Queensland University of Technology

From the SelectedWorks of Matthew Rimmer

February, 2001

The Pirate Bazaar: The Social Life of Copyright Law

Matthew Rimmer, *Australian National University College of Law*

Available at: https://works.bepress.com/matthew_rimmer/40/

UNIVERSITY OF NEW SOUTH WALES
Thesis/Project Report Sheet

Surname or Family name: Rimmer
First name: Matthew Other name/s: Rhys
Abbreviation for degree as given in the University calendar: PhD
School: Law Faculty: Law
Title: The Pirate Bazaar: The Social Life of Copyright Law

Abstract 350 words maximum:

This thesis provides a cultural history of Australian copyright law and related artistic controversies. It examines a number of disputes over authorship, collaboration, and appropriation across a variety of cultural fields. It considers legal controversies over the plagiarism of texts, the defacing of paintings, the sampling of musical works, the ownership of plays, the co-operation between film-makers, the sharing of MP3 files on the Internet, and the appropriation of Indigenous culture. Such narratives and stories relate to a broad range of works and subject matter that are protected by copyright law.

This study offers an archive of oral histories and narratives of artistic creators about copyright law. It is founded upon interviews with creative artists and activists who have been involved in copyright litigation and policy disputes. This dialogical research provides an insight into the material and social effects of copyright law.

This thesis concludes that copyright law is not just a 'creature of statute', but it is also a social and imaginative construct. In the lived experience of the law, questions of aesthetics and ethics are extremely important. Industry agreements are quite influential. Contracts play an important part in the operation of copyright law. The media profile of personalities involved in litigation and policy debates is pertinent. This thesis claims that copyright law can be explained by a mix of social factors such as ethical standards, legal regulations, market forces, and computer code. It can also be understood in terms of the personal stories and narratives that people tell about litigation and copyright law reform.

Declaration relating to disposition of project report/thesis

I am fully aware of the policy of the University relating to the retention and use of higher degree project reports and theses, namely that the University retains the copies submitted for examination and is free to allow them to be consulted or borrowed. Subject to the provisions of the Copyright Act 1968, the University may issue a project report or thesis in whole or in part, in photostat or microfilm or other copying medium.

I also authorise the publication by University Microfilms of a 350 word abstract in Dissertation Abstracts International (applicable to doctorates only).

Matthew Rimmer ..... Signature
Tanya Lapworth ..... Witness
23/7/2001 ..... Date

The University recognises that there may be exceptional circumstances requiring restrictions on copying or conditions on use. Requests for restriction for a period of up to 2 years must be made in writing to the Registrar. Requests for a longer period of restriction may be considered in exceptional circumstances if accompanied by a letter of support from the Supervisor or Head of School. Such requests must be submitted with the thesis/project report.

FOR OFFICE USE ONLY Date of completion of requirements for Award

25.6.01

Registrar and Deputy Principal

THIS SHEET IS TO BE GLUED TO THE INSIDE FRONT COVER OF THE THESIS

THE PIRATE BAZAAR:

THE SOCIAL LIFE OF COPYRIGHT LAW

MATTHEW RHYS RIMMER

A thesis submitted in fulfilment of the requirements
for the degree of Doctor of Philosophy

The Faculty of Law, The University of New South Wales, Sydney

FEBRUARY 2001

CERTIFICATE OF ORIGINALITY

I hereby declare that this submission is my own work and to the best of my knowledge it contains no materials previously published or written by another person, nor material which to a substantial extent has been accepted for the award of any other degree or diploma at UNSW or any other educational institution, except where due acknowledgement is made in the thesis. Any contribution made to the research by others, with whom I have worked at UNSW or elsewhere, is explicitly acknowledged in the thesis.

I also declare that the intellectual content of this thesis is the product of my own work, except to the extent that assistance from others in the project's design and conception or in style, presentation and linguistic expression is acknowledged.

(Signed) Matthew Rimmer

I hereby declare that this submission is my own work and that, to the best of my knowledge and belief, it contains no material previously published or written by another person nor material which to a substantial extent has been accepted for the award of any other degree or diploma of the university or other institute of higher learning, except where due acknowledgment is made in the text.

Matthew Rhys Rimmer
Faculty of Law
The University of New South Wales
Matthew Rhys Rimmer

ABSTRACT

This thesis provides a cultural history of Australian copyright law and related artistic controversies. It examines a number of disputes over authorship, collaboration, and appropriation across a variety of cultural fields. It considers legal controversies over the plagiarism of texts, the defacing of paintings, the sampling of musical works, the ownership of plays, the co-operation between film-makers, the sharing of MP3 files on the Internet, and the appropriation of Indigenous culture. Such narratives and stories relate to a broad range of works and subject matter that are protected by copyright law.

This study offers an archive of oral histories and narratives of artistic creators about copyright law. It is founded upon interviews with creative artists and activists who have been involved in copyright litigation and policy disputes. This dialogical research provides an insight into the material and social effects of copyright law.

This thesis concludes that copyright law is not just a 'creature of statute', but it is also a social and imaginative construct. In the lived experience of the law, questions of aesthetics and ethics are extremely important. Industry agreements are quite influential. Contracts play an important part in the operation of copyright law. The media profile of personalities involved in litigation and policy debates is pertinent. This thesis claims that copyright law can be explained by a mix of social factors such as ethical standards, legal regulations, market forces, and computer code. It can also be understood in terms of the personal stories and narratives that people tell about litigation and copyright law reform.

TABLE OF CONTENTS

	Page
Prologue	1
Introduction	
A Creature of Statute: Copyright Law and Legal Formalism	7
Chapter One	
The Demidenko Affair: Copyright Law and Literary Works	37
Chapter Two	
Daubism: Copyright Law and Artistic Works	76
Chapter Three	
The ABCs of Anarchism: Copyright Law and Musical Works	117
Chapter Four	
Heretic: Copyright Law and Dramatic Works	163
Chapter Five	
Shine: Copyright Law and Film	207
Chapter Six	
Napster: Infinite Digital Jukebox or Pirate Bazaar? Copyright Law and Digital Works	259

Chapter Seven
Bangarra Dance Theatre:
Copyright Law and Indigenous Culture 307

Chapter Eight
The Cathedral and the Bazaar:
The Future of Copyright Law 357

Appendix One
Methodology 383

Bibliography 398

ACKNOWLEDGMENTS

> It would be strange, certainly, if a book about the conceits of authorship, and the peculiar powers it confers did not acknowledge the many people, places, occasions, and conversations that went into producing this alchemy we deem a scholarly work.
>
> Rosemary Coombe
> *The Cultural Life of Intellectual Properties*

As Rosemary Coombe points out, it is especially important to recognise the many contributions behind a thesis concerning copyright law. I would like to thank a number of people who made this project possible.

I am indebted to my doctoral supervisor, Dr Kathy Bowrey, for her enthusiasm, guidance, and inspiration. She has been an insightful teacher, a fabulous friend, and a great role model.

I would also like to acknowledge the contributions of my academic mentors. I owe much to Dr Peter Drahos for kindling my interest in intellectual property at The Australian National University. I am grateful to Associate Professor Jill McKeough for providing sensible advice, calm support, and dry wit at The University of New South Wales. I am also thankful to Professor Carolyn Sappideen for offering the opportunity to teach Aspects of Intellectual Property at The University of Western Sydney.

This thesis has been enriched by my conversations and dialogues with a number of creative artists. I am indebted to my informants for their generosity in sharing their personal experiences about copyright law – Robyn Archer, Craig Cormick, Jo Dyer, Chris Gilbey, Alana Harris, David Higgins, Wayne Harrison, Susan King, Julia Leigh, Keith Lupton,

David Marr, John Mifsude, Jan Sardi, Manne Schulze, Jane Scott, Helen Simondson, Beth Spencer, John Tranter, and Michael Ward.

I have been fortunate to receive the support of the community of academics and administrators at the School of Law at The University of New South Wales – especially Ian Cameron, Kerrie Daley, Professor David Dixon, Dr Christine Parker, and Dean Paul Redmond. I have also enjoyed the company of all the postgraduate students at the Julius Stone Postgraduate Room – including Cathy Hunter, Hossein Esmaeili, Steven Freeland, Lee Lei Tang, Scott Calnan, and Ingrid Scher.

I am also obliged for the support of a number of academics and postgraduate students from other institutions – Kirsten Anker of The University of Sydney, Dr Livio Dobrez of The Australian National University, Andrew Fieldsend of The University of British Columbia, Lelia Green of Edith Cowan University, Dr Ben Goldsmith of Griffith University, Andrew Kenyon of The University of Melbourne, Associate Professor Beth Thornburg of The Southern Methodist University, and Phillipa Weeks of The Australian National University.

I am grateful for the support and the help of all my friends. Special mention should be made of some outstanding contributions. Rachel Bacon and Janine Lapworth have provided great friendship. Dr Simone Murray and Kristin Natalier have shown the way forward through their trailblazing examples. Mark Nolan and Dr Rachael Eggins offered kindness and wisdom. And I have particularly enjoyed the good cheer of my friends Kevin Boreham, Shaun Chau, Helen Chisholm, Janine Dennis, Edwin Ho, James Enderbury, Tanya Richards-Pugh, Matthew Sag, and Ivan Sun. They have made postgraduate life enjoyable and hospitable.

Parts of the thesis were presented at a number of workshops and conferences. I am grateful for the advice and comments that I received from the participants at these events. A paper based on Chapter One was

presented at the Postgraduate Seminar Series, at the School of Law, the University of New South Wales, in June 1999. A presentation based on Chapter Five was delivered at the Law and Literature Conference, at the University of Technology Sydney, on 8th July 2000. A short version of Chapter Six was presented at the Risk and Responsibility Conference at the University of Sydney on the 11th November 2000. A precis of Chapter Seven was offered to the academic staff at the Faculty of Law at The Australian National University on the 8th November 2000.

Sections of this thesis have also been published in legal journals. I am grateful for the critical feedback that I received from the editors, copyeditors, and anonymous reviewers. Chapter One was first published in 'The Demidenko Affair: Copyright Law, Plagiarism and Ridicule', *Media and Arts Law Review*, 2000, Vol. 5 (3), p. 159. Chapter Two elaborates on themes first explored in 'Four Stories about Copyright Law and Appropriation Art', *Media and Arts Law Review*, 1998, Vol. 3 (4), p. 180. There are also a number of pieces awaiting publication. Chapter Five is under review at *The University of New South Wales Law Journal*. Chapter Seven will be published in the *Griffith Law Review*.

I am indebted to Ria van de Zandt for her patient and meticulous editing, and Kirsten Anker for reading the final draft of the manuscript.

I would also like to pay tribute to my family. I am the beneficiary of the faith, devotion, and largesse of my parents, Peter Rimmer and Sue Rimmer. My brother Joe Rimmer has shown great forbearance in sharing a flat with me for three years. He has provided great company, entertainment, and computer support. My sister Rachel Rimmer has added much fun, glamour and excitement to my life.

Finally, I wish to thank my partner Sue Harris for her unstinting love, commitment, and patience.

PROLOGUE

The phrase, 'the pirate bazaar', provides a good sense of the contest between creators, distributors, and users over the future of copyright law.

The head of the United States Motion Picture Association and the Copyright Assembly, Jack Valenti, first used the term in 1997. He observed:

> Internet piracy is not a 'maybe' problem, a 'could be' problem, a 'might someday be' problem. It is a 'now' problem. Later, sooner than we think, it could become a cancer in the belly of our business. In odd corners of the World Wide Web, in linked sites based in Europe, Asia and Australia as well as the U.S., a pirate bazaar is underway. Its customers span the globe, wherever the Internet reaches, and its wares are the fruits of American creativity and ingenuity.
>
> Today, Internet piracy focuses on computer programs, video games, and recorded music. Movies and videos are not much in evidence – yet. That's because our audio-visual content is so rich in information that it can't yet move easily everywhere in the digital network – the volume of flow is too great for some of the pipes. We know that the reprieve is temporary, however. The same technology that will smooth the way for legitimate delivery of video on demand over digital networks will also prime the pump for copyright pirates. [1]

Jack Valenti draws on the dominant discourse of copyright owners about piracy. He paints a picture of an apocalyptic future, in which the piracy of all kinds of copyright works will be rampant without the intervention of the courts and the legislature. Such an alarmist vision should be treated with a certain amount of suspicion. It seems designed to galvanise governments to take legislative action to protect existing

---

[1] Valenti, J. 'If You Can't Protect What You Own – You Don't Own Anything', the House Subcommittee on Courts and Intellectual Property on *WIPO Copyright Treaties Implementation Act* and the *Online Copyright Liability Limitation Act*, 16 September 1997.

markets based upon the exploitation of copyright works. The term 'pirate bazaar' was later to re-surface in the debate over Napster. It was applied to the file-sharing company in pleadings against them by the Record Industry Association of America (RIAA).[2]

The media have searched throughout the world to find literal representations of the 'pirate bazaar'. The reporter for the *Atlantic Monthly*, Charles Mann, thinks that the exemplar of this place is found in Hong Kong: 'The Golden Shopping Centre was a kind of shopping mall for copyright infringement: three stories of pirated video games, CDs, videotapes, and software'.[3] The journalist for the *Guardian* Ian Traynor thinks that the 'pirate bazaar' is located in Moscow: 'Welcome to Gorbushka, a maze of hundreds of little red and white tents in a park in Western Moscow and Russia's biggest bazaar for the entertainment and electronic era. There are more pirates here than in the South Seas'.[4] Emmanuel Candi of the Australian Record Industry Association would have us believe that the 'pirate bazaar' is at home, right here in Australia, with flea-markets selling CDs full of unauthorised musical works reduced to MP3s.[5] And of course Jack Valenti insists that the 'pirate bazaar' is located in cyberspace, with Napster and its file-sharing clones. So the notion of the 'pirate bazaar' is free floating, not bounded by any particular time or place.

The concept of a 'pirate bazaar' taps into a certain kind of Orientalism. In 'The Bazaar and the City', Ravi Sundaram reflects upon

---

2 Recording Industry Association of America. 'Motion for Preliminary Injunction', 12 June 2000, p. 13.

3 Mann, C. 'Who Will Own Your Next Good Idea?', *The Atlantic Monthly*, September 1998.

4 Traynor, I. 'Russia's Pirate Kings of E-Commerce', *The Guardian*, 1 July 2000.

5 McCullagh, A. 'MP3 in Australia – Copyright Digital Agenda', Internet Industry Association, 8 June 2000, http://www.iia.net.au

the colonial distrust of the traditional city, and its main public institution, the bazaar: 'From the 18th century onwards, European travellers began writing horrified narratives on the Indian bazaar, with its density and apparent lack of regulation, its chaos and smells, and an inability to produce a healthy commercial society'.[6] So it seems that the notion of the 'pirate bazaar' draws upon some old colonial imagery in an effort to encourage government regulation to stamp out disorder and chaos.

However, other writers have found more positive meanings in the metaphor of the bazaar. Eric Raymond once believed that computer software needed to be built like cathedrals, carefully crafted by individual wizards or small bands of mages working in splendid isolation. He was surprised by the bazaar-style development of the open source software program Linux:

> Linus Torvalds's style of development – release early and often, delegate everything you can, be open to the point of promiscuity – came as a surprise. No quiet, reverent cathedral-building here – rather, the Linux community seemed to resemble a great babbling bazaar of different agendas and approaches (aptly symbolized by the Linux archive sites, who'd take submissions from anyone) out of which a coherent and stable system could seemingly emerge only by a succession of miracles.[7]

---

6 Sundaram, R. 'The Bazaar and the City: History and the Contemporary in Urban Electronic Culture', Architecture and Globalisation conference, Bauhaus University, Weimar, October 1999.

7 Raymond, E. *The Cathedral and the Bazaar: Musings on Linux and Open Source by an Accidental Revolutionary*. Cambridge, Mass.: O'Reilly And Associates, 1999.

