to you by the Faculty of Law at ePublications@bond. It has been accepted for inclusion in Bond Law Review by an authorized administrator of ePublications@bond. For more information, please contact [Bond University's Repository Coordinator](#).

From vault to honesty box: Australian authors and the changing face of copyright

Abstract

Copyright in written work is facing unprecedented challenges in the digital era. The changing face of copyright requires a re-evaluation of the existing norms and theories of copyright as an inanimate phenomenon that is reliant on humans for its adaptations. This article examines authors' responses to these developments in the context of the philosophical theories underpinning copyright law, current Australian legislative and judicial considerations, and the impact of e-publishing on traditional perceptions of copyright protection. In particular, the article incorporates findings from a research study conducted with Australian authors on their perceptions of the value and meaning of copyright and how these viewpoints affect their creative practice, as well as their ability to deal with digital copyright challenges and publishing opportunities. In taking cognisance of these research results and considering the concurrent evolution of digital copyright models, this article proposes that there is a need to address the tension exhibited between the utilitarian approach, characteristic of Australian copyright law, and the natural rights views of authors, to create a sustainable balance.

2013 HERDC submission. FoR codes: 180115, 180119

Keywords

copyright law, digital copyright, e-publishing, digital publishing

FROM VAULT TO HONESTY BOX: AUSTRALIAN AUTHORS AND THE CHANGING FACE OF COPYRIGHT

FRANCINA CANTATORE*

ABSTRACT

Copyright in written work is facing unprecedented challenges in the digital era. The changing face of copyright requires a re-evaluation of the existing norms and theories of copyright as an inanimate phenomenon that is reliant on humans for its adaptations. This article examines authors' responses to these developments in the context of the philosophical theories underpinning copyright law, current Australian legislative and judicial considerations, and the impact of e-publishing on traditional perceptions of copyright protection. In particular, the article incorporates findings from a research study conducted with Australian authors on their perceptions of the value and meaning of copyright and how these viewpoints affect their creative practice, as well as their ability to deal with digital copyright challenges and publishing opportunities. In taking cognisance of these research results and considering the concurrent evolution of digital copyright models, this article proposes that there is a need to address the tension exhibited between the utilitarian approach, characteristic of Australian copyright law, and the natural rights views of authors, to create a sustainable balance.

I INTRODUCTION

The concept of copyright in written work is facing unprecedented challenges in the digital era. Whilst copyright has historically adapted to the changing demands of technology in a reactive rather than proactive manner, it is apparent that authors can no longer rely on traditional expectations of 'copyright protection' and 'reward' for their creative efforts. The changing face of copyright requires a re-evaluation of the existing norms and theories of copyright, and a concerted effort by authors of written work to adapt to the changing publishing environment and refocus their attention on emerging issues.

Whereas copyright in written work was previously relevant to the printed word, and regulated within the relative constraints of Australian copyright law, digital publishing has expanded copyright borders into global territory, with increasingly complex licensing agreements regulating its use. These developments have caused publishing options to flourish but have contemporaneously created new challenges

* Senior Teaching Fellow, Bond University, PhD LLB(Hons) BA MA GDLP.

for authors. Protection of digital copyright has become a significant issue, as has the ability to adapt to numerous publishing forums.

In its Issue Paper on Digital Copyright,¹ the Australian Law Reform Commission ('ALRC') mentions the impact of 'changed consumer attitudes' and a diminished 'willingness to recognise copyright as a form of property, owned by a creator.'² Significantly, as one of its options for reform, it considers the possible recognition of 'fair use' of copyright material in the *Copyright Act* (1968) (Cth) (the 'Act') (as opposed to the current closed list of permitted purposes for 'fair dealing'), which will allow for expanded transformative use.³

The question then arises: where does the digital shift in publishing leave authors and their copyright expectations, and how are authors adapting to changing demands and expectations in the publishing marketplace? This article focuses on authors' perceptions of copyright and their response to these developments by considering, first contextually, the historic objectives and philosophical theories of copyright, second, the current Australian approach to copyright in literary work, and third, how e-publishing and the internet have impacted on traditional perceptions of copyright protection. In examining these issues the article incorporates findings from research conducted nationally in relation to published Australian authors.⁴ In particular, their views on the value and meaning of copyright, how these perceptions affect their creative practice and their ability to deal with and adapt to copyright challenges and publishing opportunities in the digital dimension are investigated. In conclusion, this article demonstrates that there is a need to address the tension exhibited between the utilitarian approach characteristic of Australian copyright law and the natural rights views of authors, to create a sustainable balance.

II PHILOSOPHICAL PERSPECTIVES: A SHORT OVERVIEW

In contrast to the accepted norm and belief today that copyright law exists to promote a balance between the public interest and the creator's rights, the beginnings of copyright law germinated largely as a result of early European printers' efforts to protect their investments. Although commercial printing started in Europe in the 15th century, it was unregulated with no protection afforded to either author or publisher.

¹ Australian Law Reform Commission, Australian Government, *Copyright and the Digital Economy* (IP 42) (27 August 2012) <<http://www.alrc.gov.au/publications/copyright-ip42>>.

² Ibid 21.

³ Ibid 24.

⁴ Francina Cantatore, *Negotiating a Changing Landscape: Authors, Copyright and the Digital Evolution* (Bond University PhD Thesis 2011) <<http://www.textjournal.com.au/april12/cantatore.htm>>.

In the early 16th century, the printing industry was flourishing and competitive, with nothing preventing the copying and distribution of printed work without any regard for the rights of authors or original publishers.⁵

Initially the issue of copyright was the concern of publishers rather than authors. Although authors were recognised as having some rights in their work, they did not have ownership of the work. This position prevailed until the promulgation of the British *Copyright Act 1709* (UK) (*Statute of Anne*), which referred to the rights of the author in some depth and formalised certain copyright provisions.⁶ In 1769 the court affirmed the principle of perpetual copyright and the common law right of literary property in the case of *Millar v Taylor* (1769) 98 ER 201 (*Millar*).⁷ However, in the 1774 landmark case of *Donaldson v Beckett* (1774) 1 ER 837, the House of Lords on appeal disagreed with the approach in *Millar's* case and overruled the decision in favour of the principle that copyright should be limited in time.⁸ This result heralded the recognition of a public benefit component to copyright (as opposed to the interests of publishers and booksellers).

The tension between the public benefit and authors' rights has since been instrumental in the development of copyright law, and is reflected in the utilitarian approach favoured in Australia. For example, in the 2000 Ergas Intellectual Property and Competition Review Committee Report ('ECR'),⁹ the ECR recognised that the general objective of the intellectual property law system in Australia was 'utilitarian, and more specifically economic, rather than moral in character'.¹⁰ The Report relied heavily on the *Competition Principles Agreement 1995* (Cth) ('CPA'), which advocated the limitation of intellectual property rights in order to avoid the restriction of distributing creative material to the end user. Significantly, the CPA provided that legislation should be reviewed as follows:¹¹

The guiding principle is that legislation should not restrict competition unless it can be demonstrated that:

⁵ Elizabeth Armstrong, *Before Copyright: The French Book-Privilege System 1498-1526* (Cambridge University Press, 1900) 21.

⁶ Mark Rose, *Authors and Owners: The Invention of Copyright* (Harvard University Press, 1993) 48.

⁷ Mark Rose, 'The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship' (1988) 23 *Representations* 51, 52.

⁸ *Ibid* 53.

⁹ Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (Commonwealth of Australia, 2000).

¹⁰ *Ibid* 22.

¹¹ Competition Principles Agreement 1995 (Cth) cl 5(1).

FROM VAULT TO HONESTY BOX

- a) the benefits of the restriction to the community as a whole outweigh the costs;
and
- b) the objectives of the legislation can only be achieved by restricting competition.

However, as copyright law represents something different to its varying member groups (i.e. authors, publishers and users), it is necessary in the context of this article, to go beyond this utilitarian perspective and consider the range of philosophical concepts and frameworks which might be seen to underpin copyright use in Australia. Relevantly, it bears consideration whether the existing utilitarian structure provides authors with the envisaged 'reward' for authorship in the digital era, or whether other copyright theories may merit stronger recognition.

The relationship between authorship and copyright, and its philosophical foundations, has been the subject of academic discourse for some time. Authors have expressed different viewpoints on the issue of copyright and authorship. For example, Saunders articulated the view that '[h]istorical diversities and internal discontinuities make the legal sphere a good obstacle to any global theory concerning authorship.'¹² However, whilst critical of the historical philosophical approach in interpreting authorship, Saunders also implicitly recognised the inextricable link between copyright law and the philosophical ideals that underpin its theory and interpretation.¹³

Goldstein on the other hand specifically distinguished between copyright and 'author's right' as two separate legal traditions for protecting literary and artistic works, stating:

Copyright's philosophical premise is utilitarian: the purpose of copyright is to stimulate production of the widest possible variety of creative goods at the lowest possible price. By contrast, author's right is rooted in the philosophy of natural rights: an author is entitled to protection of his work as a matter of right and justice.¹⁴

He regarded these two traditions as 'far more alike than they are unlike', and cited the *Berne Convention*¹⁵ as a bridging factor and reason for the merging of the two

¹² David Saunders, *Authorship and Copyright* (Routledge, 1992) 19.

¹³ Ibid 19-20.

¹⁴ Paul Goldstein, *International Copyright: Principles, Law, and Practice* (Oxford University Press, 2001) 3-4.

¹⁵ *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 828 UNTS 221 (amended on 28 September 1979), UN Doc 99-27 (1986).

philosophies by recognising authors' moral rights,¹⁶ as well as providing for allowable uses of authors' work.¹⁷

Authors, such as William Fisher, cite four popular approaches: the utilitarian approach, the natural right (or Lockean) theory, the personality theory, and the social planning (for the public good) theory.¹⁸ Other authors such as Stokes divide the philosophical theories into three categories: the economic/utilitarian theory, public policy arguments, and moral rights. Stokes distinguishes two major moral rights, namely 'natural rights' and 'personality rights'. He further proposes that the granting of exclusive rights to the author is an incentive for the author to create, but it is also an incentive to publishers who will benefit from the copyright protection given to the author.¹⁹

Although the labels and divisions vary, most authors recognise four concepts that form the basis of copyright justification: economic/utilitarian considerations, public benefit policies, natural rights attaching to the labour/work, and moral rights attaching to the creator/personality. A brief discussion of these principles follows below.

A The Utilitarian Approach

Regarded today as the most widely accepted and recognised justification for copyright, in 1780 Jeremy Bentham described 'the greatest good to the greatest number of people'²⁰ as a guiding principle of conduct. Utilitarianism has since been applied in Australian copyright law over the last century, along with considerable influence from early United Kingdom ('UK') models since 1901.²¹

The legislature, through this approach, has striven towards balancing the rights of creators with public benefit, i.e. the use and enjoyment of their creations.²² This view militates against situations where too much emphasis is placed on either side of the scale, creating a risk of loss of the creative incentive to the author, or conversely, a

¹⁶ Ibid art 6bis.

¹⁷ Ibid arts 8-14; Goldstein, above n 14, 4.

¹⁸ William Fisher, 'Theories of Intellectual Property' in Stephen R Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001) 168, 172.

¹⁹ Simon Stokes, *Art and Copyright* (Hart Publishing, 2001) 10-11.

²⁰ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, (Clarendon Press, 2007) 2.

²¹ As reflected in the *Copyright Act 1905* (Cth), *Copyright Act 1912* (Cth), *Copyright Act 1956* (Cth) and *Copyright Act 1968* (Cth).