The clash between the cathedral and the bazaar is a good metaphor – so good in fact that it should not be limited to just open source software.[8] It is also very suggestive about the ongoing debate about the design of copyright law – whether it should develop a strong architecture, or flourish in a state of chaos and disorder.[9]

Furthermore, in 'The Future Of Music', Ram Samudrala develops the metaphor of the cathedral v the bazaar in relation to the music industry:

> The trackers, the home recorders, and the MP3ers are all part of the Bazaar. The major distributors and the distribution mechanisms comprise the Cathedral, siphoning the creative worth of musicians for monetary profit while remaining distant and unreachable from the creative and consumer bases. Today, like with software, thousands of musicians are creating and distributing music over the Internet, primarily because of inherent reasons, such as a love for music or creative ego, rather than any intention of making profit. As a result, a lot of this music is freely copied and distributed, and forms a key component of the Bazaar model. Creativity in the Bazaar occurs in a bottom-up environment (there are no restrictions; it doesn't even have to 'work') as opposed to a top-down environment in the Cathedral (the major labels impose 'rules' such as 'has to sell well' on any creative output).[10]

Eric Raymond and Ram Samudrala draw upon a discourse of copyright users, which emphasises freedom, liberty, and revolution. They envisage

---

8 Bezroukov, N. 'Open Source Software Development as a Special Type of Academic Research (Critique of Vulgar Raymondism)', *First Monday*, 1999, Vol. 4 (10), http://www.firstmonday.org; Bezroukov, N. 'A Second Look at the Cathedral and Bazaar', *First Monday*, 1999, Vol. 4 (12), http://firstmonday.org; and Wayner, P. *Free for All: How Linux and the Free Software Movement Undercut the High-Tech Titans*. New York: Harper Business, 2000.

9 Madison, M. 'Complexity and Copyright in Contradiction', *Cardozo Arts and Entertainment Law Journal*, 2000, Vol. 18, p. 125.

10 Samudrala, R. 'The Future of Music: I've Seen the Future and it will be a Battle Between the Cathedral and the Bazaar', MP3.com, 12 April 1998, http://www.mp3.com.

a utopian society, in which information is shared and exchanged for free. This image of the future is no more convincing than that of Jack Valenti. It seems an exercise in wishful thinking. Furthermore, the notion of the 'pirate bazaar' should not be limited to open source software or the digital distribution of musical works. It gives a sense of market abundance and variety. The range of cultural goods on offer is plentiful – literary works, artistic works, musical works, dramatic works, film, digital works, and Indigenous culture.

My personal usage of the term 'pirate bazaar' does not necessarily connote such partisan meanings. It does not signify the dystopia envisaged by Jack Valenti or the utopia imagined by Eric Raymond and Ram Samudrala. Rather, the metaphor of the 'pirate bazaar' is evocative of my vision of copyright law. It is suggestive, I think, of the chaos and the disorder that attends the domain. There are a babel of voices and opinions in the debate over copyright law – from the all-or-nothing approach of copyright owners to moderates who believe that there should be a balancing of competing interests, and libertarians who believe that copyright law is dead. This debate is not always one of political consensus. There is disagreement and misunderstanding. There is a gulf between the views of creators, distributors, and users.

Some have found this chaos and disorder to be disagreeable and offensive. The Copyright Law Reform Committee's plans on simplification are nothing if not an exercise in cathedral-building.[11] They

---

11 Copyright Law Reform Committee. *Copyright Reform: A Consideration of Rationales, Interests and Objectives*. Canberra: The Attorney-General's Department, 1996; Copyright Law Reform Committee. *Fair Dealing under the Copyright Act*. Canberra: The Attorney-General's Department, 1997; Copyright Law Review Committee. *Simplification of the Copyright Act 1968: Part 1. Exceptions to the Exclusive Rights of Copyright Owners*. Canberra: The Attorney-General's Department, 1998; Copyright Law Review Committee. *Simplification of the Copyright Act 1968: Part 2. Rights and Subject Matter*. Canberra: Attorney-General's Department, 1999.

seek to get rid of the chaotic pirate bazaar and instead create an orderly realm of formal rules and principles, which are transparent and lucid. However, this pure, antiseptic vision fails to address the complexity and diversity of copyright law. So it is important, in my view, to delve into the 'pirate bazaar', and listen to the cacophony of dissonant and strident voices about copyright law.

INTRODUCTION

A CREATURE OF STATUTE: COPYRIGHT LAW AND LEGAL FORMALISM

In the decision of *Bulun Bulun and Milpurrurru* v *R & T Textiles Pty Ltd*, Justice von Doussa declared the common wisdom: 'Copyright law is now entirely a creature of statute'.[1] This notion of copyright law as a set of formal rules and principles is pervasive among policy-makers, jurists, academics, and even non-lawyers.

The academy has in the main supported this image of copyright law as a set of formal rules and principles. A number of scholars such as Sam Ricketson,[2] Jill McKeough,[3] and Patricia Loughlan[4] provide an overview of intellectual property in Australia. They map the known territory of case law, legislation, and international conventions. The main landmarks are leading decisions from appellate courts – such as the Federal Court and the High Court. The other primary source of information comes from legislative changes and policy documents. There is also reference to international treaties and conventions – such as the *Berne Convention for the Protection of Literary and Artistic Works* 1886. At the

---

1 *Bulun Bulun and Milpurrurru* v *R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 525.

2 Ricketson, S. *The Law of Intellectual Property*. Sydney: Law Book Company, 1984; Ricketson, S. *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*. London: Kluwer, 1987; Ricketson, S. *Intellectual Property: Cases, Materials, and Commentary*. Sydney: Butterworths, 1994; Ricketson, S. and Richardson, B. *Intellectual Property: Cases, Materials, and Commentary*. Sydney: Butterworths, 1998; and Ricketson, S. *The Law of Intellectual Property: Copyright, Designs and Confidential Information*. Sydney: Law Book Company, 1999.

3 McKeough, J. *Intellectual Property: Commentary and Materials*. Sydney: The Law Book Company Limited, 1992; McKeough, J. and Stewart, A. 'Intellectual Property and the Dreaming' in Johnson, E., Hinton, N., and Rigney, D. (eds) *Indigenous Australians and the Law*. Sydney: Cavendish Publishing, 1994; and McKeough, J. and Stewart, A. *Intellectual Property Law in Australia Second Edition*. Sydney: Butterworths, 1997.

4 Loughlan, P. *Intellectual Property: Creative and Marketing Rights*. North Ryde, N.S.W.: LBC Information Services, 1998.

launch of *The Law of Intellectual Property*, Sam Ricketson expressed doubts about whether it was possible to write a comprehensive account of intellectual property.[5] He noted how difficult it was to even have a grasp of all of copyright law, let alone all areas of intellectual property.

In the book *Authorship and Copyright*, David Saunders envisages copyright law as a set of formal rules and principles.[6] He provides a survey of copyright law in a number of jurisdictions – Great Britain, France, Germany, and the United States. David Saunders seeks to rebut romantic accounts of authorship and copyright law. He argues that there is no equivalence between the aesthetic persona of the romantic author and the legal persona of the copyright owner. David Saunders also denies that post-structuralist accounts of authorship have any relevance to copyright law. He believes that the so-called 'death of the author' does not have any consequences for the legal construction of authorship. Instead David Saunders advocates a positive history of the legal arrangements relating to authorship. He identifies a number of coordinates for such a history: the growth of print literacy; a historical anthropology of personhood; and a recognition of the determining role of law in relation to culture. This account of the relationship between cultural production and copyright law is rather unsatisfactory.[7] David Saunders is too limited and narrow in his focus upon legal actors and

---

5 McDonald, I. 'Copyright Society: Launch of "The Law of Intellectual Property"', *Copyright Reporter*, 1999, Vol. 17 (2), p. 70.

6 Saunders, D. *Legal Decisions and Cultural Theory*. Griffith University: Institute for Cultural Policy Studies, 1989; Saunders, D. *Authorship and Copyright*. New York: Routledge, 1992; and Saunders, D. 'Dropping the Subject: An Argument for a Positive History of Authorship and the Law of Copyright', in Sherman, B. and Strowel, A. (eds) *Of Authors and Origins: Essays on Copyright Law*. Oxford: Clarendon Press, 1994, p. 93.

7 Bently, L. 'Copyright and the Death of the Author in Law and Literature', *Modern Law Review*, 1994, Vol. 57, p. 973; Coombe, R. 'Challenging Paternity: Histories of Copyright', *Yale Journal of Law and the Humanities*, 1994, Vol. 6, p. 397; and Bowrey, K. 'Who's Writing Copyright's History?', *European Intellectual Property Review*, 1996, Vol. 18 (6), p. 322.

legal institutions. He is too deferential and submissive towards the authority of the law. David Saunders fails to consider the agency of other players and stakeholders – such as creators, industry groups, distributors, and consumers. He also neglects to examine whether disputes over copyright law could be played out in non-legal forums – such as artistic communities and the media.

In a number of articles, the freelance writer and visual artist Peter Anderson takes the sceptical view that contemporary artistic practices do not have any necessary practical impact upon copyright law.[8] He asserts that art is designed, not so much to reform the law, as to implicate the viewer in the artist's critical gesture. Peter Anderson claims that copyright law is a creature of government regulation: 'The goal of the law may be not to somehow "reflect" the truth of art, rather, it's purpose is to manage the cultural field'.[9] He invests the courts with the special responsibility of defending private property rights and individual autonomy. He assumes that the role of law is to regulate and resolve conflict between the private interest of owners in obtaining a reward, and the public interest of users in gaining access to information. This approach is a useful descriptive aid because it identifies the role of the government and the courts in law reform and clarifies the interests at

---

8 Anderson, P. 'Copyright and Moral Rights: Setting the Agenda for the 1990s', *Eyeline*, 1990, Vol. 11, p. 8. Anderson, P. 'Aboriginal Imagery: Influence, Appropriation or Theft', *Eyeline*, 1990, Vol. 12, p. 8; Anderson, P. 'Copyright and Moral Rights – Finding the "Write" Balance', *Arts and Entertainment Law Review*, 1994, Vol. 5, p. 68; Anderson, P. 'On the Legal Limits of Art', *Arts and Entertainment Law Review*, 1994, Vol. 5, p. 70; Anderson, P. 'The Author and Copyright Law: From Criticism to Policy', *Culture and Policy*, 1996, Vol. 7 (1), p. 65; Anderson, P. 'Introduction: Indigenous Copyright', *Culture and Policy*, 1996, Vol. 7 (3), p. 1; Anderson, P. and Collie, I. *Evident Tensions: Law and Culture in the Age of Post-modernism*. Sydney: Arts Law Centre, 1994; Anderson, P. and Saunders, D. (eds) *Moral Rights Protection in a Copyright System*. Brisbane: Griffith University, 1992.

9 Anderson, P. 'On the Legal Limits of Art', *Arts and Entertainment Law Review*, 1994, Vol. 5, p. 74.

stake. However, it is an unreliable guide as to how the law should manage the cultural field. Peter Anderson assumes that the legal system and the cultural field are relatively autonomous spheres of influence. He fails to acknowledge that government regulation may have a great impact on artistic practice, if it fails to appreciate the range and diversity of cultural production. There is a danger that copyright law may privilege certain forms of artistic practice, and marginalise others.

It is worth accounting for the popularity of this formalistic image of copyright law among jurists, policy-makers, and academics. Brad Sherman speculates upon the motivations behind this urge to represent the law as autonomous, universal, and integrated.[10] First, the movement towards unity in copyright law reflects the long-held desire in legal science and education to achieve more precise denotation, the striving to create a single voice and objective knowledge. Second, the desire to present the picture of copyright law in a unified and coherent manner serves to justify and legitimise the existence of the copyright system. Third, the particular style of reasoning which has been adopted in copyright law stems from the fact that we are dealing with a body of law which is increasingly conceptually closed. Finally, the notion of unity and coherence supports the idea that copyright law is a form of instrumental regulation. The formalistic image of copyright law is generic in that it draws its inspiration from legal positivism. Yet, it is also distinctive and unique, because it represents an effort to constitute a relatively new legal field as a legitimate body of doctrine and area of study.

This study argues that copyright law is not just 'a creature of statute', but it is also a social and imaginative construct. It draws upon a

---

10 Sherman, B. 'Appropriating the Postmodern: Copyright and the Challenge of the New', *Social and Legal Studies*, 1995, Vol. 4, p. 31.

number of critiques of legal formalism. Part 1 of the Introduction explores the claims that copyright law suffers from a case of historical amnesia. The scholars of new historicism argue that the positive rules and principles of copyright law are historically contingent and politically contested. Part 2 investigates copyright law from the perspective of cultural studies. The practitioners of cultural studies argue that the formal rules and principles of copyright law fail to register the material and symbolic effects of the legislation in everyday life. Part 3 considers the projections about the future of copyright law. A set of philosophers, social scientists, political scientists, and economists argue that the positive character of copyright law serves to hide the favouritism of policy-makers towards special interest groups. The theoretical critiques reach a similar conclusion. They call for legal formalism to be abandoned in favour of a more reflective and contextual understanding of copyright law.

PART 1
A HISTORY OF THE PRESENT:
NEW HISTORICISM

There have been a number of histories of copyright law, which have been influenced by Michael Foucault, and his view of the author-function.

In *Authors and Owners*, Mark Rose considers copyright law and literary property in England during the 18th century.[11] His approach draws inspiration from literary theories about authorship by the French post-structuralists. Mark Rose emphasises that his discussion of

---

11 Rose, M. 'The Author as Proprietor: *Donaldson* v *Becket* and the Genealogy of Modern Authorship', *Representations*, Vol. 23, 1988, p. 51; and Rose, M. *Authors and Owners: The Invention of Copyright*. Cambridge: Harvard University Press, 1993.

authorship is concerned with discourse, rather than subjectivity. He is not concerned with the production of the author as a consciousness so much as with a representation of authorship based on notions of property, originality, and personality. Rather he is concerned with the relationship between origination and ownership, and with the way these notions are incorporated into what Foucault calls the 'solid and fundamental unit of the author and the work'.[12]

Mark Rose considers the industry lobbying and the parliamentary debates which lead to enactment of the Statute of Anne. He examines a number of legal actions by authors – such as Dr Thomas Burnet, John Gay and Alexander Pope – under the Statute of Anne against pirates. He examines a series of litigation involving the booksellers of England – such as *Millar* v *Kincaid*,[13] *Tonson* v *Collins*,[14] and *Millar* v *Taylor*[15] – which considered whether the Statute of Anne extinguished any common law right of the author to property. Finally, he reviews the decision of the House of Lords in the case of *Donaldson* v *Beckett*, which established the statutory basis of copyright law.[16]

At the conclusion of the book, Mark Rose seeks to come full circle, and bring this historical discussion of copyright law back to the present-day litigation. He observes: 'The story of copyright since *Donaldson* v *Beckett*, then, can be understood as an exploration of two central reifications, the "author" and the "work"'.[17] However, Mark Rose does not take the time to examine how the historical discourses of authorship

---

12 Rose, M. *Authors and Owners: The Invention of Copyright*. Cambridge: Harvard University Press, 1993, p. 1.

13 (1759) 98 ER 210.

14 (1761) 96 ER 169.

15 (1769) 4 Burr. 2303; 98 ER 201.

16 (1774) 4 Burr 2408; 98 ER 257.

17 Rose, M. *Authors and Owners: The Invention of Copyright*. Cambridge: Harvard University Press, 1993, p. 133.

and creative work have been transformed in modern times. He can only gesture at the changes in culture, copyright law, and new technologies, referring the reader to the contemporary work of Peter Jaszi[18] and Jessica Litman.[19]

In *The Author, Art, and the Market*, the Professor of Literature Martha Woodmansee writes about copyright and the development of a class of professional writers in Germany during the 18th century.[20] She also examines the economic and legal conditions of the concept of authorship with the help of the work of Foucault. Martha Woodmansee charts the change in the conception of authorship in the 18th century. The old Renaissance ideas of the author as a craftsman and an inspired person were replaced with the new conception of the author as an original genius. The texts of Alexander Pope and William Wordsworth illustrate this transformation. Martha Woodmansee focuses upon the shift from the limited patronage of an aristocratic age to the democratic patronage of the marketplace. She examines the emergence of the professional writer in Germany, looking at such cases as Lessing, Schiller and Goethe. Her account concludes with the debate between poets, philosophers, publishers and legal experts over the intellectual property rights and obligations of writers and publishers in the period between 1773 and 1794. This historical discussion provides a good counterpoint to the

---

18 Jaszi, P. 'Toward a Theory of Copyright: The Metamorphoses of "Authorship"', *Duke Law Journal*, 1991, p. 455.

19 Litman, J. 'The Public Domain', *Emory Law Journal*, 1990, Vol. 39 (4), p. 965.

20 Woodmansee, M. *The Author, Art, and the Market: Rereading the History of Aesthetics*. New York: Columbia University Press, 1994.

experience of the United Kingdom, which has been documented and interpreted by Mark Rose,[21] as well as Brad Sherman and Lionel Bently.[22]

However, Martha Woodmansee does not really connect this historical experience outlined in *The Author, Art, and the Market* with the present situation of copyright law. Instead she has left such matters to colloquia. With her collaborator, Peter Jaszi, a Professor of Law, Martha Woodmansee has organised a number of conferences on copyright law, and published the results of those proceedings. At the first conference, Martha Woodmansee and Peter Jaszi explored the social and cultural construction of authorship in relation to the evolution of proprietary rights in texts. They released the lively collection of papers in the book *The Construction of Authorship*.[23] At the second conference, Martha Woodmansee and Peter Jaszi helped draft the Bellagio Declaration as a clarion call for the progressive reform of copyright. The conference on cultural agency and authority focused on the politics and poetics of intellectual property in the post-colonial era.

In his books *The Literary Underground of the Old Regime, The Kiss of Lamourette* and *The Forbidden Best-Sellers of Pre-Revolutionary France*, Robert Darnton considers the history of publishing and books in 18th century France.[24] He develops a general model for analysing the way books come into being and get diffused through society. He depicts a communication

---

21 Rose, M. *Authors and Owners: The Invention of Copyright*. Cambridge: Harvard University Press, 1993.

22 Sherman, B. and Bently, L. *The Making of Modern Intellectual Property: The British Experience*. Cambridge: Cambridge University Press, 1999.

23 Woodmansee, M. and Jaszi, P. (eds) *The Construction of Authorship: Textual Appropriation in Law and Literature*. Durham and London: Duke University Press, 1994.

24 Darnton, R. *The Literary Underground of the Old Regime*. Cambridge, Mass.: Harvard University Press, 1982; Darnton, R. *The Kiss of Lamourette: Reflections in Cultural History*. New York and London: WW Norton and Company, 1990; and Darnton, R. *The Forbidden Best-Sellers of Pre-Revolutionary France*. New York and London: WW Norton, 1995.

circuit that runs from the author to the publisher, the distributors, the retailers, and the readers. Robert Darnton considers the circulation of sanctioned texts and transgressive books in 18th century France. Before the France Revolution, all books, printers, and booksellers had to have a royal stamp of approval, called a 'privilege'. In return for their lucrative monopoly, the French guild of printers and booksellers helped censor and suppress seditious texts. However, a mob of underground printers, many from across the border from Switzerland, flooded the book market with pirated, pornographic, and seditious literature. Furthermore, desperate writers tried to persuade underground booksellers to commission such iconoclastic texts. This historical discussion has a resonance in the current debate over the regulation of the dissemination of texts on the internet.

In *The Making of Modern Intellectual Property: The British Experience*, Brad Sherman and Lionel Bently investigate the origins and the development of intellectual property law from the 16th century to the beginning of the 20th century.[25] The authors provide a post-structuralist vision of history:

> Our aim in writing this book has been to disentangle the conditions of intellectual property law's history, to de-naturalise it and to show that what are often taken as givens or as constructs of nature are, in fact, the product of a complex and changing set of circumstances, practices and habits. We also hope to show that as a juridical category, intellectual property cannot be identified as a purposive technique governed by a teleology of function, principle or norm; nor can it, except at the most banal and trite level, be explained in terms of economic arguments, personality theory, or in terms of natural or positive law. We also hope to resist the endless temptation to mystify the story of law. In this version of events, the philosophers, the International Conventions, the principles of law,

---

25 Sherman, B. and Bently, L. *The Making of Modern Intellectual Property: The British Experience*. Cambridge: Cambridge University Press, 1999.

> as well as natural-law arguments are displaced from the centre of the narrative. Instead they are placed alongside things such as the act of negotiating bilateral treaties, the formation and exercise of rules designed to regulate the way patent specifications were drafted, and the stories intellectual property law tells about itself, to form an alloy of factors that go to explain the shape of intellectual property law.[26]

Brad Sherman and Lionel Bently conclude that many aspects of modern intellectual property law can only be understood through an understanding of the past: 'The image of intellectual property law that developed during the 19th century and the narrative of identity which this engendered played and continue to play an important role in the way we think about and understand intellectual property law'.[27] The authors claim that this past is relevant to a number of matters of contemporary importance – the patenting of genetically modified plants and animals,[28] the regulation of digital technology,[29] the question of appropriation art,[30] and the protection of indigenous artistic and cultural expression.[31]

In *The Making of Modern Intellectual Property*, Brad Sherman and Lionel Bently call for the invention of new narratives about intellectual property:

---

26 Id, pp. 6-7.

27 Id, p. 219.

28 Sherman, B. 'Patent Law in a Time of Change', *Oxford Journal of Legal Studies*, 1990, Vol. 10, p. 278; and Bently, L. and Sherman, B. 'The Ethics of Patenting: Towards a Transgenic Patent System', *Medical Law Review*, 1995, Vol. 3, p. 279.

29 Bently, L. 'Sampling and Copyright: Is the Law on the Right Track?', *Journal of Business Law*, 1989, p. 113, p. 405; and Bently, L. and Sherman, B. 'Cultures of Copying: Digital Sampling and Copyright Law', *Entertainment Law Review*, 1992, Vol. 3 (5), p. 158.

30 Sherman, B. 'Appropriating the Postmodern: Copyright and the Challenge of the New', *Social and Legal Studies*, 1995, Vol. 4, p. 31.

31 Sherman, B. 'From the Non-original to the Ab-original: A History', in Sherman, B. and Strowel, A. (eds) *Of Authors and Origins: Essays on Copyright Law*. Oxford: Clarendon Press, 1994, p. 111.

> If the law is to achieve what we demand of it, it is not only necessary to recognise the influence that narratives have upon law, it is also important that we set about inventing new narratives. As intellectual property grapples with the issues that flow from its attempts to regulate digital technology and organic computing as well as indigenous artistic and cultural expression, these needs are as urgent and pressing as they ever were.[32]

One promising line of research might be to embark upon what Michel Foucault would call 'a history of the present'.[33] It would involve a critical use of history to make intelligible the possibilities in the present. This inquiry could investigate how the historical traditions of copyright law have been translated and re-interpreted in the contemporary situation of Australia. As Rosemary Coombe notes: 'Modern nation-states developed legal systems in relation to one another, often in relations marked by an anxiety of influence'.[34] It is evident that Australia defines its copyright system in relation to foreign models – the United Kingdom, France, Germany and United States. Australian law is nothing if not eclectic. It supplements the British legislation with an American approach to digital rights and a translation of the European tradition of moral rights. Nonetheless, Australia has developed a local culture of copyright law, which is uniquely its own.

---

32 Sherman, B. and Bently, L. *The Making of Modern Intellectual Property Law: The British Experience 1760-1911*. Cambridge: Cambridge University Press, 1999, p. 220.

33 Michel Foucault explained why he investigated the penal codes in *Discipline and Punish*: 'Simply, because I am interested in the past? No, if one means by that writing a history of the past in terms of the present. Yes, if one means writing the history of the present'. Dean, M. *Critical and Effective Histories: Foucault's Methods and Historical Sociology*. London and New York: Routledge, 1994, p. 20.

34 Coombe, R. 'Challenging Paternity: Histories of Copyright', *Yale Journal of Law and the Humanities*, 1994, Vol. 6, p. 397.

PART 2
'EMPIRE OF SIGNS':
CULTURAL STUDIES

There have been a series of cultural studies, which have considered copyright law and other forms of intellectual property as a form of culture.

Bernard Edelman is a French barrister who is influenced by the Marxist theories of Louis Althusser. He is interested in the relationship between intellectual property and technology. In his classic book *The Ownership of the Image*, Bernard Edelman examines how photography surprised and caught out copyright law.[35] He considers the accommodation of the new technology within the logic of the legal system. Bernard Edelman also investigates the treatment of cinema under copyright law. He charts a shift from authorship being vested in the producer of a film to authorship being shared between the creative collaborators such as the screenwriter and the director. Bernard Edelman emphasises that the reversal in the treatment of photography and film reflects a shift from craft production to industry production. He claims that the legal recognition of the new art forms was a response to market demands. In later work, Bernard Edelman focuses upon the development of the author's right in the 19th century, and the creation of the culture industry in the 20th century.[36] He considers how the coherence of older legal theory is threatened in the face of new media. A later essay,

---

35 Edelman, B. *Ownership of the Image: Elements for a Marxist Theory of Law.* London: Routledge, 1979.

36 Geller, P.E. 'La Propriété Littéraire et Artistique: A Book Review', *Intellectual Property Journal*, 1990, Vol. 6, p. 113; and Edelman, B. 'The Law's Eye: Nature and Copyright', in Sherman, B. and Strowel, A. (eds) *Of Authors and Origins: Essays on Copyright Law.* Oxford: Clarendon Press, 1994, p. 79.

translated in part by John Frow in *Time and Commodity Culture*, provides an account of the accommodation of biotechnology under patent law and plant variety rights.[37]

Bernard Edelman provides some important insights into the relationship between law, technology, and ideology. He has inspired further investigations into copyright law and critical legal studies, such as Ronald Bettig's *Copyrighting Culture*.[38] However, this account of copyright law could be criticised for being too deterministic and mechanistic. In a review of *The Ownership of the Image*, Nancy Anderson and David Greenberg comment that individuals do not just passively accept and obey copyright law: 'People do take law into account in carrying out their affairs. When they do so, however, they do not merely follow law. They attempt to evade it, they bend it to their purposes and assert their own interpretations of what it is and should be. So too, they may calculate the likelihood of law enforcement in organizing their conduct'.[39] This criticism highlights the need to consider the agency and resistance of individuals in relation to copyright law.

In *Contested Culture*, Jane Gaines maps the entertainment industry – the 'grandiose Luna Park of capitalism' – in the United States over a one-hundred period from 1882 to 1982. She limits herself to the doctrine of copyright law and unfair competition, because she is more interested in cultural software rather than the industrial hardware side of production. Jane Gaines provides critical readings of significant cases that figure as turning points in the United States – such as disputes over Oscar Wilde's

---

37 Frow, J. *Time and Commodity Culture: Essays in Cultural Theory and Postmodernity.* Oxford: Oxford University Press, 1997, pp. 195-197.

38 Bettig, R. *Copyrighting Culture: The Political Economy of Intellectual Property.* Boulder: Westview Press, 1997.

39 Anderson, N. and Greenberg, D. 'From Substance to Form: The Legal Theories of Pashukanis and Edelman', *Social Text*, 1983, Vol. 3 (1), p. 69 at 82.

photograph, a look-alike of Jacqueline Onassis, the image of Dracula, and the character merchandising based on Superman. She examines the transformations in the logic of intellectual property law that resulted from them.[40] She does not set out to provide a systematic outline of entertainment law. Jane Gaines adopts the approach of cultural studies. She assumes that although intellectual property has its specialised traditions, codes, and practices, it can also be studied as an object of culture.

In *The Cultural Life of Intellectual Properties*, Rosemary Coombe provides a map of intellectual property that is situated in Canada and North America.[41] She starts her book with a description of her journey along Queen Street in Toronto on the way to teach at the University of British Columbia:

> My encounters along Queen Street reflect and refract the major themes of this volume. The lecture that followed this walk – back when I halfheartedly acquiesced in the coverage of doctrine contained in appellate-level judicial decisions as a model for legal pedagogy – will not figure significantly. Although litigated and unlitigated disputes will be referred to, my contribution is not intended as a comprehensive treatise nor as a philosophical tome; it is, rather, a seriously irreverent intervention designed to provoke and stimulate what I will nominate 'a critical cultural studies of law'. Like other practitioners of cultural studies, my approach is anti-positivist. I do not presuppose that the social life of the law can be explored simply in terms of its logos, positivities, or presences. It must be seen, as well, in terms of 'counterfactuals', the missing, the hidden, the repressed, the silenced, the misrecognized, and the traces of practices and persons underrepresented or unacknowledged in its legitimations. To embody a

---

40 Gaines, J. *Contested Culture: The Image, the Voice and the Law*. London: British Film Industry Publishing, 1992.

41 Coombe, R. *The Cultural Life of Intellectual Properties: Appropriation, Authorship, and the Law*. Durham and London: Duke University Press, 1998.

> sensitivity to the marginalized – the absences and inaudibilities in contemporary cultural spheres – I have avoided limiting enquiries to reported cases or even to litigated disputes. The law's impact may be felt where it is least evident and where those affected may have few resources to recognize or pursue their rights in institutional fora.[42]

Rosemary Coombe observes that signs of intellectual property are pervasive in ordinary life – copyright symbols, trademarks, and celebrity images are omnipresent. She emphasises that intellectual property is not just a product of formal legislation, cases, and policy documents: it is a part of everyday life and experience.

Rosemary Coombe proposes an expanded understanding of politics and advocates an ethics of contingency with respect to the use of cultural texts: 'Politics is cultural activity; its practice demands appropriate access to the materiality of means and mediums of expressive communication. A radical democratic politics, however, will involve more than simply a libertarian celebration of regimes of freedom for appropriation. Post-colonial circumstances ... urge upon us a heightened sensitivity to the differential relations of others'.[43] In other words, she wants to reconcile the free flow of information with a respect for Indigenous culture. Although this goal is laudable, the notion of an 'ethics of contingency' is too vague and abstract to be very helpful or practical in achieving this reconciliation.

In *Time and Commodity Culture,* John Frow is interested in the distinction between information as a gift and as a commodity.[44] He

---

42 Id, p. 9.

43 Id, p. 274.

44 Frow, J. *Time and Commodity Culture: Essays in Cultural Theory and Postmodernity.* Oxford: Oxford University Press, 1997.

argues that there should be an open, 'library' system of information rather than a private system of ownership:

> A library is a collection of information materials, traditionally but not necessarily printed matter, which have typically been bought in the market but which, in most public library systems, do not circulate as commodities. But neither do these materials circulate as gifts; they are, rather – to pick up Marcel Mauss's term – prestations, 'gifts' that return without conferring any rights of ownership or permanent use. At the same time, loaned library materials create no personal ties of obligation and lack the coerciveness of the various forms of prestation that Mauss describes. In this sense, they partake of the impersonality and the abstractness of the commodity form, but unlike commodities they have also been largely free of the forms of coercion – the constraints on access and use – that tend to flow from the price mechanism. While the 'library model' thus tends to collapse rather than to dichotomize the categories of gift and commodity, it does nevertheless represent a genuine alternative to the privatization of the commons in information.[45]

In his consideration of globalisation, intellectual property rights, and capitalism, John Frow focuses upon several subjects – the TRIPS treaty, patents, body parts, plant varieties, and copyright in relation to libraries.[46]

Similarly, in his articles, John Frow is interested in the recent evolution of copyright law in the United States because it is rich in contradictions because of the pressure exerted by the new information technologies, and by the requirements of the information technologies. He deals with North American law on computer software,[47] video

---

45 Id, p. 207.

46 Frow, J. 'Information as Gift and Commodity', *New Left Review*, No. 219, 1996, p. 89; and Frow, J. *Time and Commodity Culture: Essays in Cultural Theory and Postmodernity*. Oxford: Oxford University Press, 1997.

47 Frow, J. 'Repetition and Limitation: Computer Software and Copyright Law', *Screen*, Vol. 29 (1), 1988, p. 4.

cassettes,[48] and publicity rights in relation to Elvis.[49] The only article to address intellectual property in Australia is one on Indigenous cultural property.[50] It is a curious oversight that Australian law should be lost in the grand sweep of this global intellectual property.

The ambition of such cultural studies of copyright law is to reveal and uncover the social experience of intellectual property. Although promising, this work has yet to fully realise its goals and aspirations. Part of the problem has been one of methodology. Bernard Edelman, Jane Gaines, and John Frow have been content to restrict themselves to philosophical treatises, legal judgments, and the record of parliamentary debate. As a result, culture remains an object, rather than a subject of study. Rosemary Coombe shows a way forward. She is willing to go beyond formal law and tell anecdotes about cultural controversies. Her work, though, is yet to deal with such phenomena in a systematic fashion. Consequently, there is a need for cultural studies of copyright law to be grounded in empirical, sociological research.