²² Competition Principles Agreement cl 5(1).

risk of too much copyright control that may stifle economic utility. Whether such a balance from authors' perspectives is in fact achieved in current Australian copyright legislation and structures is investigated as a key issue in this article.

Proponents of the utilitarian theory, such as Landes and Posner, suggest that creators should be given the exclusive right, for a limited period of time, to make copies of their creations. This would enable them to recoup their 'costs of expression', whilst consumers would have access to the products at a cost which takes into account the reward to the creators.²³ This approach would thus provide an economic incentive to creators and prevent them being undercut by copyists.

In their earlier work, Landes and Posner explored the dual perspective of copyright: the positive benefit to the owner as a result of the property right and the incentive purpose of the right which caused the author to create.²⁴ Although expressed as a utilitarian viewpoint, this approach showed strong elements of the natural right approach in property followed by John Locke, as discussed below. In *The Economic Structure of Intellectual Property Law*, Landes and Posner concede however, in discussing the economics of property rights in intellectual property, that 'it is unclear to what extent an intellectual property right can realistically be considered the exclusive fruit of its owner's labour.'²⁵

In the Australian context, the current system of copyright law which provides for aspects such as 'moral rights' recognition, (the same 70 year copyright term as applied in the US and European Union ('EU')), and the establishment of licensing bodies such as the Copyright Agency Limited ('CAL'), appears to embody the Landes and Posner ideal. However, it may be suggested that Landes and Posner represent an academic rather than 'grass roots' viewpoint and do not necessarily represent the viewpoints of authors in general. This article focuses on the perceived value, ambits, and limitations of copyright, from such 'grass roots' authors' viewpoints.

B The Natural Right Theory

Supporters of this theory hold the belief that a creator has a natural right to the fruit of his or her labour or an exclusive right of property in one's own labour. It requires

²³ William M Landes and Richard A Posner, 'An Economic Analysis of Copyright Law' (1989) 18 *The Journal of Legal Studies* 325, 346.

²⁴ William M Landes and Richard A Posner, 'Trademark Law: An Economic Perspective' (1987) 30 *Journal of Law & Economics* 265.

²⁵ William M Landes and Richard A Posner, *The Economic Structure of Intellectual Property Law* (Harvard University Press, 2003) 4.

that common resources are 'unowned' or 'held in common', as opposed to those that have been utilised or transformed by the labourer. The Lockean argument relies on the theory that resources derived from one's labour are owned by the labourer, provided 'there is enough and as good left in common for others.'²⁶ However, some authors have questioned Locke's original rationale for his property rights theory, and especially his argument that 'labour upon a resource held "in common" should entitle the labourer to a property right in the resource itself.'²⁷

Whilst utilitarianism strives to marry the conflicting interests of public benefit and creators' protection based on economic considerations, the natural rights theory can be viewed as somewhat idealistic in its application of proprietary rights to work created through the labour of the creator. There is difficulty for example with the interpretation of what can be regarded as 'a resource in common' and considerations such as the extent to which a person laboured on a resource, conflicting claims, and the extent of transformation, then become relevant. The natural rights theory, despite its equitable character, remains problematic for these reasons and does not offer sound resolutions to the creator/public interest conflicts, nor does it properly address the intangible nature of creative effort, its focus being limited to the tangible end result: the written work itself.

Theoretically, the theory proposes unlimited creative resources for all, on the basis that copyright does not diminish the available creative expression. Suzor, who favours expanding the transformative use of copyright, argues that 'each appropriation is a limitation on the ability of future creators to work', which devalues the substance of the 'no harm' argument in the realms of an ideal limitless, creative environment,²⁸ which requires that there is 'still enough and as good left' in common for others.²⁹

This approach is in contrast with Macpherson's much earlier observations in his book *The Political Theory of Possessive Individualism*, where he stated: '[t]he individual is proprietor of his own person, for which he owes nothing to society.'³⁰ This understanding is shared by Stokes, who sees natural rights as part of the 'moral rights' theory, based on the idea of a 'just reward' for labour.³¹ Although this

²⁶ John Locke, *Two Treatises on Government*, (London, 1821) 209, 210.

²⁷ Fisher, above n 18, 184.

²⁸ Nicolas Suzor, *Transformative Use of Copyright Material* (LLM Thesis, Queensland University of Technology, 2006) 1-221, 106.

²⁹ Locke, above n 26, 214.

³⁰ Crawford B Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford University Press, 1962) 269.

³¹ Stokes, above n 19, 12.

approach recognises the intrinsic right of the creator, it does not go further in addressing the rights of middle or end users who may have invested financially in the product. In this sense, the natural rights theory has limitations, which are only addressed to a limited extent by Locke's 'no harm' provisions.

In Australia, there has been some measure of recognition of this theory, evidenced by the inclusion of a 'moral rights' provision in the legislation, which seeks to acknowledge creators' rights to derive a benefit from, and control over, their creative work.³² The concept of 'natural rights' may therefore be regarded as a close relation of the 'moral rights' theory.

C Moral Rights

Derived from the writings of Kant and Hegel and also described as the personality theory, this theory is premised upon the idea that private property rights are crucial to the satisfaction of some fundamental human needs. This viewpoint justifies copyright on the ground that it protects the piece of work created by the author on the basis that it creates conditions conducive to 'creative intellectual activity', which in turn meets the creator's needs.³³

This approach is a departure from the natural right theory in that it does not rely on labour as a necessary requirement, nor does it give extensive consideration to the 'public good' aspect of copyright justification. Instead, it focuses solely on the protection of the personality of the creator. The recognition of personality rights may pose a problem for the objective observer: How does one define the ambits of a 'moral right' and how is it administered? In this regard, legislative provisions are necessary to enforce such rights, and the overlap between moral rights and intellectual property rights may become indistinguishable upon closer examination.

According to Stokes, moral rights can be justified on economic and public policy grounds for the following reasons: consumer interest is served by establishing the authenticity of products, and further, the value of a product will be increased if it is shown to be original.³⁴ Whilst particularly true in the field of art, this line of reasoning is applicable to all forms of creative endeavour, especially when viewed within the ambits of transformative capabilities.

³² *Copyright Amendment (Moral Rights) Act 2000* (Cth), incorporated in s 189 of the Copyright Act 1968 (Cth).

³³ Fisher, above n 18, 171.

³⁴ Stokes, above n 19, 65.

Although cases such as *Millar*³⁵ historically played an important part in the recognition of the rights of authors, the issue of 'moral rights' was not given any consideration in the Court's decision. In that landmark case, arguments were based on the concepts of 'property' (and the nature of the property), 'author' (the creator) and the 'work' (a tangible thing), and hinged on the proprietary rights of authors, rather than personality or moral rights.

Inclusion of moral rights provisions in legislation, such as the amendments implemented by the *Copyright Amendment (Moral Rights) Act 2000* (Cth), shows a move towards legal recognition of author's personality rights. However, whilst the legislature attempts to formulate the ambit of moral rights, these rights remain firmly subject to the economic-utilitarian provisions of the current Act as amended by the *Copyright Amendment Act 2006* (Cth).

D The Public Benefit Theory

This approach favours the widest possible application of knowledge and culture in the interest of the public good. It has also been described as a 'social planning theory',³⁶ whereas Stokes refers to it as 'public policy arguments'.³⁷ Early proponents of this doctrine include Jefferson and Marx, whose ideal is a just and desirable society, rather than the utilitarian aim of 'social welfare'.³⁸

Public policy arguments have become more pertinent with digitisation and the electronic media, raising the contention that copyright restrictions prevent the proper utilisation of creative expression for broader use in the interest of the public benefit. Transformative use, such as parody and animation, are thus lauded as creative re-expression.³⁹ Whilst the advantages of a public benefit approach are undeniable, there is some difficulty in formulating guidelines as to what constitutes 'the public good' or 'public benefit'. Fisher suggests various considerations such as consumer welfare, access to information and ideas, and a rich artistic tradition.⁴⁰ Whilst some authors may agree with these considerations and value the transformative benefits gained by the limitation of copyright, others might not. The challenge lies in reconciling these (sometimes) conflicting ideologies. The danger of placing undue emphasis on public interest considerations, in limiting the scope of copyright (and

³⁵ *Millar* (1769) 98 ER 201.

³⁶ Fisher, above n 18, 173.

³⁷ Stokes, above n 19, 10.

³⁸ Fisher, above n 18, 172.

³⁹ Suzor, above n 28, 2-3.

⁴⁰ Fisher, above n 18, 192-193.

maximising public benefit), is that those very limitations imposed to provide freedom of use by the public may be responsible for the demise of creative efforts, due to a lack of creative or financial incentive to authors. Unfortunately, this paradoxical consequence of an excessively robust public interest focus is often ignored by proponents of a strong public benefit pursuit.

III COPYRIGHT LAW IN AUSTRALIA

A Legislative Considerations

In line with its utilitarian premise, the objectives of copyright in written work are principally reflected in the Act, as amended by the *Copyright Amendment (Digital Agenda) Act 2000* (Cth), the *Copyright Amendment (Moral Rights) Act 2000* (Cth), and the *Copyright Amendment Act 2006* (Cth). Copyright in a literary work is specifically protected under section 31(1) of the Act, whilst authors' moral rights are dealt with under section 189.

It is evident that the legislation defines copyright not only as an economic right, but also accommodates the author's moral rights under the definition of the rights protected under the Act.⁴¹

Whereas earlier authors such as Thomas asserted that 'the purpose of copyright is basically to ensure a continuing profit to the originator or creator of a copyrighted work',⁴² legislative provisions have become more far-reaching in protecting the rights of other stakeholders and to serve broader economic purposes, as is evident from the legislative approach in current Australian copyright law. Thus, whilst Australian copyright law has incorporated 'moral rights' in the *Copyright Amendment (Moral Rights) Act 2000* (Cth), the *Copyright Amendment Act 2006* (Cth) has simultaneously placed the emphasis on economic considerations, thereby continuing to provide for divergent interests and needs.

The ECR's distinct preference for a utilitarian approach, sought to balance the economic incentive policy in respect of the creator, with the public benefit idea and dissemination of the material to the distributor and end user. This approach is consistent with the theory that copyright should serve as an incentive to the author to create, whilst also ensuring the derivation of financial benefit to the author, but goes further by addressing public interest considerations. It may be observed that these principles appear to favour the doctrine of 'serving the greater good' and economic considerations, rather than concerning itself primarily with the protection of the

⁴¹ *Copyright Act* (1968) (Cth) s 189.

⁴² Denis Thomas, *Copyright and the Creative Artist* (Institute of Economic Affairs, 1967) 27.

creator's interests. Having said that, the Act has to date retained parallel importation restrictions on books, effectively protecting Australian publishers and authors against unauthorised imports.⁴³

An analogy by Hansen visualises two disparate and irreconcilable viewpoints of copyright; a secular priesthood of copyright lawyers all firmly believing that creators are entitled to copyright in their works and the "agnostics and atheists" imbued with a culture of the public domain.⁴⁴

This viewpoint emphasises the conflict between the 'moral rights' and 'public benefit' or social interest theories, which prevail in the digital domain. How Australian authors cope with these tensions is revealed later in this article. Moral rights protect the creator rather than the copyright holder. However, the Australian system may more accurately be regarded as 'a hybrid system with authorial moral rights grafted onto a framework that has developed to protect the economic interests, not of the author, but the copyright owner,' as described by Elizabeth Adeney.⁴⁵ This perception has given rise to concerns by authors that their interests are not always adequately protected.