This study develops an archive of oral histories about copyright law from the perspective of creators. It fills an important gap in the literature. As Fiona Macmillan observes: 'Copyright has also been guilty of considerable arrogance in its failure to take heed of the opinions and expertise of those supposedly most intimately affected by its operation, the creative artists'.[51] The views and opinions of creative artists about copyright law should not be discounted, dismissed or ignored. They

---

48 Frow, J. 'Timeshift: Technologies of Reproduction and Intellectual Property', *Economy and Society*, Vol. 23 (3), 1994, p. 290.

49 Frow, J. 'Elvis' Fame: The Commodity Form and the Form of the Person', *Cardozo Studies in Law and Literature*, 1995, Vol. 7 (2), p. 131.

50 Frow, J. 'Public Domain and Collective Rights in Culture', *Intellectual Property Journal*, 1998, Vol. 13, p. 39.

51 Macmillan, F. 'Copyright, Culture and Private Power', *Prometheus*, 1998, Vol. 16 (3), p. 305.

need to be recorded and documented. Such an archive of oral histories can tell us much about copyright law. It can provide a basis to judge the goals of the law – whether it is indeed intended to promote creativity or regulate the trade of commodities. It highlights the instrumental effects of the law – the extent to which rules and principles are incorporated into real world situations. It also stresses the symbolic significance of copyright law – in terms of authorship, creativity, and appropriation. Such a resource could make an important contribution to our understanding and knowledge of copyright law.

PART 3
'CODE IS LAW':
CYBER-LAW

A vanguard of philosophers, sociologists, political scientists, and economists have speculated upon the future of intellectual property.

In *The Philosophy of Intellectual Property*, Peter Drahos develops his idea that there should be an intellectual commons, in which ideas, information, and knowledge should be free from private ownership and commodification.[52] The writer relies upon the work of such modern philosopher-kings, such as Marx, Hegel, Locke, and Rawls. He is forced to extrapolate from the texts of such writers, because they have little to say themselves about intellectual property. Peter Drahos argues that intellectual property rights should be conceived of as temporary privileges granted by the state for instrumental purposes. He questions

---

52 Drahos, P. *A Philosophy of Intellectual Property*. Aldershot: Dartmouth Publishing Company, 1996.

whether intellectual property rights should be considered as a set of private property rights. Peter Drahos further explores the politics of intellectual property in essays on topics such as artistic communication,[53] the information society,[54] Indigenous culture,[55] methods of human treatment,[56] and biotechnology[57].

In *Global Business Regulation*, John Braithwaite and Peter Drahos investigated the global regulation of business.[58] They adopted a 'micro-macro method' for the anthropology of global cultures. They interviewed 500 leaders in business and government who acted as agents for larger collectivities. John Braithwaite and Peter Drahos applied this method to 13 cases that they regarded as the most important domains of business regulation. They encompassed property and contract, financial regulation, corporations, trade, labour standards, the environment, nuclear energy, telecommunications, drugs, food, and sea, road, and air transport. John Braithwaite and Peter Drahos provided an overview of the nature of globalisation – the actors, principles, and mechanisms that are of significance and importance. They concluded with a set of

---

53 Drahos, P. 'Decentring Communication: The Dark Side of Intellectual Property', in Campbell, T., and Sadurski, W. (ed). *Freedom of Communication*. Aldershot: Dartmouth, 1994, p. 249; Drahos, P. 'Community and Creativity: The Role of Copyright', *Copyright Reporter*, 1995, Vol. 13 (1), p. 4; and Drahos, P. 'The Visual Artist in the Global Information Economy', *Communications Law Bulletin*, 1995, Vol. 14 (3), p. 1.

54 Drahos, P. 'Information Feudalism in the Information Society', *The Information Society*, 1995, Vol. 11, p. 209.

55 Drahos, P. 'Indigenous Knowledge and the Duties of Intellectual Property Owners', *Intellectual Property Journal*, 1997, Vol. 11, p. 179.

56 Faunce, T. and Drahos, P. 'Trade Related Aspects of Intellectual Property Rights (TRIPS) and the Threat to Patients: A Plea for Doctors to Respond Internationally', *Medicine and Law*, 1998, Vol. 17, p. 299.

57 Drahos, P. 'Biotechnology Patents, Markets and Morality', *European Intellectual Property Review*, 1999, Vol. 21 (9), p. 441.

58 Braithwaite, J. and Drahos, P. *Global Business Regulation*. Cambridge: Cambridge University Press, 2000.

strategies for non-government organisations to intervene in webs of regulation to ratchet up standards in the world system.

In a case study, John Braithwaite and Peter Drahos stress that there has been a contest over a number of competing principles in the globalisation of intellectual property. The ideas of national sovereignty, free flow of information and strategic trade have been pitted against the dictates of harmonisation, rule compliance, and world best practice. John Braithwaite and Peter Drahos emphasise the role of a number of collective actors. They stress the influence of world organisations such as the World Trade Organisation (WTO) and the World Intellectual Property Organisation (WIPO), nation states such as the United States, trade blocs such as the European Union, international business organisations like the Motion Picture Association, and non-government organisations, like the International Federation of Musicians. John Braithwaite and Peter Drahos also stress the key role played by lawyers in this epistemic community because of their technical knowledge. They observe that entrepreneurial lawyers like Eric Smith and Jon Baumgarten played an important role in linking intellectual property to trade.[59] John Braithwaite and Peter Drahos emphasise that a number of mechanisms have been behind the harmonisation of intellectual property law across a number of countries.[60] Countries have relied upon economic coercion, modelling, and reciprocal adjustment to achieve consensus. John Braithwaite and Peter Drahos conclude that weaker actors can generate power through external networks to counter the strength of hegemonic actors like the United States.

---

59 Id, p 204.

60 Drahos, P. 'Global Property Rights in Information: The Story of TRIPS at the GATT', *Prometheus*, 1995, Vol. 13 (1), p. 6; and Drahos, P. 'Global Law Reform and Rent-Seeking: The Case of Intellectual Property', *Australian Journal of Corporate Law*, 1996, Vol. 7, p. 45.

In *Intellectual Property in the Information Age,* Debora Halbert considers the liberal discourses of politics and economics that underpin new forms of intellectual property in the information age.[61] She calls for a critical assessment of these dominant narratives about copyright law:

> In working through the layers of narrative created in the copyright story, it is important to document the types of stories that are being told about intellectual property and who is telling these stories. The narratives that have been created to entrench private property in the information age present multinational corporations as victims, teenage hackers and developing countries as villains, and involve the government as both a peacekeeper and enforcer. This narrative process serves to establish property lines in new technology and socializes the average citizen to an understanding of what is and what is not acceptable. If the copyright message can be uncritically passed on through narratives to the general population, then the property rights of current owners will be reinforced. If copyright cannot be embraced, then more individuals will find themselves facing criminal charges until a new concept of private property is accepted.[62]

In *Shamans, Software and Spleens,* James Boyle considers the regulation of information in a disparate array of contexts: copyright, blackmail, insider trading, and privacy.[63] In recent work, the author has considered whether the Internet will facilitate the rise of a surveillance society.[64] He has advocated the need for a new politics of intellectual property, drawing upon analogies with the environment.[65] In *Owning the Future,*

---

61 Halbert, D. *Intellectual Property in the Information Age: The Politics of Expanding Ownership Rights.* Westport, Conn.: Quorum, 1999.

62 Id, xiii.

63 Boyle, J. *Shamans, Software and Spleens: Law and the Construction of the Information Society.* Harvard: Harvard University Press, 1997.

64 Boyle, J. 'Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors', *University of Cincinnati Law Review,* 1997, Vol. 66 (1), p. 177.

65 Boyle, J. 'A Politics of Intellectual Property: Environmentalism for the Net?', *Duke Law Journal,* 1997, Vol. 47, p. 87.

Seth Shulman charts the current trends in the ownership of knowledge.[66] He investigates controversies in the United States over the patenting of computer software, pharmaceuticals, biotechnology, and methods of human treatment. The journalist ends with a polemic against the expansion of intellectual property.

In *Code and other Laws of Cyberspace*, Lawrence Lessig takes issue with the notion that the internet is a zone of freedom and liberty, which is outside regulation.[67] He argues that such first thoughts about government and cyberspace are misguided:

> Cyberspace, the story went, could *only* be free. Freedom was its nature. But why was never made clear. That *cyberspace* was a place that governments could not control was an idea that I never quite got. The word itself speaks not of freedom but of control. Its etymology reaches beyond a novel by William Gibson to the world of 'cybernetics', the study of control at a distance. Cybernetics had a vision of perfect regulation. Its very motivation was finding a better way to direct. Thus, it was doubly odd to see this celebration of non-control over architectures born from the very ideal of control.[68]

Drawing upon a combination of economic theory, constitutional law, and technology, Lawrence Lessig argues that it is difficult for government to regulate behaviour on the Internet. However, he believes that it is not hard for government to take steps to alter, or supplement, the architecture of the Internet. Lawrence Lessig considers four areas of controversy – intellectual property, privacy, free speech and sovereignty. He argues that the interaction between law and code helps constitute the values at risks in these fields. Lawrence Lessig fears that the courts, the

---

66 Shulman, S. *Owning the Future*. Boston: Houghton Mifflin, 1999.

67 Lessig, L. *Code and other Laws of Cyberspace*. New York: Basic Books, 1999.

68 Id, p. 5.

government, and the technocrats will be unable to respond to the choices that a changing cyberspace will present. He surveys a state of inertia: 'Courts are disabled, legislatures pathetic, and code untouchable. That is our present condition'.[69]

Such political studies provide the means to interpret and organise the competing discourses about copyright law. They demonstrate that oral histories and narratives can be interpreted in terms of interpretative communities, social fields, and cultural semiotics. Debora Halbert and Lawrence Lessig turn to the work of Stanley Fish, the theorist who coined the notion of an 'interpretative community'.[70] The legal philosopher seeks to explain the shared interpretative strategies of readers who belong to the same community.[71] Peter Drahos and John Braithwaite rely upon Peter Haas' notion of an 'epistemic community', which describes a network of professionals with recognised expertise and competence and an authoritative claim to policy-relevant knowledge within a particular domain.[72] Pierre Bourdieu proposes a theory of social fields.[73] He comments that a number of fields structure social space – including the field of cultural production,[74] the juridical field,[75] and the field of journalism.[76] His argument is that individual agents and collectivities are engaged in competition for monopoly over the economic and symbolic

---

69 Id, p. 221.

70 Fish, S. *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*. Durham: Duke University Press, 1989.

71 Id, p. 141.

72 Haas, P. 'Introduction: Epistemic Communities and International Policy Coordination', *International Organization*, 1992, Vol. 46 (1), p. 1.

73 Bourdieu, P. 'The Force of Law: Toward a Sociology of the Juridical Field', *The Hastings Law Journal*, 1987, Vol. 38, p. 805.

74 Bourdieu, P. *The Field of Cultural Production: Essays on Art and Literature*. Cambridge and Oxford: Polity Press, 1993.

75 Bourdieu, P. 'The Force of Law: Toward a Sociology of the Juridical Field', *The Hastings Law Journal*, 1987, Vol. 38, p. 805.

76 Bourdieu, P. *On Television and Journalism*. London: Pluto Press, 1996.

capital specific to each field. Such methodologies are useful in mapping the complex micro-politics at play in poly-centric disputes over copyright law.

CONCLUSION

This thesis provides a history of the present of copyright law in the context of Australia during the last decade of the 20th century. It tells a series of local narratives, stories and anecdotes about copyright law. This study is based upon dialogical research and oral histories. It is founded upon interviews with artists who have been involved in copyright litigation and policy disputes. An extended discussion of the methodology can be found in Appendix One. This thesis examines particular crises within traditional art forms such as literature, art, music, drama, cinematographic films, new technologies, and Indigenous culture. Such narratives relate to a broad range of works and subject matter that are protected by copyright law.

Chapter One investigates copyright law, literary works, and plagiarism in the context of a case study of the Demidenko affair that arose in 1995. The author Helen Darville was accused of plagiarising a number of historical and literary texts in the novel *The Hand that Signed the Paper*. It was a focal point for a discussion and debate about appropriation within the literary community, the legal system, and the media. This discussion draws upon a public discussion about copyright and plagiarism that was held by the Australian Society of Authors in the wake of the Demidenko affair. It is supplemented by interviews with

Beth Spencer, the author of the novel, *How to Conceive of a Girl*,[77] and David Marr, the biographer of Patrick White and a journalist with *The Sydney Morning Herald*.[78]

Chapter Two examines copyright law and artistic works in the example of the Daubist dispute that took place in Adelaide in 1991. It is based upon an interview with Manne Schulze, an artist and a sculptor who belongs to the Adelaide group, the Daubists.[79] Part 1 considers the dispute over Daubism in the artistic community of Adelaide. It examines the debate over the meaning and nature of landscape painting in terms of the movements of romanticism, modernism, and post-modernism. Part 2 examines the dispute over Daubism in the legal system. Charles Bannon sued driller Jet Armstrong in the Federal Court alleging that the treatment of his painting was defamatory and a breach of the *Copyright Act* 1968 (Cth). He obtained an injunction in the Federal Court to prevent the exhibition and sale of the daubed work, pending a full hearing. The matter, though, was settled out of court, on terms that the work would be purchased from Armstrong and returned to its original author. Part 3 focuses upon the dispute over Daubism in the media. Charles Bannon used *The Adelaide Advertiser* and other syndicated papers to support the litigation and to push for the introduction of a moral rights regime. In response, the Daubists have used underground media to defend their name, and oppose the implementation of moral rights.

Chapter Three considers copyright law and musical works in the case of digital sampling by the Melbourne group Antediluvian Rocking Horse. It is based on an interview with the Melbourne musician and DJ

---

77 Rimmer, M. 'Interview with Beth Spencer', Melbourne, 28 December 1998.

78 Rimmer, M. 'Interview with David Marr', Sydney, 2 November 1998.

79 Rimmer, M. 'Interview with Manne Schulze', Sydney, 25 March 1999.

Susan King.[80] This activist argued at a symposium that copyright law was being used to stifle musical innovation and experimentation. She generated debate in the musical community about the legitimacy of sampling. This paper engages in comparative law, to a limited extent. It examines the strategies of the group in dealing with copyright law in comparison to its overseas contemporaries – the American group Negativland and the British band Chumbawamba.

Chapter Four uses the dispute over the play *Heretic* to discuss copyright law, dramatic works, and collaboration. It generated discussion within the performing arts community, the legal system, and the media about the nature of collaboration. Part 1 considers the complaints of the playwright David Williamson that his economic and moral rights were violated by the production of the play, *Heretic*. Part 2 examines the defence of the director and the dramaturg Wayne Harrison that he was a joint author of the play. Part 3 looks at the question of the rights of the originating producer. Part 4 examines performers' rights in the context of the performing arts. Part 5 looks at the situation of the designer, John Senzcuk. This account is built upon e-mail correspondence with Wayne Harrison, the former director and producer of the Sydney Theatre Company.[81] David Williamson was unable to participate because of his work commitments. However, he has published his views in *The Sydney Morning Herald*. The discussion is supplemented by correspondence with Robyn Archer, the actor, singer, and festival director.[82] It is supported by a telephone discussion with Helen Simondson, the project manager of the Performing Arts Multi-Media Library.[83]

---

80 Rimmer, M. 'Interview with Susan King', Melbourne, 29 December 1998.

81 Rimmer, M. 'Correspondence with Wayne Harrison', London, 24 February 1999.

82 Rimmer, M. 'Correspondence with Robyn Archer', Adelaide, 11 October 1998.

83 Rimmer, M. 'Telephone Interview with Helen Simondson', Melbourne, 2 September 1998.

Chapter Five uses the film *Shine* as a focus for an examination of copyright litigation and policy in respect of cinematographic films. It draws upon a number of interviews with individuals who collaborated in the creation, production, and marketing of the film *Shine*.[84] This paper is divided into six parts. Part 1 considers the situation of the screenwriter Jan Sardi, and his involvement in the Australian Writers Guild. It focuses upon the introduction of a moral rights regime in the film industry. Part 2 recounts the tale of the director Scott Hicks, and his role as a spokesperson for the Australian Screen Directors Association. It examines the push for directors to acquire royalties under the retransmission scheme in the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth). Part 3 tells the story of the independent producer Jane Scott. It considers her contractual dispute with the distributor over the gross receipts to the film *Shine*. Part 4 examines the case of the composer, David Hirschfelder. It explores the disputes over the use of Sergei Rachmaninov's music in the film *Shine*. Part 5 features the actor Geoffrey Rush. It investigates the attempts of the Media Arts and Entertainment Alliance to introduce performers' rights. Part 6 looks at the work of the Director of Photography, Geoffrey Simpson. It analyses the efforts of cinematographers to gain authorship under copyright law. This discussion is supported with a background interview with members of the Film Finance Corporation.[85]

Chapter Six argues that the controversy over Napster crystallises the debate over copyright law and digital works. It considers how this dispute was played out in the online community, the legal system, and

---

84 Rimmer, M. 'Interview with Jan Sardi', Melbourne, 30 April 1999; and Rimmer, M. 'Interview with Jane Scott', Sydney, 29 July 1999.

85 Rimmer, M. 'Interview with Keith Lupton, John Mifsude, and Michael Ward of the Film Finance Corporation', Sydney, 27 April 1999.

the media. Part 1 considers the techno-culture of file-sharing. It features a discussion with Chris Gilbey about such applications as Napster, Freenet, and MP3.Board.[86] Part 2 examines the litigation over Napster. It draws upon the public statements of Emmanuel Candi, the representative of the local record industry in Australia, who has been using the controversy to push for the introduction of the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth). Part 3 examines the various market models available for the on-line distribution of musical works. Part 4 looks at the extensive media coverage given to the dispute over Napster in the newspapers, radio, television, and the Internet. It relies upon correspondence with David Higgins, the technology editor at *The Sydney Morning Herald*.[87] The Conclusion considers how the Federal Parliament drew upon these various discourses in its deliberations over the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth).

Chapter Seven considers copyright law and Indigenous culture in the context of Bangarra Dance Theatre. It is based on an interview with Jo Dyer, the general manager of Bangarra Dance Theatre.[88] Part 1 considers the special relationship between Bangarra Dance Theatre and the Munyarrun Clan. It examines the contractual arrangements developed to recognise communal ownership. Part 2 examines the role of the artistic director and choreographer. It looks at the founder, Carole Johnson, and her successor, Stephen Page. Part 3 focuses upon the role of the composer, David Page. It examines his ambition to set up an Indigenous recording company, Nikinali. Part 4 focuses upon the role of the artistic designers. It looks at the contributions of such artistic designers such as Fiona Foley. Part 5 deals with broadcasts of performances on television,

---

86 Rimmer, M. 'Interview with Chris Gilbey', Sydney, 28 June 2000.

87 Rimmer, M. 'Correspondence with David Higgins', Sydney, 25 July 2000.

88 Rimmer, M. 'Interview with Jo Dyer', Sydney, 15 September 1998.

film, and multi-media. Part 6 considers the collaborations of Bangarra Dance Theatre with the Australian Ballet, and the Sydney Organising Committee for the Olympic Games. The Conclusion considers how Bangarra Dance Theatre has played a part in a campaign to increase legal protection of Indigenous culture.

Chapter Eight examines the future of copyright law in light of the metaphor of the cathedral and the bazaar. It argues that the simplification plans of the Copyright Law Reform Committee fails to take into account the unruly and chaotic social life of copyright law. Part 1 considers the controversies over copyright law in various artistic communities. It stresses the active role played by creative artists in interpreting copyright law. It also highlights the influence of interest groups and professional organisations in the formulation of copyright law reform. Part 2 draws conclusions about legal relations in the area of copyright law. It highlights the role of lawyers in copyright litigation and policy-making. It also points to the prudence of judges in dealing with copyright controversies. Part 3 looks at the relationship between the media and copyright law. It points to the important part played by journalists in educating the public about copyright law. Chapter Eight ends with a clarion call for copyright law to take heed of the views and opinions of creative artists. It concludes with a declaration by the performer Robyn Archer about ownership, access, and identity.

The stories are what Kenneth Burke calls 'representative anecdotes'.[89] Although they are partial and selective, the narratives have arguably sufficient scope and range to be faithful reflections of reality.

---

89 Burke, K. *A Grammar of Motives*. Berkeley and Los Angeles: University of California Press, 1945, p. 59.

Such an approach might raise the hackles of conventional historians. As Catherine Gallagher and Stephen Greenblatt observe:

> But to most mainstream historians, anecdotes are no-account items: tolerable, perhaps, as rhetorical embellishments, illustrations, or moments of relief from analytical generalization, but methodologically nugatory. When modern historians write about individual lives or small events, they usually stress their broad historical significance or generalizable typicality. Such people and events usually come into view historically only at a distance from the trivialities and intricacies of daily life, in a cognitive retreat where the reliability of the data of experience can be weighed and proportional significance assigned.[90]

It is anticipated that the anecdotes could be criticised as being unrepresentative, without any significance beyond their peculiar circumstances. This complaint could be framed in a number of ways. It could be objected that the artistic disputes only represent a limited range of artistic practices and forms. A defence would be that the disputes went beyond their immediate participants, involved a diverse range of practitioners and critics, and crystallised issues for artistic communities. The legal cases could be dismissed as insignificant because they produced no binding legal precedents. A reply is that the legal controversies reflect the social experience of copyright law. The processes of bargaining, settlement, and judging are central to the legal system. Moreover, it might be contested that the media events are anything more than mere ephemera. Such cases have become symbols and emblems of the crisis in authorship and appropriation.

---

90 Gallagher, C. and Greenblatt, S. *Practicing New Historicism*. Chicago and London: The University of Chicago Press, 2000, p 49.

CHAPTER ONE
THE DEMIDENKO AFFAIR:
COPYRIGHT LAW AND LITERARY WORKS

The Demidenko affair was a literary hoax that attracted wide public attention in Australia, because it touched on a number of social tensions and anxieties. It raised matters of history and fiction, authenticity and identity, plagiarism and copyright law. The Demidenko affair did not result in a judicial decision, let alone a reported case. It could easily be dismissed as just some legal posturing outside the courts. Yet, the Demidenko affair is important because it highlights the lived experience of copyright law. As Rosemary Coombe noted, 'the interpretive life of the law may be found in rumours and myths about rights and obligations, local conventions of textual appropriation, cease-and-desist letters, and injunctions threatened and settled without hearings in disputes rarely addressed at trial on their legal merits'.[1] The Demidenko affair demonstrates that matters of plagiarism are only formally dealt with by the courts as a matter of last resort. They are usually resolved within a number of different contexts – the literary community, the legal system, and the media.

Helen Darville was the author of the novel *The Hand that Signed the Paper* and the winner of the Vogel Award and the Miles Franklin award.[2] She was a transgressive writer in a number of respects. Helen Darville blurred the boundaries between fact and fiction. She faced allegations that her book *The Hand that Signed the Paper* was a racist and anti-Semitic text. Helen Darville also challenged notions of individual authorship and

---

1 Coombe, R. 'Critical Cultural Legal Studies', *Yale Journal of Law and the Humanities* 1998, Vol. 10, p. 463 at 473.

2 Darville, H. *The Hand that Signed the Paper*. Sydney: Allen and Unwin, 1994.

romantic creativity. She was an elusive, shifting, protean figure with multiple personae. She wrote the book *The Hand that Signed the Paper* under an assumed name and an assumed Ukrainian identity, 'Helen Demidenko'. Helen Darville was also a transgressive writer in terms of originality. She engaged in the appropriation of texts from a number of different historical and fictional sources. As a result, Helen Darville was accused of plagiarism, copyright infringement, and inauthenticity.

Helen Darville was accused of plagiarising a number of historical texts in the creation of *The Hand that Signed the Paper*. In particular, she used an incident from a collection of oral histories in *The Black Deeds of the Kremlin*, in which a Ukrainian witness tells of a girl who begged for bread in a queue in the 1933 famine:

> At last she reached the storekeeper. This man must have been some newly arrived stranger who either could not, or would not speak Ukrainian. He began to berate her, said she was too lazy to work on the farm, and hit her outstretched hand with the blunt edge of a knife blade. The girl fell down and lost a crumb of bread she was holding in the other hand. Then the storekeeper stepped closer, kicked the girl and roared: 'Get up! Go home, and get to work!' The girl groaned, stretched out and died. Some in the queue began to weep.[3]

In *The Hand that Signed the Paper*, Helen Darville writes about a character called Vitaly who accompanies his cousin Lara to a bread queue:

> Finally she got to the storekeeper, a Russian colonist. She begged at him. He said she was too lazy to work on the farm. He yelled at her, and hit her hand with the knife. Luckily it was blunt. Lara fell down and lost the crumb of bread she had in one hand. Then the storekeeper came out from behind the stall and

---

3 Jost, J., Totaro, G. and Tyshing, C. *The Demidenko File*. Melbourne: Penguin Books, Melbourne, 1996, p. 251.

> kicked her and kicked her, all the while yelling at her to get up, go home, and work. People in the queue started to cry ...[4]

In addition, Helen Darville was also accused of having plagiarised much from Martin Gilbert's *The Holocaust*, a historical study of the atrocities committed against European Jewry during World War Two, and Deborah Dwork's *Children of the Star*.

The feminist poet, writer, and journalist Robin Morgan condemned Helen Darville for using a passage concerning a guilty death camp guard from her book *The Demon Lover: On the Sexuality of Terrorism*:

> 'I don't like what I – what we – what happens. I-I-.' My son is almost his age. I can't help reaching out to touch his hand, lightly, his gangly adolescent hand that rests on the butt of his Galil rifle. His dark eyes fill. 'I-we do ... bad things, lady,' he whispers, 'bad things. And we're – I'm scared. I'm scared all the time'.[5]

In *The Hand that Signed the Paper*, Helen Darville appeared to have closely copied the form and content of this expression:

> 'He had an automatic rifle across his knees. His gangly, adolescent hand rested on the butt ... 'I don't like what I ... what happens ... what we do –' He looked up; his dark brown eyes filled. 'I ... we ... do bad things, Pani. Bad things, and I'm scared all the time'.[6]

Helen Darville was also criticised from having lifted the book's first line from Thomas Keneally's *Gossip from the Forest*. She also reportedly used a

---

4 Darville, H. *The Hand that Signed the Paper*. Sydney: Allen and Unwin, 1994.

5 Morgan, R. *The Demon Lover: On the Sexuality of Terrorism*. New York: Norton, 1989.

6 Darville, H. *The Hand that Signed the Paper*. Sydney: Allen and Unwin, 1994.

passage from Graham Greene's *The Power and The Glory* about the smuggling of religious works, as well as imagery from Toni Morrison's *The Bluest Eye*, Patrick White's *Down at the Dump*, and Robert Lowell's poem *For The Union Dead*. And, in other work, Helen Darville plagiarised an article that she put in The University Of Queensland student newspaper, culled anecdotes from the work of Professor Brian Matthews for an article published in *Republica*, and used an Internet essay by another author for a newspaper column.

In this paper, I would like to use the notion of 'interpretative communities' to help understand the competing interpretations of the Demidenko affair by writers, lawyers, and journalists. Stanley Fish first formulated this concept.[7] He defined 'interpretative communities' as 'made up of those who share interpretative strategies not for reading (in the conventional sense) but for writing texts, for constituting their properties and assigning their intention'.[8] Stanley Fish argued that this concept explained the stability of interpretation among different readers (they belong to the same community) and the variety of interpretation in the career of a single reader (they belong to different communities). He submitted that this idea explained how disagreements can be debated in a principled way, because of a stability in the makeup of groups and therefore in the opposing positions they make possible. However, the concept of interpretative communities has been criticised by radical and conservative critics alike.[9] There are a number of deficiencies and

---

7 Fish, S. *Is there a Text in this Class? The Authority of Interpretative Communities.* Cambridge, Mass: Harvard University Press, 1980.

8 Fish, S. *Doing what Comes Naturally.* Durham: Duke University Press, 1989, p. 141.

9 Goldsmith, A. 'Is there Any Backbone in this Fish? Interpretative Communities, Social Criticism, and Transgressive Legal Practice', *Law and Social Inquiry*, 1998, Vol. 23 (2), p. 373.

weaknesses in relation to its account of interpretation, community, and authority. It is thus important to recognise that the abstract concept of interpretative communities is of limited explanatory power. It is useful in structuring and organising the various discourses in the Demidenko affair.[10] Yet it will not account for all the unruly facts in the dispute. It is thus important that the idea of interpretative communities is grounded in a social and historical context.[11]

In the Demidenko affair, a number of 'interpretative communities' can be identified in the debate over the copying of literary works by Helen Darville. They operated within a number of institutions: the legal system, the literary industry, and the media. This paper argues that the acts of appropriation by Helen Darville were interpreted differently according to the norms and standards of these communities. Part 1 analyses how writers, publishers, and critics were concerned with the aesthetics and ethics of plagiarism. Part 2 investigates how the lawyers acting for Helen Darville interpreted the case in terms of copyright infringement of economic rights and moral rights of authors. Part 3 shows that journalists and reporters investigated the politics of the appropriation by Helen Darville. The interpretative communities did have internal divisions and conflicts. There were disagreements within the groups over the Demidenko affair, but they were conducted according to the standards and norms of those groups. The interpretative

---

10 The concept of interpretative communities has also been applied by Andrew Fieldsend in his doctoral thesis on Maori cultural property, and Louise Harmon in her essay on Jeff Koons and copyright law: Harmon, L. 'Law, Art, and the Killing Jar', *Iowa Law Review*, 1994, Vol. 79, p. 367 at 409.

11 For alternative theories to interpretative communities, see Pierre Bourdieu's sociology of fields, and Michel Foucault's archaeology of discourse: Bourdieu, P. 'The Force of Law: Toward a Sociology of the Juridical Field', *The Hastings Law Journal*, 1987, Vol. 3, p. 805; and Dean, M. *Critical and Effective Histories: Foucault's Methods and Historical Sociology*. London and New York: Routledge, 1994.

communities were also engaged in external disagreements with one another. There was a struggle between the groups over which had the authority to judge and sanction Helen Darville for her acts of appropriation. There is a need for greater dialogue and communication between the legal system, the literary community and the media over the legitimacy of copying.

PART 1
'DEAR HELEN, JUST GIVE ME BACK MY WORDS': THE LITERARY COMMUNITY

The Demidenko affair is not without precedents in the literary community of Australia. It needs to be placed in the historical context of a tradition of literary hoaxes. The Ern Malley affair was an important antecedent.[12] Two Australian poets Harold Stewart and James McAuley submitted a series of poems to a magazine called *Angry Penguins* under the fictional authorship of Ern Malley. They sought to debunk the esoteric and arcane nature of literary modernism. The deception attracted great publicity in the media, and resulted in Max Harris, the editor of the *Angry Penguins*, being prosecuted on the grounds that some of the works were obscene. The Demidenko affair had some similarities. Helen Darville wrote the book *The Hand that Signed the Paper* under the fictitious persona of Helen Demidenko. She sought to challenge notions of identity, authenticity and multi-culturalism. However, the publisher Michael Heyward noted that

---

12 Heyward, M. *The Ern Malley Affair*. Brisbane: University of Queensland Press, 1993.

the Ern Malley deception was a cunningly crafted literary hoax.[13] He did not think that the stories told by Helen Darville had the same coherence. In a later hoax, Leon Carmen, a white male, wrote the book *My Own Sweet Time* under the name of Wanda Koolmatrie and published the work with the Aboriginal press, Magabala Books.[14] He alleged that non-white writers are advantaged in Australia – in spite of much evidence to the contrary. The literary hoaxes speak to the fictional and protean nature of Australian national identity. They attracted public attention, because they touched upon social anxieties and tensions about culture, race, and nationhood. The controversies also raised important questions about the aesthetics and ethics about the appropriation of identity and texts in the literary community of Australia. They also lead to debate over the process of granting awards and prizes to authors in literary competitions.

Aesthetics

The community of writers, publishers, and critics judged *The Hand that Signed the Paper* on the basis that the act of appropriation was a matter of aesthetics and ethics, rather than a question of law. David McCooey articulated this sentiment: 'If literature appears to appropriate from experience too wilfully, with too much abandon, we should remember that appropriation (though not without moral and legal imperatives) is pre-eminently an imaginative act and so requires that it satisfied itself before it satisfies any other jurisdiction'.[15] This kind of argument represents an attempt by the literary community to retain authority over

---

13 Jost, J., Totaro, G. and Tyshing, C. *The Demidenko File.* Melbourne: Penguin Books, 1996, p. 257.

14 Stevenson, A. and Hubble, A. 'Great White Hoax', *The Daily Telegraph,* 13 March, 1997, pp. 1 and 8.

15 McCooey, D. 'Thirteen Ways', *The Australian's Review of Books,* 1998, Vol. 3 (5), p. 14 at 31.

this domain. The Demidenko affair was the catalyst for a fierce debate in the literary community about the differences between 'plagiarism', 'influence', and 'appropriation'. The community of writers, publishers, and critics interpreted, understood, and explained the conduct of Helen Darville in light of their communal traditions and their concomitant prejudices.