B The Judicial View

Ironically, Australian courts have historically characterised copyright as a negative right. For example, copyright has been defined as 'a power to prevent the making of a physical thing by copying.'⁴⁶ This definition has been cited with approval in subsequent Federal Court decisions such as *Australasian Performing Rights Association Ltd v Commonwealth Bank of Australia* (1992) 25 IPR 157.

From a theoretical perspective, Australian case law has followed the utilitarian approach evident in many US decisions, such as in *Fox Film Corp* 286 US 123 (1932) ('*Fox Film*'). The later US case *Computer Associates International Inc v Altai Inc*, 982 F 2d 693 (2nd Cir, 1992) ('*Altai*') expressed the following policy considerations, which have since been endorsed by Australian courts:

⁴³ *Copyright Act* (1968) (Cth) s 29(5).

⁴⁴ Hugh C Hansen, 'International Copyright: An Unorthodox Analysis' (1996) 29 *Vanderbilt Journal of Transnational Law* 579.

⁴⁵ Elizabeth Adeney, 'Moral Rights and substantiality' (2002), *Australian Intellectual Property Journal* 13, 5, 10.

⁴⁶ *Pacific Film Laboratories Pty Ltd v Federal Commissioner of Taxation* (1970) 121 CLR 154, 167.

FROM VAULT TO HONESTY BOX

The goal of copyright law is to award artistic creativity in a manner that permits the free use and development of non-protectable ideas and processes. The main goal of copyright law is not to reward the labour of authors.⁴⁷

This decision has since been followed in several Australian cases, such as *Coogi Australia Pty Ltd v Hysport International Pty Ltd* (1998) 86 FCR 154, where Drummond J referred to the *Altai* case in his judgment in support of the transformative use of copyright. In the Australian Federal Court decision of *Hamm v Middleton* (1999) 44 IPR 656, Von Doussa J took a different approach and held that '[t]he monopoly of the copyright is intended to give the authors a fair return for their effort, and to provide market incentives for authors to create new works for the public benefit'.⁴⁸

In the 2002 Australian case *Copyright Agency Ltd v Queensland Department of Education* (2002) 54 IPR 19, the Tribunal also emphasised the importance of 'public benefit' in the consideration of statutory licensing rates, stating further that 'the rate set should not inhibit the use of the statutory licence'.⁴⁹

In another case involving Nine Network, the issues of authorship and copyright were considered in its landmark case against Ice TV.⁵⁰ In this case, Nine Network claimed that its weekly television program schedules were protected by copyright as compilations and that Ice TV had infringed on its copyright by reproducing a substantial part of the schedules in its own electronic program guide, the *IceGuide*.

The High Court, overturning the decision of the Full Federal Court, held that any reproduction of the time and title information in the *IceGuide* contained little originality and could not be regarded as a reproduction of a substantial part of any of Nine's Weekly Schedules or the Nine database. In their judgment, their Honours stated that: '[t]he "author" of a literary work and the concept of "authorship" are central to the statutory protection given by copyright legislation, including the Act.'⁵¹ The High Court also recognised the importance of balancing the reward to the author of an original work with public benefit considerations, and acknowledged the influence of the *Statute of Anne* on present Australian copyright law.⁵²

The case signalled a move away from the Court's approach in the case of *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* (2000) FCA 612, where the Court found that the names and telephone numbers from Telstra's *White Pages* and *Yellow*

⁴⁷ *Alati* 982 F 2d 693 (2nd Cir, 1992), 1241.

⁴⁸ *Hamm v Middleton* (1999) 44 IPR 656, [8].

⁴⁹ *Copyright Agency Ltd v Queensland Department of Education* (2002) 54 IPR 19, [10].

⁵⁰ *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458 ('*IceTV*').

⁵¹ *Ibid* [22].

⁵² *Ibid* [24]-[26].

Pages were protected by copyright. In the *IceTV* case,⁵³ the Court considered the information reproduced as not sufficiently substantial to constitute an infringement of the skill and labour expended by Nine Network's employees.

In a more recent decision, *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCA 44, the Federal Court held that copyright did not subsist in the *White* and *Yellow Pages* phone directories produced by Telstra. Justice Gordon referred to the 2009 *IceTV* decision and stated that for copyright to subsist, it was necessary to identify authors and demonstrate that those authors directed their contribution to the particular form of expression of the work. Telstra subsequently appealed the judgment to the Full Federal Court, but in December 2010 the appeal was dismissed.⁵⁴

Inevitably, proprietary issues arise where authors as creators depend on the use of their creations to earn a living. Clearly, the tension between authors' rights and the public benefit has provided a major source of conflict in copyright litigation, and continues to do so. As illustrated below, this conflict emerged in authors' perceptions of copyright, which reflected a variety of viewpoints on how copyright in digital work should be implemented.

IV AUTHORS' PERCEPTIONS OF COPYRIGHT

A recent national online survey of published Australian authors,⁵⁵ conducted by the author, investigated the perceptions of authors on the nature and value of copyright, and how these viewpoints affected their creativity. Responses were obtained from 156 authors, including fiction, non-fiction and academic authors. Additionally, 17 in-depth interviews with a range of authors, as well as additional interviews with small and large publishers, provided further qualitative insights into these issues. The methodology incorporated qualitative one-on-one semi-structured interviews, as well as qualitative and quantitative information obtained through the online survey. Approximately one third of the surveyed authors were full-time authors and the balance part-time. A synopsis of the research methodology follows below.

⁵³ *IceTV* (2009) 239 CLR 458

⁵⁴ *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCAFC 149 (15 December 2010).

⁵⁵ Francina Cantatore, *Authors, Copyright and the Digital Evolution*, Research Survey (Survey Monkey, 2011).

A Research Model and Methodology

1 Multi-Method Approach

A multi-method approach, characterised by a combination of qualitative and quantitative research methods, was employed. In this process the use of multiple methods or triangulation⁵⁶ assisted with an in-depth investigation of the research issues. In-depth face-to-face interviews with a number of authors, underpinned by qualitative data obtained through online survey questionnaires, distributed through the Australian Society of Authors ('ASA') and Writers' Centers throughout Australia, formed the nucleus of the research, relying on 'purposive sampling', as described by Patton.⁵⁷ This information was supplemented by primary documents such as legislation and publishing contracts, a comprehensive literature review and background research on legislative and publishing issues.

2 Purposeful Sampling

The strategy described by Patton as 'purposeful sampling'⁵⁸ has also been referred to as 'purposive sampling'.⁵⁹ Stake explains 'purposive sampling' as follows: 'For qualitative fieldwork, we draw a purposive sample, building in variety and acknowledging opportunities for intensive study'.⁶⁰ Patton regards such sampling as 'information rich and illuminative', offering insight about the phenomenon studied rather than empirical generalisation from a sample to a population,⁶¹ 'to permit enquiry into and understanding of a phenomenon *in depth*'.⁶²

Purposive sampling was implemented in two stages, namely: the first sample of face-to-face interviews with 17 published authors, including 'elite' interviews - as perceived by Marshall and Rossman⁶³ - who comprised more than half of the sample. A second sample of online surveys was completed by a larger group of 156 participants from the ranks of published Australian authors. The researcher

⁵⁶ Norman K Denzin and Yvonna S Lincoln (eds) 2005, *Handbook of Qualitative Research* (Sage, 3rd ed, 2005) 5-6.

⁵⁷ Michael Q Patton, *Qualitative Research and Evaluation Methods* (Sage, 3rd ed, 2002) 40.

⁵⁸ Ibid.

⁵⁹ Robert E Stake, 'Qualitative Case Studies', in Norman K Denzin and Yvonna S Lincoln (eds), *Handbook of Qualitative Research* (Sage, 3rd ed, 2005) 451.

⁶⁰ Ibid.

⁶¹ Patton, above n 57, 40.

⁶² Ibid 46.

⁶³ Catherine Marshall and Gretchen B Rossman, *Designing Qualitative Research* (Sage, 5th ed, 2011) 155.

considered elite authors as those who have been published over an extended period of time and have made continued contributions to the development of the book industry. Because of this naturalistic approach, it was envisaged that such a sample would provide an authentic and relevant result.

The emphasis was not purely on data collection, but on the assimilation and critical analysis of research results, bearing in mind Brannen's cautionary remarks against the risks inherent in qualitative research:

For example, the current turn to reflexivity in qualitative research in respect of the focus upon the researcher risks neglecting research participants. By contrast...there is the opposite risk whereby researchers attribute to their research participants a monopoly over meaning. There is a danger of downplaying the interpretive role of the researcher.⁶⁴

With these caveats in mind, care was taken to identify and acknowledge the viewpoints of participants in the in-depth interviews where they were specific on certain issues. Furthermore, the online survey provided a means of utilising a larger sample group to obtain qualitative data against which the subjective interviewee comments and observations could be examined.

3 Scope of the Research

Two main groups of participants were identified in the research – full-time authors and part-time authors, with only data obtained from published authors utilised. In addition, three publishers (two small and one large/mainstream) and a publishing contract consultant were interviewed to provide background information and a further perspective on the research issues.

Certain sources, especially those regarded as 'elite interviews', could provide valuable information on the research issues, such as author Frank Moorhouse, who had played an instrumental part in copyright protection for Australian authors. Marshall & Rossman note some of the advantages of elite interviews as their possible familiarity with legal and organisational structures and their broad views on the development of policy fields.⁶⁵ It was thus envisaged that the findings of the research would be strengthened by the inclusion of a purposive sample of such high-profile or

⁶⁴ Julia Brannen, 'Working Qualitatively and Quantitatively', in Clive Seale, David Silverman, Jaber F Gubrium and Giampietro Gobo (eds), *Qualitative Research Practice* (Sage, 2004) 283.

⁶⁵ Marshall and Rossman above n 63, 155-156.

'elite' participants with a high level of knowledge on the subject matter, as proposed by Patton.⁶⁶

In respect of the online survey all responses were anonymous, with no identifying features other than broad demographic information, such as the respondent's state of residence, age, type of writing engaged in and income. The non-identifying approach was selected as the underlying basis for this strategy as it was aimed at encouraging prospective respondents to participate in the survey due to the assurance of anonymity.⁶⁷ The scope of the research therefore sought to include a number of different 'types' of authors, who could be classified as full-time or part-time writers, and also according to profession (for example fiction writer, non-fiction writer, academic writer, etc.)

4 The Two Stages of Data Collection

As explained above, the research process was executed in two stages, a first stage which consisted of limited open-ended face-to-face interviews with 17 authors, three publishers and a publishing contract consultant, followed by a second stage, which comprised an online survey which was distributed through the Australian Society of Authors, the professional association for Australia's literary creators, and various writers' centres nationally. This approach allowed for the collection of rich qualitative data through the in-depth interviews,⁶⁸ together with a wider scope of data collection through the online survey.

An interview guide was used to facilitate the in-depth interviews, in line with Patton's suggestion that the use of an interview guide leaves the interviewer 'free to explore, probe and ask questions that will elucidate and illuminate the particular subject.'⁶⁹

The open-ended structure of the interviews with this sample group provided the first valuable source of qualitative data and informed the second stage of the research by providing more insight into the research issues. Furthermore, the scope of the research questions evolved through the process of interviewing as key trends and changes in the industry became more evident and synthesised as the research progressed.

⁶⁶ Patton, above n 57, 46.

⁶⁷ Elizabeth A Buchanan, *Readings in Virtual Research Ethics: Issues and Controversies* (Idea Group Publishing, 2004) 146.

⁶⁸ Denzin and Lincoln, above n 56, 12.

⁶⁹ Patton, above n 57, 343.

The second research stage allowed for a more focused approach by utilising an online web-based survey questionnaire, attached as Appendix A, consisting of limited open-ended and multiple choice questions. Significantly, the online survey provided a purposive sample of data on the research issues, larger in scope than the face-to-face interviews. It was envisaged that the use of this additional instrument would increase the validity of the findings, as proposed by Marshall and Rossman⁷⁰ and as favoured by Patton.⁷¹ Web-based surveys have become more widely used in the last 10 years and are regarded as inexpensive, with a short response time and able to achieve satisfying response rates compared to questionnaires delivered by 'classical' mail.⁷² Web-based surveys are also regarded as having lower respondent errors and increasing the completeness of response.⁷³

Fontana and Frey recognised the fact that computer surveys were becoming more widely used as part of the data gathering process and stated that developments in computer-assisted interviewing had called into question the division between traditional modes of interviewing such as the survey interview and the mail survey.⁷⁴ Consequently, it was envisaged that an online survey promoted by the ASA (a national organisation with approximately 3,000 members from all Australian States and Territories) would obtain pertinent responses from a wide geographic spectrum of authors, implemented by using a web-based survey mechanism such as 'Survey Monkey',⁷⁵ a user-friendly research tool commonly used by academics.

The substantive content of the survey, entitled 'Authors, Copyright and the Digital Evolution' consisted of seven pages, which included 'Demographic information', 'Your views on copyright', 'The existing copyright framework', 'The publishing industry' and 'Publishing on the internet.' The questions were presented in three formats, which included limited open-ended questions, allowing for a paragraph of comment per subject. The second format used was that of multiple questions, where the subject matter lent itself to such a format. The third type of questions used was 'likert' scale choices, employed to scale participants' responses in relation to the

⁷⁰ Marshall and Rossman above n 63, 104-105.

⁷¹ Patton, above n 57, 306.

⁷² Stephane Ganassali, 'The Influence of the Design of Web Survey Questionnaires on the Quality of Responses' 2 *Survey Research Methods* (2008) 21.

⁷³ Heath McDonald and Stewart Adam, 'A Comparison of Online and Postal Data Collection Methods in Marketing Research' (2003) 21 *Marketing Intelligence & Planning* 85.

⁷⁴ Andrea Fontana and James H Frey, 'The Interview: From Neutral Stance to Political Involvement' in Norman K Denzin and Yvonne S Lincoln (eds), *Handbook of Qualitative Research* (Sage, 3rd ed, 2005) 703.

⁷⁵ <<http://www.surveymonkey.com>>.

questionnaire topics. The survey instrument allowed for 'filtering', which enabled the elimination of unpublished author responses to focus on results related to published authors. It further provided a function for cross tabulating results. This facility also enabled comparison of the results of part-time and full-time authors.

5 Limitations

There were certain inherent limitations in the techniques employed and it should be noted that the purposive sampling strategy, by definition, does not allow for generalisations in respect of authors. However, the purposive sample nevertheless allowed for in-depth discussion and provided insight into the authors' subjective viewpoints on the research issues within the framework of this research, as proposed by Patton.⁷⁶

In the context of similar surveys, such as the national *Queensland University of Technology Survey on Academic Authorship, Publishing Agreements and Open Access*⁷⁷ - where emails with survey links were sent directly to 27,385 academics, and only 509 responses were received - it appears that the level of interest displayed by authors in the present survey was not unusual, and that the sample was adequate and useful for the scope and purpose of this research.

The findings are presented below by discussing: first, some authors' personal viewpoints on the meaning and value of copyright; second, whether they regarded copyright as an incentive to create; and third, other considerations in the creative process.

B The Meaning and Value of Copyright

Authors' responses varied markedly in their perception of copyright and its effects on their practice as writers. The variation was driven largely by their level of interest in copyright issues, awareness of the economic implications of copyright, and financial reliance on their writing. Some authors placed a strong emphasis on the emergence of an internet culture and the sharing and exchanging of creative work, contrasting newer models such as the Creative Commons concept with traditional publishing models. These authors were often of the view that copyright requirements have changed to such an extent that existing models no longer provided useful

⁷⁶ Patton, above n 57, 45.

⁷⁷ Anthony C Austin, Maree Heffernan and Nikki David, *Academic Authorship, Publishing Agreements and Open Access* (Research Report, Queensland University of Technology, 2008).

solutions for authors' needs. Others admitted to a lack of knowledge on the subject and expressed concerns about copyright protection of their work.

During his interview, Frank Moorhouse expressed the opinion that many authors did not want to know about, or did not particularly have an awareness of, copyright. He stated:

Authors who are essentially concerned with arts ethic tend to disregard commercial incentive, because the incentive there is self-expression and social communication and connections, readership, with essentially an arts ethic which has values other than commercial reward.⁷⁸

Kate Eltham, author and then CEO of the Queensland Writers Centre remarked on authors' attitudes towards copyright as follows:

I think that it's perceived as a legal issue and not as a business issue. I think if more authors thought about copyright in relation to it being the essential asset of their business, they might have a different attitude to it, but I think they think of it as a legal thing and therefore a bit over their heads and not worth getting into.⁷⁹

Nigel Krauth, author and academic, made some salient observations about the intrinsic value of copyright to the author as owner of the work itself, and related the instance of a book he co-authored, of which the rights were sold overseas, and was translated into German. He further noted:

It's really interesting, that concept of a book of yours that's no longer yours. Nobody even tells me what happens to it. I can't feel the same link to it. It's a very weird feeling ... this idea that without copyright the thing is not yours.⁸⁰

His comments acknowledged the emotional link that authors experienced with their work and the feeling of disconnection when they sold the copyright to that work, which indicated that copyright might have a deeper meaning for authors than a mere economic incentive. He also showed insight into the commercial value of copyright and the need for writers to manage this asset:

Writers, I know, are notoriously bad at managing their own career. One of the things I found when I was a full-time writer, for nearly ten years, was that I suddenly saw myself as the self-employed businessman. The insight (was) that

⁷⁸ Interview with Frank Moorhouse (Broadbeach, 9 May 2009).

⁷⁹ Interview with Kate Eltham (Brisbane, 4 February 2010).

⁸⁰ Interview with Nigel Krauth (Labrador, 10 July 2009).

FROM VAULT TO HONESTY BOX

I was actually a businessman managing my own products, managing my own career, managing my time.⁸¹

Phillip Edmonds, author and publisher of literary magazine *Wet Ink*, agreed that authors needed to be more proactive in protecting their copyright. Some interviewees viewed the concept in a simplistic manner. As one author said, giving voice to the 'author's proprietary right' premise proposed by Rose;⁸² 'copyright to me is simply my right to say: this is mine.' The interviewee comments reflected an acknowledgement that many authors were slow to protect their own interests, and that copyright had a commercial aspect which required proper management by authors. Copyright was seen by some authors as an 'after-the-fact' issue, a given which automatically applied once one had created something.

C Do Authors See Copyright as an Incentive to Create?

Respondents to the online survey had varying views on the incentive value of copyright in the creative process. Significantly, more than half of respondents responded negatively to the statement '*I regard copyright as an incentive to create*'. However, just over 60 per cent responded positively to the statement '*Copyright is a consideration for me when I create*'. This figure rose to almost 90 per cent in relation to the following statement: '*Copyright is a consideration for me when I publish my work*'. These responses suggest that most respondents regarded copyright as an important consideration in the publishing process, rather than during the creative process, possibly due to the immediacy of having to deal with this issue in publishing contracts and royalty considerations.

The incentive issue was discussed in more detail during the in-depth interviews. The responses appeared to support those generated by the online survey but also further revealed the relationship between authors' perceptions of copyright and creative expression. Eleven of the interviewees expressed the view that they did not regard copyright as an incentive to create and perceived it as having minimal or no influence in their approach to their work, whereas five respondents said it was an important consideration in their practice. However, five of the negative respondents qualified their answers by adding that, although copyright did not motivate them to write, it was an important issue to be considered once they had created the work. These respondents were emphatic in their viewpoint that copyright afforded them no creative motivation, some authors even expressing surprise at the suggestion. However, they provided mixed responses at how it impacted at the publishing stage.

⁸¹ Interview with Nigel Krauth (Labrador, 10 July 2009).

⁸² Rose, *The Author as Proprietor*, above n 7, 53.

Several interviewees indicated that they would write in any event, whether copyright existed or not.

Notably, none of the interviewees who responded in this manner were financially dependent on their writing and all had careers or resources other than full-time writing. Two publishers had opposing views on the issue; one agreeing that 'in many cases I think authors are going to create no matter what', whereas another mainstream publisher thought copyright was definitely an incentive to create as 'without copyright authors can't be assured of ownership and control over what they create, nor payment for their work.'

Those authors who regarded copyright as an incentive to create indicated that it was a consideration for them in how they practised their craft. However, all of them recognised that there was an element of passion or inspiration involved which fuelled the creative process. As articulated by writer and academic Robyn Sheahan-Bright:

The creation of writing, or any other art form, although obviously driven by a passion to create, is accorded value by the recognition that the product is the outcome of the creator's intellectual effort. Copyright is a recognition of that intellectual property.⁸³

Author Nick Earls considered copyright to be an incentive to create, but qualified his response by saying that the primary incentive to create was simply the act of making something itself. He went on to explain:

When I'm sitting at home staring at the wall I'm thinking creatively and I'm making up stories. What I'm doing of course is generating intellectual property that I can then license around the world in order to earn an income. So copyright is a really important part of that and has been for three hundred years. But I'm very aware that when I make something I own it, and I want as many people to read it as possible. I'm very happy for people to read it in libraries and I don't have to make three dollars out of it every time someone reads it, but I am aware that I can then take to the marketplace and sell in a range of countries and to a range of media...That's what makes this a job rather than just a hobby.⁸⁴

Another bestselling author said that copyright provided her with the reassurance that her work could not be stolen or sold, or given away without her consent, and that it 'provides me with the assurance that others can't profit from my creations without my consent.' These comments appear to reflect the notion that authors create

⁸³ Interview with Robyn Sheahan-Bright (By email correspondence, 4 August 2009).

⁸⁴ Interview with Nick Earls (Brisbane, 10 August 2009).

for different purposes but that they nevertheless attach value to copyright, irrespective of whether there are commercial considerations attached to the work.

In an earlier article⁸⁵ Frank Moorhouse discussed the issue of economic motivation for authors:

Paradoxically, the literary author is often characterised, at least in their early career, by an indirect economic motivation. The young literary author (and even mature authors) at the time of setting out to write seriously make no attempt to calculate the return on the work and the book, say, is begun without much idea of how long it is going to take or how much it will 'cost' to create the work in monetary terms let alone in terms of life – of blood, sweat, and tears. Most young writers do not think much about how they will live and what the economics of their art form is. This is not wholly a romantic attitude. It is not possible for even an experienced publisher to clearly predict what a book will earn in the life of an author and least of all, in the life of the book. For the publisher it is a speculative venture. For the writer as well, it is, unconsciously, also a speculative investment.⁸⁶

His comments support the valid contention that most authors, at least initially, are not directly motivated by economic benefits, as this is often an unknown quantity in the creative process.