First, the critics of Helen Darville accused her of plagiarism because of a belief that she had transgressed the romantic ideals of individual authorship and private possession. In a distressed letter, Robin Morgan memorably described the feeling of violation at finding herself the subject of plagiarism: 'It feels as if your brain has been burgled'.[16] She also described Helen Darville as a thief, a pirate, and a kleptomaniac. Scholars have noted that 'plagiarism' is 'one of the pathologies of romantic authorship that deserves much more critical attention than it has received'.[17] It involves the imitation or theft of literary texts without the disclosure or acknowledgment of the sources. As Hillel Schwartz observes, 'Plagiarists hope that their thefts will be taken for inventions; they make their name by standing on the shoulders buried in the sand'.[18] Plagiarism also has pejorative connotations. It is a term of opprobrium and reproach. Ian McEwan points out a strong connection between romantic aesthetics and morality: 'In our literary tradition, with its powerful emphasis on the uniqueness of the individual imagination, to be a plagiarist is to be fundamentally dishonest, it is to claim as uniquely yours what is uniquely someone else's and is a tacit

---

16 Morgan, R. 'Dear Helen, Just Give Me Back My Words', *The Sydney Morning Herald*, 23 March 1996, p. 11.

17 Woodmansee, M. and Jaszi, P. 'The Law of Texts: Copyright in the Academy', *College English* , 1995, Vol. 57 (7), p. 769 at 784.

18 Schwartz, H. *The Culture of the Copy: Striking Likenesses, Unreasonable Facsimiles*. New York: Zone Books, 1996, p. 315.

admission that your own imagination is defective, insufficient to sustain its own particular hold on the world'.[19] In her moral outrage and indignation, Robin Morgan sounds like a legalist of the highest order, speaking in terms of theft, burglary, and dishonesty. Her harsh and uncompromising rhetoric seems inflated and excessive given her familiarity with the literary practices of modernism and post-modernism.

Second, the defenders of Helen Darville submitted that the strategies in *The Hand that Signed the Paper* were acceptable and permissible for a work which followed in the tradition of modernism. They argued that the author was not guilty of 'plagiarism', but rather of receiving and assimilating 'influences'. The modernism of the early twentieth century challenged romanticism and its understanding of originality, creativity, and cultural agency. Ezra Pound's declaration to 'Make It New' was not an order to create newness out of nothing.[20] It instead encouraged the creation of imaginative work through the means of reinventing past traditions and styles. However, Luke Slattery raised doubts that Helen Darville's techniques were 'absolutely normal' - in terms of the self-conscious novelistic tradition of modernism:

> If you brush over the prototypical works of modernism, you can see how far Darville is from this territory. T.S. Eliot's *Four Quartets* and Ezra Pound's *Cantos* are a living mulch of literary antecedents: the Old and New Testaments; the Greeks; Dante; the troubadour poets; Shakespeare; Browning; the French Symbolists. But they make all this obvious to the reader, perhaps too obvious. To many readers, the result is oblique, archival, obscure.[21]

---

19 Kernan, A. *The Death of Literature*. New Haven: Yale University Press, 1990, p. 121.

20 Hughes, R. *Culture of Complaint: The Fraying of America*. New York: Oxford University Press, 1993, p. 110.

21 Slattery, L. 'Our Multicultural Cringe', *The Australian*, 13 September 1995, p. 17.

Furthermore, it is inconsistent and imprecise to claim that *The Hand that Signed the Paper* is simultaneously a modernist work and a post-modern text. There is a sharp break and rupture between the two aesthetic movements. In many respects, modernism stands in opposition and conflict to post-modernism. This suggests that there is some confusion about the exact nature of *The Hand that Signed the Paper*.

Third, the literary critic Andrew Riemer acted as an apologist for Helen Darville and claimed that the adoption of an ethnic identity and appropriation of other people's work could be understood and explained as a product of post-modernism:

> Only with the rise of capitalist concepts of individual or private property did the notion of intellectual property begin to emerge, as reflected in the passing of the first copyright legislation in England in 1709. Such notions have no validity, many literary and cultural theorists would claim, in the postmodern world.
>
> Partly for that reason, much contemporary writing, especially fiction, engages in highly sophisticated and specialised acts of plagiarism. The theoretical justification for what is, in many instances, no more than modishness is related to the almost universal scepticism about the capacity of language to reflect reality which left its mark on the structure of *The Hand that Signed the Paper*, especially where the absence of an authoritative narrating voice is concerned. The theory holds that because language cannot capture or describe anything beyond itself, anything said or written can only refer to or be 'about' something else that has been or might be said or written. Accordingly texts – novels, plays, narrative and descriptive verse – are not 'about' anything except other texts, other writing.[22]

Andrew Riemer claimed that texts such as *The Hand that Signed the Paper* are 'intertextual' because they are composed of a mosaic of quotations

---

22 Riemer, A. *The Demidenko Debate*. Sydney: Allen and Unwin Pty Ltd, 1996, p. 211.

and citations. He argued that the pejorative term, 'plagiarism', and even the neutral phrase, 'influence' were redundant in a post-modern age, in which pastiche is the norm. He preferred the euphemism, 'appropriation', to describe the act of copying. However, Andrew Riemer conceded that Helen Darville's pilferings are far removed from the sophistication of post-modern writers. The problem is that *The Hand that Signed the Paper* does not have the high degree of self-consciousness and reflexivity present in a genuine post-modern novel.[23] It is far removed from the playful re-invention of history found in books like Peter Carey's *Jack Maggs*,[24] Kate Grenville's *Joan Makes History*,[25] and Roger McDonald's *Mr Darwin's Shooter*.[26] Instead the novel *The Hand that Signed the Paper* belongs to a tradition of plain, humdrum, historical realism.

It is curious that Andrew Riemer should defend Helen Darville in terms of modernism and post-modernism given that he left his position at the Department of English at the University of Sydney because of his distaste for such fashionable theories. In his memoirs, *Sandstone Gothic*, the critic expresses a deep antipathy towards all forms of academic literary theory, from Matthew Arnold and FR Leavis, to Derrida, Foucault and Lacan.[27] He is particularly scathing about Australian academics' infatuation with post-modernism and deconstruction.[28] Andrew Riemer departed the University of Sydney, because he was upset that the syllabus no longer concentrated on the Canon of English literature. He took up practical criticism, writing book reviews of *The Sydney Morning Herald*,

---

23 Slattery, L. 'Our Multicultural Cringe', *The Australian*, 13 September 1995, p. 17.

24 Carey, P. *Jack Maggs*. Brisbane: University of Queensland Press, 1997.

25 Grenville, K. *Joan Makes History* Brisbane: University of Queensland Press, 1988.

26 McDonald, R. *Mr Darwin's Shooter*. Sydney: Knopf, 1998.

27 Riemer, A. *Sandstone Gothic: Confessions of an Accidental Academic*. Sydney: Allen and Unwin Pty Ltd, 1998.

28 Id at p. 207.

and published memoirs about being a Jewish migrant to Australia.[29] Andrew Riemer agreed to defend Helen Darville out of deep loyalty towards his publisher, Allen and Unwin. His advocacy on behalf of the author carried authority because of his literary training and Jewish heritage. Still it seems strange that Andrew Riemer should fall back upon the academic theories that he left behind to defend Helen Darville. Perhaps he did not care if the principles of post-modernism and deconstruction were discredited in the rhetorical battle over the Demidenko affair.

Ethics

Even if she was not subject to legal penalties for copyright infringement, Helen Darville was still open to a range of non-legal sanctions for plagiarism. There were a number of remedies that were available to the literary community. Helen Darville could have been required to offer an apology to the writers concerned. She could have had *The Hand that Signed the Paper* withdrawn from print by the publishers, and lost the prizes and awards that were given for the book. However, nothing of this sort was done. There was a lack of consensus about the ethical standards and norms that should apply in a given case, and the consequences that should flow from their breach. There was no independent arbiter of such matters. There was little redress against parties who refuse to be held accountable to the standards of the literary community. The Demidenko affair demonstrated the limits of ethical standards in resolving cultural

---

[29] Riemer, A. *Inside Outside*. Sydney: Angus and Robertson, 1992; Riemer, A. *The Habsburg Cafe*. Sydney: Angus and Robertson, 1993; Riemer, A. *America with Subtitles* Melbourne: Minerva, 1995, and Riemer, A. *Sandstone Gothic: Confessions of an Accidental Academic*. Sydney: Allen and Unwin Pty Ltd, 1998.

disputes, as advocated by Rosemary Coombe, John Perry Barlow and others.

First, the dispute could have been resolved in terms of inter-personal ethics. In the Demidenko affair, Peter Goldsworthy preached a philosophy of reconciliation:

> What then should be our punishment of her? ... The temporary trashing of a reputation seems sufficient, and it can only be rehabilitated by the writing of another book, which takes either thick skin, or tremendous survival instinct. We give jobs to released prisoners. From literary coventry we must allow some hope of redemption.[30]

However, Helen Darville refused to apologise to the authors concerned because she did not accept that she had made any improper use of her sources or other published works.[31] This put the onus on the aggrieved authors to offer absolution. Robin Morgan did not feel flattered by the plagiarism of her work of non-fiction, *Demon-Lover: On Sexuality of Terrorism*. She found the conduct of the unrepentant Helen Darville unconscionable and reprehensible. By contrast, Thomas Keneally was prepared to forgive Helen Darville for borrowing from his novel, *Gossip from the Forest*. The author perhaps recalled his own unhappy experience. Thomas Keneally was accused of having made extensive and unacknowledged use of material from Bill Strutton's book, *Island of Terrible Friends*, in his historical novel *Season of Purgatory*.[32] He reached an out-of-court settlement with Bill Strutton and agreed to share part of the

---

30 Goldsworthy, P. 'The Dewogging of Helen Demidenko' in *Navel Gazing*. Melbourne: Penguin Books, 1998, p. 26 at 41.

31 Tavuchis, N. *Mea Culpa: A Sociology of Apology and Reconciliation*. Stanford: Stanford University Press, 1991.

32 Pierce, P. *Australian Melodramas: Thomas Keneally's Fiction*. Brisbane: University of Queensland Press, 1995.

royalties from *Season in Purgatory*. By forgiving Helen Darville, Thomas Keneally was in effect asking for clemency and compassion towards those accused of plagiarism.

Second, *The Hand that Signed the Paper* could have been withdrawn from publication because it copied work without the permission of the owners. In response to the airing of allegations of plagiarism, the publishing house, Allen and Unwin, placed a moratorium on republishing the novel under the authorship of Helen Darville.[33] However, it lifted the moratorium after the lawyers acting for Helen Darville released their opinion that the allegations of plagiarism were unsustainable. In the end, the niceties of literary ethics were outweighed by commercial considerations. The publishing house, Allen and Unwin, decided to publish a new edition with certain changes.[34] The book was no longer authored by Helen Demidenko, but by Helen Darville. It was also significant that acknowledgment was now made to historical material drawn from *The Holocaust* and *The Black Deeds Of The Kremlin.* Such concessions were designed to mollify the authors who were aggrieved by the use of their work. The publishing house, Allen and Unwin, was not prepared to withdraw publication of *The Hand that Signed the Paper* because of its investment in the book and its commitment to the Miles Franklin Award.

Third, the Miles Franklin Award bestowed upon Helen Darville could have been revoked because of her use of copyright work without the permission of the authors. The trustees, judges, and administrators of the Miles Franklin Award held that there were no grounds, legal or

---

33 Jost, J., Totaro, G. and Tyshing, C. *The Demidenko File*. Melbourne: Penguin Books, 1996, p. 250.

34 Manne, R. *The Culture of Forgetting: Helen Demidenko and the Holocaust*. Melbourne: The Text Publishing Company, 1996, p. 112.

otherwise, to support a charge of plagiarism against *The Hand that Signed the Paper*. One of the judges, Dame Leonie Kramer, denied that Helen Darville was guilty of any breach of literary ethics: 'It's a very complicated issue, plagiarism, but I don't feel it applied to that book'.[35] However, the judges of the Miles Franklin award were criticised for this clemency. In particular, Robin Morgan was outraged that Helen Darville's conduct was not to have ethical consequences:

> What to do? Perhaps revoke the prize(s) and award them to the runners-up, thereby encouraging genuine young talent and affirming authentic multiculturalism? Simultaneously send a message about personal and literary ethics to writers, readers, publishers and prize contestants? By doing so, silence any gleeful, opportunistic, right-wing champions of monoculturalism? What an obvious solution! But no. The literati retreat to defensiveness, contradict themselves in trying to justify their actions, flail at the press (petulantly blaming the media for bestowing attention originally sought by all parties concerned), and strain to exonerate an awardee from behaviour some might charitably term psychotic.[36]

Robin Morgan could not comprehend the failure of the judges of the Vogel Award and the Miles Franklin Award to revoke the prizes that were awarded to Helen Darville. The Demidenko affair cast doubts upon the legitimacy of aesthetic values and the credibility of ethical standards in the literary community. As a consequence, the literary community abdicated authority to resolve the dispute, because they failed to take any action. As a result, the Demidenko debate passed beyond the confines of

---

35 Jost, J., Totaro, G. and Tyshing, C. *The Demidenko File*. Melbourne: Penguin Books, 1996, pp. 297-298.

36 Morgan, R. 'Dear Helen, Just Give Me Back My Words', *The Sydney Morning Herald*, 23 March 1996, p. 11.

the cultural sphere and was left to be resolved in the public domain of the mass media.

Summary

The supporters of Helen Darville claimed that the allegations of plagiarism were unsustainable, because there was no infringement of the copyright in a literary work. The publisher at Allen and Unwin, Patrick Gallagher, argued that plagiarism could not be separated from ownership, copyright and financial gain:

> As for plagiarism, it's generally considered that there has to be a breach of copyright for charges of plagiarism to be justified, and both our lawyers and those of the author confirmed that there had not been one. Careless use of sources yes – though one can only wonder how many first novels would stand up to the intense scrutiny that *The Hand that Signed the Paper* was subjected to without similar omissions coming to notice.[37]

The publisher could not see the difference between literary ethics and copyright law. This elision was not accidental. It was in the interest of Helen Darville and her supporters to confuse plagiarism with copyright infringement. It meant that her accusers had to meet a much higher standard of proof. It is important to recognise that plagiarism cannot be equated with copyright infringement because one term derives its meaning from a literary tradition, and the other phrase has certain legal connotations.

---

37 Manne, R. *The Culture of Forgetting: Helen Demidenko and the Holocaust.* Melbourne: The Text Publishing Company, 1996, p. 111.

PART 2

THE HAND THAT SIGNED THE PAPER: LEGAL RELATIONS

In the Demidenko affair, Helen Darville and her publisher Allen and Unwin sought legal advice as to whether the writer had violated copyright law. The author engaged Andrew Greenwood, a Queensland partner of the law firm Minter Ellison. This solicitor practised in the areas of intellectual property, trade practices law, and information technology. He also acted as a director of Stanwell Power Corporation Limited, a director of the National Institute for Law at Griffith University, the adjunct Professor of Law in the School of Law at the University of Queensland, and the chair of the Queensland writers' centre. The publisher Allen and Unwin retained Peter Banki, a partner of the boutique intellectual property firm Banki, Palombi, Haddock and Fiora. His previous experience included working as a solicitor at the law firm Philips Fox, overseeing the management of the Australian Copyright Council, and chairing the Copyright Law Reform Committee. In response to the allegations of plagiarism, the lawyers released the opinion that Helen Darville was not guilty of copyright infringement in respect of historical and fictional texts in *The Hand that Signed the Paper*.[38] They also claimed there was no obligation upon the writer to acknowledge the sources of her work. It is important to evaluate the strengths and weaknesses of this legal opinion. It is also worth considering the diverse range of alternative interpretations that could be made of copyright law.