D Other Considerations in the Creative Process

In addition to describing writing as a passionate pursuit, or something that was done for the love of the creative act, the authors identified factors other than copyright as motivating the creative process. These factors included, to varying degrees, personal satisfaction, financial considerations and the prospect of achieving recognition for their work. The online survey results focussed on whether any of these three factors were major motivational factors. Interestingly, there was little difference between the views of full-time and part-time authors.

Both groups - over 90 per cent of respondents - overwhelmingly agreed that they were 'mostly motivated by personal satisfaction.' However, nearly 46 per cent also agreed that they were 'mostly motivated by achieving recognition', indicating that there was some overlap in their purpose, with some respondents being equally motivated by personal satisfaction and achieving recognition. A variation in the full-time and part-time group responses was however evident in relation to financial

⁸⁵ Frank Moorhouse, 'The Escape from "Eccentric Penury": How Should We Pay Literary Authors? Policy Visions for the Australian Writing Economy' (2008) 26 *Copyright Reporter* 4.

⁸⁶ *Ibid.*

incentives. Although the majority of authors (83 per cent of part-time and approximately 66 per cent of full-time authors) disagreed that financial gain was their primary incentive, as expected, full-time authors attached more value to financial considerations.

One author, who was also a publisher, regarded both personal satisfaction and the promise of financial gain to be motivating factors in the creative process. Another author and freelance journalist focussed on recognition and personal satisfaction as the two factors motivating her to create, but commented that financial gain was important for self-worth. Both these interviewees expressed an appreciation for the economic value of their writing, but not as a primary objective. Other observations made by authors reflected the reality that an author may be motivated by several different considerations in relation to different projects at different times.

E Income from Creative Work

The participants' views were borne out by the findings in relation to their incomes. Relevantly, 92 per cent of part-time and 57 per cent of full-time authors disclosed a supplementary source of income. The largest group of respondents fell in the category of earning only \$1,000 - \$2,000 per annum from their writing, including nearly 18 per cent of full-time authors. Considering the fact that these were all published authors, this was indicative of their lack of financial motivation, although a small percentage (2.3 per cent) disclosed earnings in excess of \$100,000 per annum.

These findings echoed the observations of Cunningham & Higgs 'that arts employment is characterised by high levels of part-time work'.⁸⁷ In addition, a study by Throsby and Zednik in 2010 established that 69 per cent of writers had earned less than \$10,000 per annum from their creative work in the 2007/2008 financial year.⁸⁸ The findings from this research confirmed that this remained the case in 2011, with slightly fewer (approximately 62 per cent) of the surveyed authors earning less than \$10,000 per annum from writing and writing related activities.

It was suggested earlier in this piece that Landes and Posner represented an academic rather than 'grass roots' viewpoint in discussing the incentive purpose of

⁸⁷ Stuart Cunningham and Peter Higgs, *What's your other job? A census analysis of arts employment in Australia* (Research Report, 2010) 5. http://www.australiacouncil.gov.au/_data/assets/pdf_file/0009/79074/What_is_your_other_job_the_census_study.pdf.

⁸⁸ David Throsby and Anita Zednik, *Do you really expect to get paid? An economic study of professional artists in Australia* (Research Report, 2010) 44-45. http://www.australiacouncil.gov.au/_data/assets/pdf_file/0007/79108/Do_you_really_expect_to_get_paid.pdf.

copyright to authors.⁸⁹ These findings pertaining to authors' viewpoints on and income from copyright confirm that the Landes and Posner ideal of copyright serving its dual purpose - by providing not only a positive benefit to the copyright owner (as a result of the property right), but also an incentive for the author to create - has not yet been achieved in practice.

V COPYRIGHT IN THE DIGITAL DIMENSION

Undeniably, e-publishing and the internet have impacted on traditional perceptions of copyright. How authors have accommodated the changing landscape has been influenced by a variety of considerations, depending on for example: their views on copyright, their internet know-how, and publisher relationships. In the online survey,⁹⁰ nearly two thirds of full-time and half of part-time authors said that their work had been sold in digital/electronic format on the internet, as e-books or articles. Only 17.4 per cent of respondents sold their own work on the internet, whilst more than 46 per cent relied on their publishers to do so. It was apparent that full time authors appeared to have embraced the internet market place but that most of them were relying on their publishers to sell their books on the internet.

A significant topic addressed in the survey, and pivotal to this discussion, was the issue of digital copyright protection. Although the survey findings showed that nearly 80 per cent of all respondents were concerned about their digital copyright, more than half admitted to doing nothing to protect their copyright online. Several survey respondents specifically cited a lack of knowledge on e-book copyright as a problem and voiced concerns about a lack of time and funds to pursue copyright breaches on the internet. In addition, publishers did not provide a shield for authors against online copyright infringement, with most authors and publishers accepting the inevitability of copyright infringements on the internet. As expected, many respondents and interviewees acknowledged the increased publishing opportunities presented by the internet and were prepared to accept copyright infringements as the cost of increased exposure.

It was found that authors who took protective steps employed different measures to protect their online copyright. Significantly, only approximately 16 per cent of respondents used digital rights management ('DRM') to prevent the copying of their work. Some expressed reservations about the use of DRM and described it as 'a barrier' to readers buying their books. Whilst most respondents stated that it was impossible to protect their copyright online, approximately one third supported the

⁸⁹ Landes and Posner, 'An Economic Analysis of Copyright Law', above n 23.

⁹⁰ Cantatore, Authors, 'Copyright and the Digital Evolution', above n 55.

Creative Commons, a licensing scheme which recognises the author's moral rights and provides licensing options pursuant to the provisions of section 189 of the *Copyright Act*, thereby providing authors with a sense of control over their work.

In publishing online, more than a third of the survey respondents stated that they posted warnings on their websites or on the creative work itself, and 13 per cent used 'other means' of copyright protection such as relying on their publishers and taking note of daily Google alerts advising of illegal file sharing sites. Significantly, as some authors pointed out, the problem with protecting online copyright is that it is usually not commercially viable to pursue offenders in the case of a breach. A mainstream publisher also agreed that international copyright was a grey area and that legal advice would not necessarily help to resolve practical issues. The findings showed that the prohibitive costs of protecting their copyright and litigating overseas was a stumbling block for these Australian authors, which was evidenced by the absence of Australian copyright litigation on written work.

During the interview stage, several authors mentioned the need for new copyright solutions, although there were divergent opinions on the subject. Author Sally Collings expressed the following views on digital rights protection: 'We need to find ways of monetising content that reflect how consumers actually consume media via the internet, not how we - the publishing industry - would ideally like the consumers to behave.' She saw DRM software as one way of restricting how an author's work could be used on the internet and pointed out that digital copyright protection should enable the commercialisation of authors' work instead of restricting it. 'The DRM framework of 'locks and keys' is broken, so to speak. New solutions need to be found,' she said.⁹¹

In his interview Nick Earls stated⁹² that the existing notion of copyright was poorly prepared for how copyright should be handled in the digital domain and declared himself open to innovative ideas that could be applied to protect copyright on the internet and compensate authors for the sale of their work, for example, in advertising revenue or a licensing fee. Other authors such as self-publisher John Kelly had a relaxed attitude about digital copyright: 'If you are referring to the absence of international boundaries, I'm sure such matters will sort themselves out. There's nothing new under the sun.'⁹³

⁹¹ Cantatore, 'Negotiating a Changing Landscape', above n 4, 206.

⁹² Ibid 206.

⁹³ Ibid 207.

Two travel writers, Claire Scobie and Kim Wildman, cited problems with the copying of their work online.⁹⁴ Scobie referred to several instances where her content had been reproduced on the internet without her consent on other websites or blogs. Where she wrote articles for newspapers such as those in the Fairfax group, she had no control over the online treatment of her material. In this regard, she saw freelance writers as being powerless to protect their copyright. Wildman reported similar problems, with some of her articles being reproduced by people on their own blogs or on another website. She had previously dealt with this problem by sending the offender an email stating that they should remove the content from their site or be invoiced with an indication of the cost. Failing the removal of the material, she would send them an invoice, which would usually result in the material being removed. In other instances, such as where she was doing work for Ninemsn, she involved their legal department to follow up on the infringement.

She saw it as a problem that if she sold an article to newspapers, they automatically put it onto the internet, which effectively ruined her chance to sell the article anywhere else in the world. The newspaper's clause, providing for 'any of our publications', allowed for publication on the internet whilst the journalist did not receive any additional payment for publication on the internet. On the other hand, Wildman saw publication on the internet in a positive light from the perspective that it increased the author's exposure through social media or other opportunities.

Author Kate Eltham's approach was pragmatic regarding copyright protection on e-books: 'There is nothing at all that a publisher or an author can afford to do that is going to prevent a determined person from ripping your content and then distributing it freely on line if they should want to do that'.⁹⁵ Like Collings, she did not approve of DRM protection on e-books as she felt it to be too inflexible and restrictive from the consumer's point of view.

Thus, while some authors favoured a more proactive approach to copyright protection, others were of the view that the existing copyright structure was insufficiently suited to copyright use in the digital domain. Authors who were most optimistic about the future of online publishing acknowledged the limitations of DRM technology, yet there appeared to be few other viable income producing copyright options available.

A pertinent ongoing issue of consideration for authors in this digital arena, is the extent of Google's innovations on the internet. Google's unauthorised scanning of books constituted a breach of existing copyright law, as evidenced in *The Authors*

⁹⁴ Ibid 210.

⁹⁵ Ibid 208.

Guild et al v Google Inc, 05 Civ. 8136 (DC), NYLJ 1202487550856, at 1 (SDNY, Decided March 22, 2011), ('Google') yet nevertheless some respondents saw merit in their actions. Despite some authors expressing unequivocal criticism for Google's disregard for traditional copyright considerations and the proposed 'opt out' model, the possibility of making previously out of print works available online, was seen by others as a significant benefit for authors and readers. It was surprising that just over a third of the survey respondents admitted to being unfamiliar with the highly publicised Google Settlement, considering the inroads such a settlement would have made on authors' copyright globally. It was also evident that, although most authors were aware of the Google Settlement, they lacked in-depth knowledge of the ramifications for them as authors. Whilst some authors were of the view that 'the end justifies the means', others were highly critical of Google's high-handed approach, whilst a third group had a 'wait and see' approach.

In the *Google* case, Google, through its Google Books initiative, has been testing the boundaries of copyright in the digital arena, by digitising books in a number of libraries in the US, and later providing copyright owners with an opportunity to 'opt out' of their proposed business model.⁹⁶ The Amended Google Settlement Agreement, which was rejected by the Southern District Court of New York in March 2011,⁹⁷ was the result of a copyright dispute arising between authors and Google in 2009 with regard to its Google Library Project, involving Google's digitisation of entire collections of participating libraries without the consent of the rights' holders. Google's actions and subsequent claims of 'fair use' resulted in objections from the ranks of authors and publishers, and legal action by their representative body against Google, which resulted in the failed Google Settlement Agreement. These developments signified a major change in the application of established copyright norms on the part of Google.

On the positive side, through these initiatives Google created opportunities for authors to benefit from previously out of print publications, which would also benefit the public as a whole. Copyright owners would receive compensation for the use of their work and be allowed to control future uses of their digital books.⁹⁸ However, Google's actions were conversely regarded as transgressing accepted copyright

⁹⁶ Jerome John and Fiona James, Australian Copyright Council, *Copyrighting Google* (28 March 2011) <<http://www.copyright.org.au/news-and-policy/>>.

⁹⁷ *The Authors Guild v Google Inc* (SD NY, Civ No 05-08136, 2009) 1.

⁹⁸ Alain Strowel, *The Google Settlement: Towards a Digital Library or an Inquisitive Shopping Mall?* (Paper presented at Bond University, December 2009) 7.

norms, due to the 'opt out' provisions,⁹⁹ which ultimately resulted in the rejection of the scheme by the Court.¹⁰⁰

Although Google did not succeed in obtaining Court approval for its proposed Amended Google Settlement, the lead-up to the case signified a major shift in the application of copyright law. It is however evident that the proposed model would have to be revised substantially to have any prospect of gaining acceptance by the Court. Judge Chin of the New York District Court condemned Google's actions as being in breach of existing copyright laws, being predicated upon an 'opt out' instead of 'opt in' model.

Additionally, since the conduct of the research, the related case of *Authors Guild v HathiTrust* No.11 Civ 6351, 2012 WL 4808939 (2011)¹⁰¹ against USA libraries and the HathiTrust for the scanning and digitising of library databases, provided a further dimension in the book scanning dispute. The lawsuit, filed in September 2011 in the Southern District Court of New York by the Authors Guild (joined by the ASA and several Australian authors), described the unlawful scanning and digitising of library databases as 'one of the largest copyright infringements in history' and sought an injunction against the defendants as well as an order impounding all unauthorised digital copies under their control.¹⁰² The Court held that the HathiTrust's actions were protected under the USA 'fair use' legislation, providing a stark reflection of the impact of digitisation on the rights of copyright holders worldwide, and the Plaintiffs have filed an appeal. This is a landmark case in the dilution of authors' copyright in the digital environment, as opposed to the 1975 Australian case *University of NSW v Moorhouse* (1975) 133 CLR 1,¹⁰³ which resulted in protective measures for Australian authors in relation to unauthorised copying of their printed work.

Apart from the Google Settlement, it is evident that Google has already successfully implemented certain licensing agreements in relation to its Google Books store, where, pursuant to Partner Program Agreements with publishers, it is able to display portions of books online, varying in content depending on their agreement with publishers. The survey findings included examples where these publisher agreements had been concluded with Google without the author's knowledge. For example, one author reported that she had seen her book on a Google Books search and had been disturbed by the amount of content displayed for viewing, without the

⁹⁹ Ibid 19.

¹⁰⁰ *Google Inc* (SD NY, Civ No 05-08136, 2009).

¹⁰¹ *Authors Guild Inc v HathiTrust*, No.11 Civ 6351, 2012 WL 4808939 (2011).

¹⁰² *Authors Guild Inc v HathiTrust*, No.11 Civ 6351, 2012 WL 4808939 (2011) 4, 22-23.

¹⁰³ *University of NSW v Moorhouse* (1975) 133 CLR 1.

publisher notifying or consulting with her. Such occurrences raise concerns about the consideration given to authors' interests by publishers in the online publishing process, emphasizing the need for closer collaboration between authors and their publishers.

Loukakis, one of the Plaintiffs in the *HathiTrust* lawsuit, has expressed the view that authors should become actively involved in the review of the Act, and current licencing schemes, which, he argues, should make provision for payments for online access to publications.¹⁰⁴ Additionally, he proposes practical and enforceable measures, such as punitive sanctions, and suggests the introduction of an anti-piracy copyright education campaign for authors.¹⁰⁵ Such measures will assist authors in enforcing their copyright; however, the current ALRC considerations of digital publishing do not include a specific review of digital copyright protections for authors of written work.

VI MANIFESTATIONS OF TRANSFORMATION

Nevertheless, in recognition of the perceived limitations of current copyright models, many authors are changing their approach to writing and publishing as electronic publishing gains momentum. Along with the new opportunities presented by a global market, such as self-publishing and a plethora of online booksellers, authors have become aware of the need to revise traditional publishing expectations and embrace new marketing strategies. This trend was reflected in authors' comments, such as Eltham's observation that many authors now find that the more their work is disseminated on the internet, the more printed copies they sell of that work.

These changed perceptions have resulted in the emergence of new business models such as an 'honesty box' model utilised by international authors such as Corey Doctorow and Leo Babauta, who allow free downloads of their books with payment at the discretion of the reader. Doctorow argues that people who only read the free online versions were not going to buy his books anyway, and provides him with a wider audience.¹⁰⁶ Babauta goes further and allows readers to use his 'uncopyrighted' material freely, without any restriction.¹⁰⁷ The concept of giving away 'free' content has been employed successfully by some authors, who feel that this gives the author

¹⁰⁴ Angelo Loukakis, *Submission to the Book Industry Strategy Group* (January 2011) <http://www.asauthors.org/lib/pdf/zSubmissions/2011/ASA_Submission_To_BISG.pdf> 4-5.

¹⁰⁵ *Ibid* 6.

¹⁰⁶ Cory Doctorow, *Makers: Download for Free* (2011). <<http://craphound.com/makers/download/>>.

¹⁰⁷ Leo Babauta, 'Zenhabits' on Leo Babauta, *Zenhabits* <<http://zenhabits.net/>>.

a visibility that is difficult to obtain in the vast digital environment of the internet. The findings show that this is regarded as a viable option by some authors, and a means of free advertising.

Author Kate Eltham suggested the following approach for authors producing digital content:¹⁰⁸

As a tool for entrepreneurs, you have to be a content producer. It should be flexible enough as a legal document to allow people to pursue their business in different ways, and that means that it has to be responsive to the kind of media and not kind of mired in a type of media that was the dominant thing 500 years ago and is not the dominant media now. But also, there is a balance that needs to be struck because authors benefit from audiences. They benefit from the public consuming their content. They can't make money by selling books if people aren't willing, as a mass audience, to consume them. So they should think about balancing the interest of that group against their own commercial interest.

Publisher Alex Adsett agreed that the model adopted by Cory Doctorow of providing his material for free on the internet might be a viable option for some authors as 'a way of free advertising.' She stated that many writers held the view that the more their work was disseminated on the internet, the more printed copies they sold of their work.¹⁰⁹

Phillip Edmonds of the University of Adelaide also took a pro-active approach to exploring new models for publishing. In his article '*Interrogating Creative Writing Outcomes: Wet Ink as a new Model*'¹¹⁰ he proposed the use of institutional resources to contribute to an intervention in the 'so-called literary marketplace'. He cautioned that:

...retreating from and lamenting our perceived publishing crisis could result in a depressive culture of inwardness and defensiveness in our institutional frameworks, and even a form of 'recreational grieving' as to the high-mindedness of our intentions.

He suggested that the University, and *Wet Ink* in particular, could be involved in 'interrogating a third space containing general readers, rather than just other writing students or people trained in particular university discourses'.¹¹¹ Consequently, the

¹⁰⁸ Cantatore, 'Authors, Copyright and the Digital Evolution', above n 55.

¹⁰⁹ Cantatore, 'Negotiating a Changing Landscape', above n 4, 208.

¹¹⁰ Phillip Edmonds, 'Interrogating Creative Writing Outcomes: Wet Ink as a new Model' (2007), *TEXT*, Vol 11, No 1, <<http://www.textjournal.com.au/april07/edmonds.htm>>.

¹¹¹ Ibid.

magazine *Wet Ink* was self-funding, distributed nationally and involved people from within the university and outside. Whilst it had been challenging to build the magazine up as a viable business in a difficult and small publishing environment, he recognised the importance of developing a subscription base with constituencies such as reading groups and writers' centres in order to facilitate and expand their distribution base. Edmonds' insight reflected the willingness of many authors to embrace alternative publishing models.

Sally Collings noted that the whole economic model of publishing was changing,¹¹² as small publishing houses and self-publishing became more widespread and viable. She used her own small publishing house, Red Hill Publishing (Red Hill) at www.redhillpublishing.com as an example. Red Hill operated on a fee for service basis, where the author paid Red Hill a royalty on copies sold. As a result, authors kept nearly 90 per cent of the revenues, retained their copyright and were able to license their work to other publishers. Collings was optimistic about the ability to sell books both in Australia and internationally.

From a philosophical perspective, the current utilitarian system embraces the dual perspective of copyright, namely the positive benefit to the author as a result of the proprietary right and the incentive purpose of the right which motivates the author to create.¹¹³ This theory finds application in these new business models in the sense that, in addition to public benefit considerations, they also envisage a benefit to the author as an end result. Although the public benefit is served by making creative work freely available on the internet, these models are underscored by the expectation of a 'social contract' between author and reader as seen by Doctorow, that the author's moral rights will be respected and a confidence that the free dissemination of work will lead to book sales. Similarly, the Creative Commons provides broad licensing options, underscored by the recognition of the author's moral rights. These models also reflect Adeney's perception of authorship, by recognising notions of "'property'" on the one hand and "'personality'" or moral rights on the other.¹¹⁴

Social media such as Twitter and Facebook were seen as important marketing tools by several authors. Referred to as a 'fast, easy way to publish', there was nevertheless a perceived danger of a loss of control over material sent via Twitter, for example, where others could use that material or change it without acknowledging the author. The possibility of these types of infringements is also admitted by Doctorow;

¹¹² Cantatore, *Negotiating a Changing Landscape*, above n 4, 220.

¹¹³ Landes and Posner, *An Economic Analysis of Copyright Law*, above n 23.

¹¹⁴ Adeney, above n 45, 9.

however, he continues to promote the idea of free access to his work and sees the relationship between author and reader as 'a social contract between creator and user.'¹¹⁵

To the literary author, this may present a competitive challenge as numerous 'authors' enter the literary sphere, especially for first time authors. Additionally, authors may be disadvantaged if they lack technological skills to make use of digital marketing tools. Commentators such as Alexander contend that, although authors - as the recognised originator of written work - have to face fresh challenges in the digital environment, they are no more disadvantaged than their predecessors in the literary sphere.¹¹⁶ Alexander argues that there has always been a struggle between competing economic interests as far as copyright was concerned, since before the *Statute of Anne* was passed. She notes the fact that new innovations have historically been opposed through a 'backward-looking attitude'¹¹⁷ and are seen as a threat, rather than embraced. In support of her argument she refers to William Patry's book,¹¹⁸ and advances the thesis that copyright debates are 'essentially the product of outdated business models being threatened by innovators'.¹¹⁹ Patry regards the 'copyright wars' between protectors of copyright and marketplace considerations as an ongoing saga of conflicting economic interests, in which copyright owners run the risk of being 'armed to the teeth against consumers who have left the battlefield.'¹²⁰

Although Patry's comments are directed towards copyright developments in the US, the same issues affect Australian authors. With the emergence of e-books there has been a corresponding interest in the use of e-readers such as Kindle, Kobo, Sony and various hand-held reading devices, as well as devices such as the iPad. The scope of publication possibilities continues to expand as digital technologies proliferate. For example, recent additions to the Apple iPad applications (apps) include a book app for TS Eliot's poem 'The Waste Land', which is presented in electronic form with several inclusions; two readings by the poet himself as well as Ted Hughes and other actors, an on screen text version as well as an annotated version of the poem, a facsimile of the original manuscript with handwritten edits, and video commentaries

¹¹⁵ Doctorow, above n 106.

¹¹⁶ Isabelle Alexander, 'All Change for the Digital Economy: Copyright and Business Models in the Early Eighteenth Century' (2010) 25:3 *Berkeley Technology Law Journal* 1351-1379.