---

38 Jost, J., Totaro, G. and Tyshing, C. *The Demidenko File*. Melbourne: Penguin Books, 1996, p. 267.

History

In its legal opinion, Minter Ellison made the declaration that 'the use of historical prime source material describing historical events, incorporated in the novel, in the context of the development of the plot and features of the fictional characters in the novel does not constitute an infringement of the copyright in the prime source material nor does it constitute a plagiarism of the historical records'.[39]

The first problem is that this legal opinion relies upon a number of judicial precedents from the United Kingdom, which rest upon untested assertions. In *Ravenscroft* v *Herbert And New English Library Limited,* Justice Brightman found that the degree of use which would amount to an infringement of copyright is different in the case of a historical work than in the case of a work of fiction.[40] His Honour held that there is a greater freedom to copy in the case of the historical work because of the superior need to increase the sum total of human experience and understanding:

> I am inclined to accept that a historical work is not to be judged by precisely the same standards as a work of fiction. The purpose of a novel is usually to interest the reader and to contribute to his enjoyment of his leisure. A historical work may well have that purpose, but the author of a serious and original historical work may properly be assumed by his readers to have another purpose as well, namely to add to the knowledge possessed by the reader and perhaps in the process to increase the sum total of human experience and understanding. The author of a historical work must, I think, have attributed to him an intention that the information thereby imparted may be used by the reader, because knowledge would become sterile if it could not be applied. Therefore, it seems to me reasonable to suppose that the law of copyright will allow a wider use to

---

39 Id at p. 267.

40 *Ravenscroft* v *Herbert And New English Library Limited* [1980] 7 RPC 193.

be made of a historical work than of a novel so that knowledge can be built upon knowledge.[41]

However, this distinction between fact and fiction is unstable and shaky because of deficiencies in the definitions of history and literature. Justice Brightman classifies history as a continuous methodical record of public events, which serves to enlighten its readers. He defines literature as a form of entertainment and amusement for a class of leisured readers. Both these definitions omit the spectrum of propositions and modulations involved in any understanding of reality.[42] There is no guarantee that the Australian courts would follow the reasoning of these British authorities given the radical developments since then in the scholarly opinion of history and literature.

The second problem is that Minter Ellison were partisan and partial advocates who tended to overstate the ratio of the British authorities to defend their clients. In *Ravenscroft* v *Herbert And New English Library Limited,* Justice Brightman held that the question of whether there had been substantial copying depended upon the volume of the material taken, bearing in mind that quality was more important than quantity.[43] His Honour emphasised that the author has no copyright in ideas or facts, only in the original expression of such ideas or facts. Finally, Justice Brightman admonished 'that an author is not entitled, under the guise of producing an original work, to reproduce the arguments and illustrations of another author so as to appropriate to himself the literary labours of that author'.[44] Although it is true that

---

41 Id at p. 207.

42 Castro, B. 'Auto/biography' in Fraser, M. *Seams of Light: Best Antipodean Essays.* Sydney: Allen and Unwin, 1998, p. 125 at 128.

43 *Ravenscroft* v *Herbert And New English Library Limited* [1980] 7 RPC 193.

44 Id at p. 207.

greater liberties are allowed with the use of historical materials, arguing that one relied upon common historical sources is not an incontestable defence to a charge of copyright infringement. It is important to stress that Helen Darville was drawing upon the original expression of historical events, not just historical facts or ideas. It would be open to a court to find that Helen Darville adopted the work of the historians in order to give her novel authenticity and legitimacy with the least possible labour to herself.

The third problem is that, whatever the rules have been in place, a consistent theme from the facts of the cases is that the courts may use their discretion to punish those actors who defy the authority of the law to determine the issue. This is apparent in *Harman, N.V.* v *Osborne And Others*, a case involving an action for copyright infringement against a film called *The Charge of the Light Brigade* based on a screenplay written by John Osborne, a well-known playwright and director.[45] Justice Goff took umbrage at the failure of the playwright to appear before the court, and offer a personal explanation for the sources of his creative work: 'For this purpose, and at this stage, in my judgment the lack of explanation by John Osborne how or when he worked and how long it took him, is of fundamental importance'.[46] His Honour found it remarkable that the playwright left it to his solicitor, who did not know what happened, to compile a list of sources, and then say that they had identified many but not all of the sources which they had used. The miscalculation of the playwright and his legal advisers does not seem to be one of legal rules and principles, but one of tact and diplomacy. It is debatable whether Helen Darville would have similarly incurred the wrath of the courts. Her failure to acknowledge the sources of her creative work could have

---

45 *Harman N.V.* v *Osborne And Others* [1967] 1 WLR 723.

affected the outcome of any court case. However, much would have depended upon the behaviour of her lawyers.

Fiction

In its legal opinion, Minter Ellison emphasised that 'there is no suggestion that the author has transposed large sections of text, pages of text or block paragraphs of text'.[47] It furthermore released advice from a literary expert that 'in terms of the use of phrases or images that draw upon previous works in the genre, the techniques employed by the author are 'absolutely normal' in the kind of self-conscious novelistic traditions in which the author works, according to expert advice'.[48] However, it was most peculiar that this literary expert lent their authority to the statement of the law firm, but preferred to remain anonymous about their identity.

The first point is that Minter Ellison makes a strong case that Helen Darville is not guilty of copyright infringement because she did not take a substantial part of other fictional work. Andrew Greenwood was at pains to emphasise that the quantity of the material taken was minimal: 'It's about 89 words in 157 pages and I don't accept for a moment that that amounts to plagiarism'.[49] He glossed over the quality of the material taken, although that factor is more important in law. In the acknowledgments to *The Hand that Signed the Paper*, Helen Darville, and her publisher, Allen and Unwin, conspicuously thanked J.M. Dent for permission to quote copyright material from the poem *The Hand that Signed the Paper* by Dylan Thomas, published in *Dylan Thomas Collected*

---

46 Ibid.

47 Jost, J., Totaro, G. and Tyshing, C. *The Demidenko File*. Melbourne: Penguin Books, 1996, p. 267.

48 Ibid.

49 Id at p. 264.

Poems 1997.[50] The author drew upon the lines for the title and the skyhook to her book. It seems that the author, Helen Darville, and her publisher, Allen and Unwin, felt the need to acknowledge this source because it was such an obvious borrowing. It is interesting, too, that permission was sought for only eight lines from a poem. This is a stark contrast to the legal argument of Minter Ellison that the takings from works of history and fiction were too small and insignificant to be a substantial reproduction. This variance in treatment cannot be explained away by mere differences in genre. Helen Darville was also less forthcoming about other poetic sources and inspirations that were found in the body of the text.[51]

The second problem is that case law does not support the contention of the literary expert that the appropriation of images and words from other sources is legally permissible. The Australian courts have been reluctant to find that self-conscious forms of artistic expression, such as parody, are protected under the doctrine of fair dealing. In *AGL Sydney Ltd* v *Shortland County Council*, the Federal Court emphasised that 'the statute grants no exemption, in terms, in the case of works of parody or burlesque'.[52] There is a move afoot to simplify the *Copyright Act* 1968 (Cth) with the adoption of a single fair dealing provision, along the lines of the American fair use doctrine.[53] The United States courts have found that parody, like other forms of criticism, would be protected under fair use. In *Campbell* v *Acuff-Rose*, the Supreme Court of the United States held that the question of fair use turned on whether the second work

---

50 Darville, H. *The Hand that Signed the Paper*. Sydney: Allen and Unwin, 1994.

51 Riemer, A. *The Demidenko Debate* . Sydney: Allen and Unwin, 1996, p. 208.

52 *AGL Sydney Ltd* v *Shortland County Council* (1989) 17 IPR 99 at 105.

53 Copyright Law Review Committee. *Simplification of The Copyright Act 1968: Part 1. Exceptions to the Exclusive Rights of Copyright Owners*. Canberra: Commonwealth of Australia, 1998.

'adds something new, with a further purpose of different character, altering the first with new expression, meaning or message; it asks, in other words, whether and to what extent, the new work is 'transformative''.[54] However, even under this progressive approach, it would be doubtful that Helen Darville could be able to raise the defence of fair use. Her work seems to be a pastiche of other work, rather than a self-conscious parody. It lacks the satirical purpose and the humorous laughter that is normally associated with parody.

Finally, Helen Darville and her supporters have said in public forums that her actions could be excused because it was unconscious copying.[55] This undermined the argument that was advanced by her lawyers that she was part of a self-conscious novelistic tradition. Surely one cannot be at one and the same time conscious and unconscious of the sources drawn upon for literary inspiration. The courts do not accept the view that unconscious copying is a venial sin, because of a fear that it would be the last resort of a plagiarist or a pirate. In *Francis Day And Hunter Ltd* v *Bron*, Lord Justice Willmer held that subconscious copying is a psychological possibility, and it is capable of amounting to an infringement of the plaintiff's copyright.[56] In order to establish liability on this ground, it must be shown that the author of the offending work was familiar with the work alleged to be copied. There must be a causal link between the defendant's work and the plaintiff's work, since independent creation does not infringe copyright. If there is a substantial degree of objective similarity, there will be a presumption that there is a causal connection. Evidence of unconscious copying affords some evidence to

---

54 *Campbell* v *Acuff-Rose* (1994) 127 L Ed 500.

55 Jost, J., Totaro, G. and Tyshing, C. *The Demidenko File*. Melbourne: Penguin Books, 1996, pp. 264 and 290.

56 *Francis Day And Hunter Ltd* v *Bron* [1963] Ch 587.

rebut the inference of a causal connection from objective similarity, but it is not conclusive. It would be difficult for Helen Darville in this case to rebut the objective similarity that exists between her novel and the fictional works which she happened to use. Her claim to the author Brian Matthews that she 'had occasional trouble with her intermittent capacity for uncontrollable photographic recall of unattributed material' does not seem a credible one.[57]

Acknowledgments

In its legal opinion, Minter Ellison defended Helen Darville with the argument: 'There is no obligation or literary practice of footnoting or formally acknowledging the use of historical sources in the novel genre (as opposed to academic or scholarly work)'.[58] Furthermore, Peter Banki argued that, even under a system of moral rights, Helen Darville would not have infringed the law, because her failure to attribute the sources of her work was reasonable in all of the circumstances.[59] It is worth evaluating whether such claims about attribution can be substantiated.

At the time of the dispute, there was no law expressly requiring recognition or attribution of authorship. However, the Federal Government has sought to remedy this situation with the introduction of a new scheme of moral rights. Division 6 of Part IX of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth), provides that the right of attribution of authorship or the right of integrity of authorship is infringed where an unattributed, falsely attributed or derogatorily treated work is reproduced in material form, published, performed, transmitted

---

57 Matthews, B. 'My Demidenko Story', *The Age*, 3 October 1995, p. 13.

58 Jost, J., Totaro, G. and Tyshing, C. *The Demidenko File*. Melbourne: Penguin Books, 1996, p. 267.

59 Banki, P. 'Copyright and Plagiarism', *Australian Society of Authors*, Seminar, 23 March 1996.

or adapted. Section 195AR exonerates a failure to attribute authorship where this is reasonable. Section 195AS permits derogatory treatment which, in all the circumstances, is reasonable. Matters to be taken into account include the nature of the work, industry practice, and whether the work was made in the course of employment. Additionally, in relation to the failure to attribute a work, it is relevant whether any difficulty or expense would be incurred as a result of identifying an author.

The claim that there is no literary practice of footnoting or formally acknowledging the use of historical sources in the novel genre is questionable. It is commonplace for writers to acknowledge the historical sources of their literary work, even ones working in a tradition of self-conscious novels. One of Helen Darville's contemporaries, Beth Spencer, was concerned about the lack of attribution:

> Thus the problem for me, for instance, with Helen Darville's appropriations was not that she used someone else's words (I think pastiche as a form is fine; it can be effective and interesting if done well) but that she didn't acknowledge this. If she had, of course, then her own lack of personal experience and, hence, personal authority would have also automatically been acknowledged and made obvious, and this would have altered the whole way the book was experienced. It would have been a different book, with a different history (and vice versa). Well, anyway, while Darville's lawyers may be able to sleep soundly with the conviction that her appropriations (while admittedly 'bad form') are not actionable (that is, not a clear violation of the Copyright Act), I'm afraid I still have the occasional watery nightmare.[60]

---

60 Spencer, B. 'I'd Like to Have Permission to be Post-Modern, but I'm not Sure Who to Ask', *Jacket*, Number 1, http://www.jacket.zip.com.au/jacket01/spencer.

Furthermore, the tactical stance taken by Helen Darville's lawyers is different to the behaviour of her publishers. In response to authors outraged that their words had been used without acknowledgment, the publisher, Allen and Unwin offered that, if the book is reprinted again, it would include a line in the front matter acknowledging the authors of the material without implying this was done with their permission. This offer supports the view that it was indeed industry practice to acknowledge sources. A strong argument could be made that, contrary to what Peter Banki might contend, there would have been a clear infringement of the moral right of attribution.

There would also be an issue whether this appropriation of historical materials would amount to derogatory treatment. 'Derogatory treatment' is defined in section 195AJ of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth) as 'the doing of anything, in relation to the work, that results in a material distortion of, the mutilation of, or a material alteration to the work itself that is prejudicial to the author's honour and reputation'. The recent decision in *Schott Musik* v *Colossal Records* considered the meaning of debasement.[61] Justice Hill comments that 'a rearrangement of a work to incorporate within it notes associating the work with say a terrorist or racist body would constitute a debasement of the original'.[62] It is arguable that Helen Darville offended the honour and reputation of the original authors of the historical works by taking their historical material and using it in a new context, which was arguably offensive and demeaning. In *The Culture Of Forgetting*, Robert Manne noted that 'from a literary point of view what was interesting about Helen Demidenko's borrowing was how often an imaginative slackness or

---

61 *Schott Musik International GBH & Co And Others* v *Colossal Records Of Australia Pty Ltd And Others* (1997) 38 IPR 1.

62 Id at 12.

simple carelessness had robbed her original source of freshness, precision or power'.[63] Robin Morgan lamented: 'It's been distressing to find my name even mentioned in the unsavoury context this author and book seem to foster: crypto-fascist politics, ethno-stereotyping, greed, media hype, an embroidery of lies, and multiple plagiarisms'.[64] A strong case could be made that Helen Darville debased the literary and political qualities of the original work, and this was unreasonable in all of the circumstances.

Summary

The courts can afford to be self-conscious about copyright law because they have the power to find laws, interpret statutes, and contextualise relevant precedents. It is possible that a judge could interpret the flux and the indeterminacy of the case law in such a way as to find that Helen Darville was guilty of copyright infringement, especially if she did not show sufficient respect for the law. However, the courts remained aloof from the Demidenko affair – out of obligation, not choice. They could only adjudicate in relation to a legal process started by lawyers on behalf of their clients. This controversy highlighted that, although the courts have considerable latitude in decision-making, they have limited opportunity to exercise this power.

The Demidenko affair illustrated that lawyers play an instrumental role as gatekeepers to the courts. Andrew Greenwood and Peter Banki were strong, effective advocates who used their legal knowledge and expertise to defend Helen Darville from claims of copyright infringement.

---

63 Manne, R. *The Culture of Forgetting: Helen Demidenko and the Holocaust.* Melbourne: The Text Publishing Company, 1996.

64 Morgan, R. 'Dear Helen, Just Give Me Back My Words', *The Sydney Morning Herald,* 23 March 1996, p. 11.

They provided the realistic advice that it would be difficult for a legal action to succeed against their client. However, the case for Helen Darville was not invincible or impregnable. There were a number of flaws and weaknesses in her legal defence. Yet, these issues did not come to light in the Demidenko affair. The legal debate was one-sided. There was no advocate available to act on behalf of the aggrieved authors.

As a result, Robin Morgan was dissuaded from bringing a legal action for copyright infringement against Helen Darville and her publishing house. She was discouraged by the lack of consensus among the writers whose work had been appeared in *The Hand that Signed the Paper*. Robin Morgan also doubted that her concerns could be satisfied by any legal remedies that would be available to her. 'I don't want revenge or money, I want my own writing 'rescued' from this mess'.[65] Instead of taking the risks of a legal action, she pursued her grievances in the literary circles and the media.

PART 3
THE CULTURE OF FORGETTING:
THE MEDIA

It is significant that the debate over plagiarism in the Demidenko affair was settled not in the courts or in the literary community, but in the alternative forum of the media. It has become common for aggrieved authors to publicise allegations of plagiarism in the press. Not enough attention has been paid to this new phenomenon. The journalistic expose of Helen Darville is not an isolated example. The media performed a role

---

65 Ibid.

in airing allegations of plagiarism concerning the British author Graham Swift and the art critic Robert Hughes.[66] It played a significant part in a number of cases about fabrication of Indigenous identity and culture by white writers, such as Marlo Morgan and Leon Carmen.[67] It has also more controversially raised questions about the authenticity of black writers, such as Mudrooroo and Roberta Sykes.[68] There is a need to discuss and analyse the standards and norms at work in the interpretative community of the media.