¹¹⁷ *Ibid* 1352-3, 1378.

¹¹⁸ William Patry, *Moral Panics and the Copyright Wars* (Oxford University Press, 2009) 2.

¹¹⁹ Alexander, above n 116, 1352.

¹²⁰ Patry, above n 118, 14.

by eminent writers and experts.¹²¹ New devices are constantly being introduced into the marketplace, signalling a continued interest in meeting readers' and users' requirements.

The opening of Google's e-Bookstore in the US in December 2010 signalled the introduction of a new type of e-book, which dispensed with the concept of the book as an electronic file and instead made it available on the web in a 'cloud', a type of virtual server available over the internet.¹²² The same concept has been utilised by Australian company Booki.sh, where an e-book is a web link rather than an electronic file.¹²³ Author Simon Groth sees this development as 'great news for anyone who doesn't want to be tied to a single device and solves a few problems around what happens to all your books if you lose or upgrade your e-reader.'¹²⁴ It is also envisaged by some that the Google store will provide competition for the Amazon Kindle store, and help to prevent Amazon from monopolising the marketplace.¹²⁵ However, this concept requires the reader to make a further leap away from book ownership, namely from electronic file licensing to web link, thereby creating another dimension for authors to consider in the ongoing development of publishing and distribution.

VII PUBLISHING OPTIONS FOR AUTHORS

Authors regarded the issue of copyright as being closely linked to royalty payments in the publishing process. When asked about royalties received from electronic publications, approximately 16 per cent of respondents were unpaid and received nothing for their publications; 10 per cent received five to six per cent of RRP; 21 per cent received 10 per cent of RRP; 10 per cent received 100 per cent (being self-publishers); and the remaining respondents received amounts that varied from 10 to 99 per cent of RRP. One respondent reported receiving 'a flat rate from an education publisher for a specific title', while another received 'a flat fee of \$500 for a book to be

¹²¹ Stephen Romei, 'Kapow! Poet Defeated Superheroes', *The Australian* (Sydney), 25 June 2011, 25.

¹²² Eric Knorr and Galen Gruman, InfoWorld, *What Cloud Computing Really Means* (8 July 2010) <<http://www.infoworld.com/d/cloud-computing/what-cloud-computing-really-means-031>>.

¹²³ Jeremy Fisher, 'E-Books and the Australian Publishing Industry' (2010) 69(3) *Meanjin* <<http://meanjin.com.au/editions/volume-69-number-3-2010/article/e-books-and-the-australian-publishing-industry/>>.

¹²⁴ Simon Groth, 'Cloud Atlas' (2011) 205 *Writing Queensland* 17.

¹²⁵ Rory Cellan-Jones, 'Who's Afraid of Google's Book Store?' on BBC, *dot.Rory* (7 December 2010) <http://www.bbc.co.uk/blogs/thereporters/rorycellanjones/2010/12/whos_afraid_of_googles_book_st.html>.

included on an educational website' and others stated that payments varied depending on the publication. The highest reported royalties - except for self-publishers - had been received by a full-time fiction writer, who had received a 70 per cent royalty from publishing e-books online with Smashwords and 50 per cent from publishing with www.regencyreads.com. Although the percentages fluctuated significantly, it was apparent that online publishers were paying up to 14 times the royalties paid by traditional publishers. This was a significant departure from traditional models and a tangible reflection of the changing expectations of authors in the digital marketplace.

Most of the interviewees appreciated the need for keeping up with technology and electronic rights. Kate Eltham, a founding member of if:book Australia (a centre for research in digital publishing), expressed the view that publishing contracts needed updating and revising in order to properly incorporate digital rights. 'We are starting to see some standard royalty rates emerge for e-books and some of the trade publishers at around 25 per cent of the retail price,' she commented and added that she felt there would be a lot of pressure for the royalty rate to rise in the near future. This did not appear to be the general norm for the survey respondents, who typically earned considerably less than 25 per cent.

In the digital world authors have the opportunity of publishing through online publishers such as Smashwords¹²⁶ and Lulu,¹²⁷ smaller online publishers such as Red Hill Publishing (Red Hill),¹²⁸ or self-publish and sell their e-books through numerous sites such as Amazon¹²⁹ or Clickbank,¹³⁰ to name but a few. Social publishing sites such as Scribd¹³¹ allow authors to upload and publish e-books for free or for purchase on their website. Smashwords also allows publishing to devices such as the Apple iPad, Barnes & Noble Nook, SonyReader, Kobo reader and iPhone, offering author royalties of 85 per cent net from sales at Smashwords and 60 per cent of the 'list price' from major e-book retailers. These percentages are considerably higher than the percentages offered by mainstream publishers for e-books.¹³² Lulu offers similar services, enabling authors to self-publish and distribute their e-books in electronic publication format, which makes them compatible with various reading devices.

¹²⁶ <<http://www.smashwords.com>>.

¹²⁷ <<http://www.lulu.com>>.

¹²⁸ <<http://www.redhillpublishing.com>>.

¹²⁹ <<http://www.amazon.com>>.

¹³⁰ <<http://www.clickbank.com>>.

¹³¹ Scribd, *Upload your Documents* (2012) <<http://www.scribd.com/upload-document#files>>.

¹³² Smashwords, *Smashwords Support Center FAQ* (2012) <<http://www.smashwords.com/about/supportfaq>>.

Authors earn approximately 56 per cent of the list price for Lulu e-books sold at the iBookstore, also higher than royalties paid by mainstream publishers.¹³³ Small publishers such as Red Hill offer a different package for authors, whereby authors carry the production costs of their work and then pay Red Hill 12.5 per cent on all books sold, after all pre-print costs are recouped.¹³⁴

Scribd prides itself on being the largest social publishing and reading site in the world,¹³⁵ with 60 million readers each month. The site includes books, magazines and documents, and its technology allows users to upload and transform any file into a web document that is discoverable through search engines and may be shared on social networks.¹³⁶ Another option for authors selling digital works is Clickbank, an online retail outlet for more than 46,000 digital products. Clickbank has a one-off 'product activation fee' of US\$49.50, and charges authors a US\$2.50 'pay period processing charge' for every payment made to the author, as well as a 7.5 per cent commission plus US\$1.00 on each sale.¹³⁷

For many authors there lies a challenge in embracing these new business models and digital initiatives, and accommodating the shift towards public benefit concerns. This tension was recognised by the surveyed authors, yet few had fully engaged with these challenges. Whilst the royalty structures of online publishers appear lucrative, it should be noted that in many instances authors do not have the support and exposure provided by traditional print publishers, leaving authors ambivalent or indecisive. To an extent these disadvantages are offset by a growing awareness of the pervasiveness of digital publishing, which in turn has prompted the development of a host of websites and literature on the subject. In Australia the Copyright Agency has developed Digital Publishing Australia,¹³⁸ a forum which provides useful guidance on digital publishing, but many authors continue to resist change and cling to traditional publishing models.

VIII CONCLUSION

Whether considered philosophically or more pragmatically, within the context of technological progress, it is clear that attitudes towards copyright are changing and

¹³³ Lulu, <<http://www.lulu.com>>.

¹³⁴ <<http://www.redhillpublishing.com>>.

¹³⁵ Scribd, *About* (2012) <<http://www.scribd.com/about>>.

¹³⁶ <http://www.scribd.com>.

¹³⁷ Clickbank, *Clickbank Accounting Policy* (2012) <<http://www.clickbank.com/accounting.html>>.

¹³⁸ <<http://digitalpublishingaustralia.org.au>>.

authors are faced with a variety of transitional challenges. From the research findings it is apparent that many authors do not regard copyright as an incentive to create (or as a financial incentive) and are focussed instead on personal satisfaction and achieving recognition for their efforts. Most of the surveyed authors did not concern themselves with copyright during the creative process. Instead, they generally only addressed the issue of copyright at the publishing stage and saw the value of writing resting in 'the doing of it' rather than financial reward. Thus, it appears that authors are not 'rational maximisers' in the economic sense but largely create for the love of writing. This viewpoint indicates on the one hand, a failure on the part of authors to fully appreciate and exploit the connection between their copyright and economic reward for their creative work. On the other hand however, it augurs well for authors to reposition themselves in the digital domain and take advantage of the disseminating capabilities of the internet.

The findings further indicate that these authors generally regarded copyright as a proprietary 'right' and took it for granted in the belief that it existed primarily for their benefit and protection. Significantly, they did not view it as an economic or creative incentive as envisaged by the legislation.¹³⁹ This ambivalence in perception – between authors' perception and that of the regulators – illustrates Goldstein's supposition of the two legal traditions protecting literary works, namely: copyright - with a utilitarian philosophical premise, and author's right - based on the philosophy of natural rights.¹⁴⁰ In this context authors appear to pay little heed to utilitarian considerations but rather view copyright as something that exists mainly to protect their rights as a creator. This view only partly resonates with the Court's findings in the *IceTV* case¹⁴¹ where 'authorship' was recognised as a fundamental principle underpinning copyright law,¹⁴² but the Court also considered a 'just reward for the creator' to be in the public interest.¹⁴³ The authors thus chiefly regarded their rights as being the natural rights of creators in the Lockean tradition, as proposed by Macpherson.¹⁴⁴

In addition, the authors in question were highly motivated by personal satisfaction and achieving recognition, indicating a strong reliance on personality or moral rights. Their dual belief in natural rights and moral rights is therefore more aligned with a philosophical viewpoint of seeing copyright as an instrument to indicate personal

¹³⁹ Intellectual Property and Competition Review Committee, above n 9.

¹⁴⁰ Goldstein, above n 14, 3.

¹⁴¹ *IceTV Pty Ltd* (2009) 239 CLR 458.

¹⁴² *Ibid* 95 – 6.

¹⁴³ *Ibid* 106.

¹⁴⁴ Macpherson, above n 30, 269.

standing, self-expression and ownership rather than a financial tool. This approach ties in with Stokes' contention that natural rights should be regarded as part of the 'moral rights' theory, based on the idea of a 'just reward' for labour.¹⁴⁵ It also resonates with Adeney's contention that the current system can be regarded as 'dualist', with the idea of 'property on the one hand and personality on the other',¹⁴⁶ and her observation that the Australian copyright system is 'a hybrid system with authorial moral rights grafted onto a framework' that protects the economic interests of the copyright owner rather than the author.¹⁴⁷

In relation to digital copyright, it is clear that the authors had quite disparate views on the value of copyright on the internet and on how it should be enforced. The divergent viewpoints confirm the perception that the 'author group' is far from homogenous and can be divided into various categories within the literary sphere, for example:

- Those authors who embrace the digital future of the industry and are informed about its possibilities;
- Those who write part-time and are less concerned with copyright than with the act of creating;
- The 'trail-blazers' who recognise copyright challenges and take a proactive role in resolving them;
- Those who are passive about copyright and authors' rights in general;
- The online publishers who shun traditional publishing; and
- Those who have dealt mainly with print publishing in the past and are concerned about copyright protection in the digital publishing environment.

The expanded publishing arena has made self-publishing a viable option. Authors can now self-publish, publish with a mainstream publisher, a small publisher or an online publisher. They can decide on their own copyright licensing scheme and the degree of copyright protection they wish to apply to their work. They can decide on a marketing strategy and support their marketing through online blogs, and social media sites such as Twitter and Facebook. Thus, a paradox exists within the new digital publishing landscape. Although authors have obtained new publishing opportunities in the decentralised literary public sphere of the internet and thus an

¹⁴⁵ Stokes, above n 19, 12.

¹⁴⁶ Adeney, above n 45, 9.

¹⁴⁷ Ibid 10.

increased power, copyright enforcement has become more onerous as a result. Furthermore, self-publishing options must be weighed up against the support and marketing provided by the traditional publisher, causing many authors to choose earning a smaller percentage on a larger number of book sales, as opposed to a larger percentage of fewer sales, due to a lack of marketing skills on their part. Significantly, authors also acknowledged the prestige associated with being published by a major publisher, and the resulting exposure this provided.

Moreover, the increased opportunities for anyone to assert 'authorship' on the internet has made it more difficult for an author to be noticed, although an 'honesty box' strategy of giving away free books could reap significant rewards in the long run. However, implementing such strategies requires authors to have a significant level of technical and marketing knowledge, and thus results in a re-assessment of the author's role. The increasing capabilities of reading devices have also changed readers' expectations because they now have more reading options (such as the ability to manipulate print size) and possibilities of interaction with the text. These technological changes, together with the expanded publishing arena, continue to challenge authors, requiring them to be resilient and innovative in their creative work.

Whilst some authors embrace the 'culture of sharing' facilitated by the internet and favour giving away their work for free, others disagree and complain about the erosion of their copyright online. Yet it is apparent that authors are generally not in favour of a hard line copyright enforcement approach because of the limiting nature of some copyright protection systems, such as DRM protection, which restricts readers unnecessarily. Despite the differences in their viewpoints, authors by and large recognise the necessity of a utilitarian strategy as proposed by Landes and Posner,¹⁴⁸ whereby some balance between the consumer's right of access and the creator's right is achieved.

These observations show a strong indication that there is a need to address the tension exhibited between the utilitarian approach characteristic of Australian copyright law, and the natural rights views of authors, to create a sustainable balance. John and Reid¹⁴⁹ observe that owners' and users' copying rights are now being determined more by individual licenses, and less by provisions in copyright

¹⁴⁸ Landes and Posner, *An Economic Analysis of Copyright Law*, above n 23, 325.

¹⁴⁹ Jerome John and Mary Ann Reid, Australian Copyright Council, *Making Content Pay Online* (28 April 2011) <<http://www.copyright.org.au/news-and-policy>> 2.

law, than in the past. These observations also support a contention by Young¹⁵⁰ that copyright requires a re-assessment in the digital environment. At the very least, Australian publishers and authors should apply close scrutiny to the terms and conditions of international electronic licensing agreements such as Google and Kindle agreements. There is a concern that unless checked, the power of the individual – both author and localised publisher – may be sliding backward as global publishing giants advance forward. These are pertinent issues which, although not specifically addressed, might be contemplated during the ALRC investigations.¹⁵¹

Keeping in mind Alexander's warning against a 'looking backwards attitude' in the copyright industry, and considering both the public interest and the encouragement of creativity, it is imperative that copyright law continues to evolve to meet the demands of new business models and protect the rights of creators in the digital domain. Whether this objective will be achieved by the forthcoming ALRC review of copyright in Australia, remains to be seen. While there is merit in the 'honesty box' approach and generous licensing options such as the Creative Commons, it should not be forgotten that copyright remains a personal property right under Australian law, worthy of protection in the same way as any other property right.

¹⁵⁰ Sherman Young, *The Book is Dead (Long Live the Book)* (University of New South Wales Press, 2007) 158-9.

¹⁵¹ Australian Law Reform Commission, above n 1.

APPENDIX A

AUTHORS, COPYRIGHT AND THE DIGITAL EVOLUTION

DEMOGRAPHIC INFORMATION

1. Are you a member of the ASA?
2. Where do you live?
3. How old are you?
4. Do you write full time or part time?
5. Have you had work published?
6. How would you describe yourself? (please tick applicable box/es)
 - (a) Full time author
 - (b) Part time author
 - (c) Full time journalist
 - (d) Freelance journalist
 - (e) None of the above

If none of the above, please provide particulars.

7. Which word best describes the type of writing that you do?
 - (a) Fiction
 - (b) Non-fiction
 - (c) Journalistic
 - (d) Academic/text book
8. Approximately how many hours per week do you spend:
 - (a) Actually writing?
 - (b) On writing related activities?
9. What is your approximate gross annual income from this source?
10. Do you have any other source of income?

If 'Yes', please provide a description and annual income.

YOUR VIEWS ON COPYRIGHT

11. I would rate my knowledge of copyright as follows:
 - (a) Very little knowledge
 - (b) Not much knowledge
 - (c) Reasonably informed
 - (d) Well informed
 - (e) Very well informed

(2013) 25.1 BOND LAW REVIEW

12. Copyright is a consideration for me when I create.
 - (a) Strongly disagree
 - (b) Disagree
 - (c) Undecided
 - (d) Agree
 - (e) Strongly agree
13. Copyright is a consideration for me when I publish my work.
 - (a) Strongly disagree
 - (b) Disagree
 - (c) Undecided
 - (d) Agree
 - (e) Strongly agree
14. I regard copyright as an incentive to create.
 - (a) Strongly disagree
 - (b) Disagree
 - (c) Undecided
 - (d) Agree
 - (e) Strongly agree
15. Copyright mainly exists to protect my rights as a creator.
 - (a) Strongly disagree
 - (b) Disagree
 - (c) Undecided
 - (d) Agree
 - (e) Strongly agree
16. I have specific concerns about my copyright.
 - (a) Strongly disagree
 - (b) Disagree
 - (c) Undecided
 - (d) Agree
 - (e) Strongly agree

If you have concerns, please elaborate.
17. When I create I am mostly motivated by financial considerations.
 - (a) Strongly disagree
 - (b) Disagree
 - (c) Undecided
 - (d) Agree
 - (e) Strongly agree

FROM VAULT TO HONESTY BOX

18. When I create I am mostly motivated by personal satisfaction.
- (a) Strongly disagree
 - (b) Disagree
 - (c) Undecided
 - (d) Agree
 - (e) Strongly agree
19. When I create I am mostly motivated by the prospect of achieving recognition.
- (a) Strongly disagree
 - (b) Disagree
 - (c) Undecided
 - (d) Agree
 - (e) Strongly agree

| |
|---|
| THE EXISTING COPYRIGHT FRAMEWORK |
|---|

20. Australian authors are adequately protected by copyright laws.
- (a) Strongly disagree
 - (b) Disagree
 - (c) Undecided
 - (d) Agree
 - (e) Strongly agree
21. Australian copyright protections and licencing authorities (such as the Australian Copyright Act, CAL, etc.) support authors sufficiently in their creative efforts.
- (a) Strongly disagree
 - (b) Disagree
 - (c) Undecided
 - (d) Agree
 - (e) Strongly agree
- If you disagree, please elaborate.*
22. I am familiar with the Copyright Agency Limited (CAL) and its operation.
- (a) Strongly disagree
 - (b) Disagree
 - (c) Undecided
 - (d) Agree
 - (e) Strongly agree

(2013) 25.1 BOND LAW REVIEW

23. How satisfied are you with CAL's administration?
- (a) Very dissatisfied
 - (b) Dissatisfied
 - (c) Neither satisfied nor dissatisfied
 - (d) Satisfied
 - (e) Very satisfied
24. I derive a financial benefit from: (please tick applicable box/es)
- (a) CAL
 - (b) Public lending rights (PLR)
 - (c) Educational lending rights (ELR)
 - (d) A government grant or fellowship
- Please indicate approximate amount received annually from each source. If you receive a government grant or fellowship, please specify.*
25. In my view moral rights are:
- (a) Very important
 - (b) Important
 - (c) Neither important nor unimportant
 - (d) Unimportant
 - (e) Not important at all
26. My moral rights are adequately protected under the current structure.
- (a) Strongly disagree
 - (b) Disagree
 - (c) Undecided
 - (d) Agree
 - (e) Strongly agree
27. I have not experienced problems within the current copyright framework.
- (a) Strongly disagree
 - (b) Disagree
 - (c) Undecided
 - (d) Agree
 - (e) Strongly agree
- Your opportunity to comment:

THE PUBLISHING INDUSTRY

28. I would describe my relationship with my publisher as:
- (a) Very unsatisfactory
 - (b) Unsatisfactory
 - (c) Neither unsatisfactory nor satisfactory
 - (d) Satisfactory
 - (e) Very satisfactory
29. In publishing matters I generally:
- (a) Deal directly with my publisher
 - (b) Deal with my publisher through an agent
 - (c) Deal with my publisher through a lawyer
 - (d) Publish my own work
30. With regard to my publishing contracts, I generally: (please tick applicable box/es)
- (a) Ensure that I understand the terms of the contract
 - (b) Am not concerned with the terms of the contract as it should be fair
 - (c) Rely on the publisher to explain the contract to me
 - (d) Rely on my agent to explain the contract to me
 - (e) Rely on my lawyer to explain the contract to me
31. In my view, having an agent is:
- (a) Essential
 - (b) An advantage
 - (c) Neither an advantage nor a disadvantage
 - (d) A disadvantage
 - (e) Unnecessary
32. In my view, first time authors in Australia generally find it:
- (a) Very difficult to get published
 - (b) Reasonably difficult to get published
 - (c) Neither difficult nor easy to get published
 - (d) Easy to get published
 - (e) Very easy to get published
33. As a published author:
- (a) I have sold my book(s) on the internet
 - (b) My publisher has sold my book(s) on the internet
 - (c) I have not sold any books on the internet
 - (d) I am not a published author

34. Are you familiar with the Google book scanning project (resulting in 'the Google settlement')?
- (a) Yes, very familiar
 - (b) Quite familiar
 - (c) Neutral
 - (d) Not very familiar
 - (e) Very unfamiliar
35. The Google settlement: (please tick applicable box/es)
- (a) Is a subject in which I take a personal interest
 - (b) Is a subject which I leave to my publisher
 - (c) Is a subject which I leave to my agent
 - (d) Is a positive step for authors' copyright control
 - (e) Is a negative step for authors' copyright control
 - (f) Is a neutral step for authors' copyright control
- Your opportunity to comment:*
36. Would you be prepared to licence your work to Google in the future?
- (a) Yes
 - (b) No
 - (c) Uncertain
37. I support the concept of the Creative Commons.
- (a) Yes
 - (b) No
 - (c) Neutral
 - (d) I am not familiar with the Creative Commons concept
38. Has your work been sold in digital/electronic form (as eBooks or electronic articles)?
- (a) Yes
 - (b) No

| |
|-----------------------------------|
| PUBLISHING ON THE INTERNET |
|-----------------------------------|

39. How concerned are you about protecting your copyright electronically?
- (a) Very concerned
 - (b) Concerned
 - (c) Neither concerned nor unconcerned
 - (d) Unconcerned
 - (e) Totally unconcerned

FROM VAULT TO HONESTY BOX

40. I protect my digital copyright by: (please tick applicable box/es)

- (a) Digital Rights Management (DRM) technology
- (b) A Creative Commons licence
- (c) Posting a warning on my work/website
- (d) Other means
- (e) Doing nothing

Please stipulate which other means of copyright protection is used.

41. On the sale of my electronic books/articles, I receive a royalty of: _____.

If another amount is received, please elaborate.

42. My publishing contracts: (please tick applicable box/es)

- (a) Make separate provision for electronic royalties
- (b) Treat all royalties the same (print and electronic)
- (c) Do not include electronic rights
- (d) Are satisfactory
- (e) Need amendment