In the Demidenko affair, the media was less interested in the legalities of copyright infringement or the aesthetics of influence than in the politics of appropriation. As Mark Davis remarked, 'Most fascinating is the way the book enabled a certain community of critics, columnists and journalists to go over some agendas that were firmly in place long before *The Hand that Signed the Paper* stumbled onstage'.[69] The media was narrow in its focus upon contemporary politics and current affairs in the Demidenko affair. As McKenzie Wark observed, culture is rarely news in itself:

> Culture is in some respects the antithesis of news. It's about an endless, almost infinite series of little acts of making sense of things, be they books or songs or

---

66 On Graham Swift, see: Julius, A. 'A New Definition for the Rights of Writers', *The Sydney Morning Herald*, 13 March 1997, p. 13. On Robert Hughes, see Slattery, L. ''Cannibal' Eats His Own Words', *The Australian*, 7 November 1998, p. 28.

67 On Marlo Morgan, see: Behrendt, L. 'In Your Dreams: Cultural Appropriation, Popular Culture and Colonialism', *Law/Text/Culture*, 1998, Vol. 14 (1), p. 256. On Leon Carmen, see Stevenson, A. and Hubble, A. 'Great White Hoax', *The Daily Telegraph*, 13 March 1997, pp. 1 and 8.

68 On Mudrooroo, see: Mudrooroo. 'Tell Them You're Indian' in Cowlishaw, G. and Morris, B. (eds) *Race Matters: Indigenous Australians and 'Our' Society* . Canberra: Aboriginal Studies Press, 1997, p. 259. On Roberta Sykes, see: Marsh, J. 'You Fella Snake, Dr Sykes? Prove It', *The Sydney Morning Herald*, 17 October 1998, p. 17.

69 Davis, M. *Gangland: Cultural Elites and the New Generationalism*. Sydney: Allen and Unwin, 1997, p. 214.

> everyday gestures, through which people learn and practice and sometimes modify the structures of feeling through which they engage with the world ... It's certainly not the sort of hard edged thing from which a keen reporter makes news.[70]

However, he qualifies the general rule that culture is not newsworthy: 'Big, well-promoted events or personalities with packs of publicists working the fax machines on their behalf are of course often news, but they are news because they are well known, not because there is anything in the cultural material involved that matters all that much'.[71] Thus a book may become consequential if it becomes the focus for a cult of personality, or a political conflict and dispute around the author. The Demidenko affair satisfied both of these conditions, and passed into the public sphere. It attained far more attention than the conduct of Helen Darville warranted or deserved.

There is an economy of celebrity at work in the media. The creative artist has also become a performing artist to some extent. Malcolm Bradbury comments that we live in an age of sensation in which the author is hyped and promoted, studied and celebrated:

> In the commonsense world, authors commonsensically exist, in inordinate numbers. We may not think of them as highly as pop-stars or politicians, nor reward them with honours as we do our civil servants. But they have visibility, a certain fame; they are there ... The reader takes the name on the spine of a book as a real sign, the name of a true person – true in a special way, of course, capable of wisdom, genius, moral insight, the qualities both of the magus and the celebrity. Like most people in the public eye the name is an image, a mystery,

---

70 Wark, M. *Virtual Republic: Australia's Culture Wars in the 1990's*. Sydney: Allen and Unwin, 1997, p. 120.

71 Ibid.

> and becomes the stuff of news, illusion, gossip, scandal and vicarious public involvement.[72]

The media was interested in Helen Darville, because she sought fame and celebrity through the mechanics of publicity. She marketed herself as a young writer of Ukrainian origins telling a family story. However, the critics of Helen Darville argued that she had adopted an ethnic persona and mixed fact and fiction in order to give authenticity and legitimacy to her claims about the Holocaust. They said that *The Hand that Signed the Paper* was racist and anti-Semitic, because it perpetuated the myth that there was a casual connection between the Ukrainian famine and the part of the Nazi Holocaust that took place in the Ukraine. The supporters of Helen Darville claimed that she was the victim of political correctness and multi-culturalism. They held that the expression of some prejudices and views should not be suppressed just because they are offensive and hurtful to some groups. This political conflict and dispute heightened and intensified the attention that Helen Darville attracted in the press.

Publicity

It is quicker, cheaper, and easier to pursue a claim of plagiarism in the media than to go through the courts or even wait for the professional judgment of one's peers. In an interview, the journalist and biographer David Marr commented that in most cases publicity is the most effective way of dealing with cases of plagiarism:

> I think, though, in those cases, the most effective way of dealing with them is publicity. There would be no point in going through the courts, I imagine ... You do not go into those things to earn money. You just want to see that it does not

---

72 Bradbury, M. *No, Not Bloomsbury*. London: Arena, 1987, pp. 311-312.

> happen again. The best way of making sure that it does not happen again is to make a joke of the person who does it. You just say look this is what happened, reveal it, and that's that.[73]

It is important to recognise that, just as there is unequal access to the legal system, there is also unequal access to the media. Journalists are particularly good at using this instrument, because they have privileged access to newspapers, television, and radio. However, it is not as useful for other members of the public. It is worth considering the efficacy of the media as an alternative forum for resolving disputes over copying.

The allegations of plagiarism represented an attack upon the reputation and good name of the author, Helen Darville. As Jonathan Sutherland has remarked, 'Probably the most wounding insult one can level at a self-respecting author is 'plagiarist,' suggestive as it is of underhand theft and impotence'.[74] Such ridicule can be terribly effective. As Andrew Riemer acknowledged, 'Helen Demidenko's future as a figure of fun, a grotesque creature in a contemporary mythology, seems assured'.[75] However, there is a danger that such an attack could have the unintended effect of enhancing the reputation of the author by giving them the opportunity of martyrdom. By going public about the plagiarism, the critics of Helen Darville redeployed issues of substance, character and reputation into the wider discursive domain of the media. They set off a vicious and punitive debate over the character of the

---

73 Rimmer, M. 'Interview with David Marr', Sydney, 2 November 1998.

74 Kernan, A. *The Death of Literature.* New York: Yale University Press, 1990, p. 120.

75 Riemer, A. *The Demidenko Debate* . Sydney: Allen and Unwin, 1996, p. 259.

author. It gave Helen Darville the opportunity for displays of pride and disdain towards her critics.[76]

The accusations of plagiarism were also an attempt to hurt the market for a work and the sales that it would generate for the publisher. It would be interesting to find out whether the sales of *The Hand that Signed the Paper* were affected by its notoriety. There is at least circumstantial evidence to suggest that many readers were discouraged from buying the book on the account of its disrepute. They did not want Helen Darville to profit from her sins. However, there seems to have been a counter-trend as well. There was a fear in the Demidenko case that the sales of *The Hand that Signed the Paper* were enhanced by the sensationalism and the scandal that surrounded the book. The publicity that raged about the novel ensured that it reached beyond the niche market of a literary audience to a mass market of consumers. By October 1995, *The Hand that Signed the Paper* was reputed to have sold some 30,000 copies.[77] Furthermore, there were a number of spin-off books designed to profit from the Helen Demidenko affair. Robin Morgan worried that she did not 'intend to become embroiled further in the distasteful growth industry of Darvilliana now blighting Australian letters'.[78] However, it is debatable whether this foray into public relations was successful as the Helen Darville phenomena thrived on such negative publicity.

---

76 Tavuchis, N. *Mea Culpa: A Sociology of Apology and Reconciliation*. Stanford: Stanford University Press, 1991, p. 54.

77 Manne, R. *The Culture of Forgetting: Helen Demidenko and the Holocaust*. Melbourne: The Text Publishing Company, 1996, p. 112.

78 Morgan, R. 'Dear Helen, Just Give Me Back My Words', *The Sydney Morning Herald*, 23 March 1996, p. 11.

Accountability

In the absence of authoritative judgments from the law or literature, the charge of plagiarism against Helen Darville was prosecuted in the public forum of the media. This proved to be an effective means of attacking the reputation of the author, and the sales of the book, *The Hand that Signed the Paper*, and the hopes of advances and future royalties. However, there was a concern about the standards and norms that were being used to judge plagiarism in the community of the media. Luke Slattery raised important questions about the role of the media in such cases of plagiarism:

> Have we, perhaps, become a culture of truffle-sniffers – keen to root out such scandals for our public delectation? Have we, as a result, become over-sensitised to the appropriation of original work? Is our frame of reference in these cases too simplistic and inflexible?[79]

However, Luke Slattery failed to answer the questions that he raised about the role of the media, even though they were both appropriate and pertinent. It seems that such issues of accountability were critical in the Demidenko affair and will be of increasing importance if parties continue to seek to resolve matters in the media, not the courts.

In response to criticisms, Helen Darville reflected that she was vilified by the media because, as a young woman, she was the wrong age and the wrong gender. She complained that the responses of the journalists were extraordinarily vicious: 'The Australian mass media will turn on any perceived 'high achiever' and grind them into mincemeat

---

79 Slattery, L. "Cannibal' Eats his Own Words', *The Australian*, 7 November 1998, p. 28.

given half a chance'.[80] The publisher at Allen and Unwin, Patrick Gallagher, remained bitter about the role of the journalists in the controversy:

> Any literary debate, however bitter, can usually be justified in terms of the importance of the issues involved. But what has been truly ugly about this debate has been the unholy alliance between the more strident critics and those fearless investigative journalists of the tabloid variety – not that they are employed purely by tabloid media. The joy to them has been a photogenic young quarry who has kept playing into their hands by behaving foolishly, and then whipping them into lather of frustration by refusing to allow herself to be caught and impaled, bleeding, on their pens in front of their cameras.[81]

There are, of course, limits to attacks upon reputation. The law of defamation helps set boundaries of what criticism is acceptable of art and literature.[82] Helen Darville could have brought an action if she thought her reputation was harmed by the accusations of plagiarism that were published in the media. She would need to establish that the material lowered the estimation in which she was held, or exposed her to hatred, ridicule and contempt, or caused people to shun or avoid the individual. It would be difficult, though, to dispute that the journalists were engaged in fair comment on a matter in the public interest. Moreover, Helen Darville cannot be cast entirely in the role of the innocent victim. She,

---

80 Westbury, M. 'Lies, Damned Lies, and Media: An Interview with Helen Darville', *Loud*, Tuesday, 21 October 1997, http://www.loud.org.au/noise.

81 Jost, J., Totaro, G. and Tyshing, C. *The Demidenko File*. Melbourne: Penguin Books, 1996, pp. 286-287.

82 Kenyon, A. 'Defamation, Artistic Criticism and Fair Comment', *Sydney Law Review* 1996, Vol. 18, p. 152.

too, was accused of libel after she criticised Wongar, an Australian writer of a Serbian background who assumed an Aboriginal identity.[83]

In relation to the charges of plagiarism, Helen Darville and her supporters accused the media of hypocrisy and double-standards. Andrew Riemer said that 'similar accusations may be levelled at several journalists, except that nothing much happens to them when they are caught out'.[84] It is true that unattributed quotation, paraphrasing, and stealing are some of the occupational hazards of journalism. However, the profession has sought to outlaw plagiarism. In 1997, the Media, Entertainment and Arts Alliance released a new draft code of ethics, which warned journalists that plagiarism was plagiarism, and that fair attribution was always required. This standard is couched in much more astringent terms than is the case in law or literature. There is no equivalent to the exceptions to copyright infringement - such as fair dealing. There is no alternative tradition of aesthetics under which copying might be permissible. Furthermore, it is wrong to suggest that there are no sanctions against this conduct. Ethical panels can warn, reprimand and fine members of the union for breaching the code of conduct; and can expel or suspend members from the association.[85] Editors can sanction journalists and contributors for unethical conduct. In the past, plagiarism has been a ground for termination of employment. Commentators are also keen to reveal instances of plagiarism in the media. Indeed it shows that journalists are not immune from being punished through publicity.

---

83 Manne, R. *The Culture of Forgetting: Helen Demidenko and the Holocaust.* Melbourne: The Text Publishing Company, 1996, pp. 53-57.

84 Riemer, A. *The Demidenko Debate.* Sydney: Allen and Unwin, 1996, p. 210.

85 Armstrong, M, Lindsay, D. and Watterson, R. *Media Law in Australia.* Melbourne: Oxford University Press, 1995, pp. 210-211.

Finally, Helen Darville sought to reinvent herself as a journalist in the hope that she could redeem her reputation in the media. She became a columnist for the *Courier-Mail*, the very Brisbane newspaper which had exposed the fictive nature of her identity. However, her career was short-lived. In her second column, *When I Am an Evil Overlord*, Helen Darville reproduced an article by Dr Peter Anspach from the University of Oklahoma without permission. She was sacked for plagiarism by the editor of the Courier-Mail, Chris Mitchell. In a statement from her lawyers, Helen Darville said 'if these lines are not part of free and public domain material as I thought I apologise for any error on my part in using material posted on the net'.[86] However, such evasions are unconvincing. Helen Darville ignored that the web-site featured a clear copyright notice. She also overlooked the developments in copyright law being wrought by the Digital Agenda.[87] Since being dismissed as a columnist for the *Courier-Mail*, Helen Darville has engaged in occasional freelance work. She was commissioned by a fashion magazine called *Australian Style* to conduct an interview with David Irving, the revisionist historian who has also been accused of anti-Semitism because of his attempts to cast doubt upon the existence of the Holocaust.[88] Helen Darville has also maintained her own personal web-site to communicate her point of view to the public.

---

86 Pybus, C. 'Helen Darville Aka Helen Demidenko – Update', *Australian Humanities Review*, February 1997, http://www.lib.latrobe.edu.au/AHR/copyright.html.

87 *Copyright Amendment (Digital Agenda) Act* 2000 (Cth).

88 Helen Darville interviewed David Irving just before he lost his defamation case against Penguin Books and Deborah Lipstadt. *Irving* v *Penguin Books And Lipstadt* (Unreported, Justice Gray, 11 April 2000), http://www.courtservice.govuk/judgments/qb.irving.htm

Summary

The Demidenko affair has important ramifications for the nature and function of the legal system in the age of mass communications. It is apparent that parties will use the instrument of publicity in disputes over appropriation as an alternative, or in addition, to legal action. As a consequence, legal practitioners will have to become more media savvy in copyright disputes, and start combining legal advocacy with public relations. They would also be wise to form ties and links with editors, journalists, and columnists in the mass media. The courts in Australia will increasingly have to decide how to respond to such media spectacles. They face two possible alternatives. The courts can try to reassert their authority, and control the representations of the law in the media through legal sanctions like defamation law and contempt of court, or else they can accept the presence of the media in the legal system, and follow the lead of the United States in allowing greater public coverage of courtroom cases.

CONCLUSION

The Demidenko affair was interpreted and understood in radically different ways by three interpretative communities - the literary society, the legal system, and the media. There was a struggle between the groups over which had the authority to judge and sanction Helen Darville for her acts of appropriation. The community of writers, publishers, and critics claimed that the conduct of Helen Darville was a matter of aesthetics and ethics. However, such considerations did not prevail because of doubts over their legitimacy. The legal profession asserted that the conduct of Helen Darville should be understood in terms of

economic rights and moral rights laid down under copyright law. However, this point of view did not gain sway because it was not validated by the authority of a court. Finally, the media was decisive in its interpretation of the Demidenko affair in terms of personal and political reputation. However, there were misgivings about the accountability of the media. Such concerns must be taken seriously given that publicity is proving to be an alternative method to litigation. In the future, there is a need for greater dialogue and communication between the legal system, the literary society and the media about the meaning of appropriation.[89]

---

89 Bowrey, K. 'Who's Writing Copyright's History?', *European Intellectual Property Review*, 1996, Vol. 18 (6), p. 322.

CHAPTER TWO
DAUBISM: COPYRIGHT LAW AND ARTISTIC WORKS

The artistic controversy over the Daubists was a catalyst for the introduction of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth).

The Daubists were originally a group of South Australian visual artists. Manne Schulze recalls that the name of the group refers to the crude and sloppy techniques used in idealised landscape paintings in Australian art:

> We did not choose this name because our main concern was to daub over other people's paintings but in reference to our own deliberately badly painted landscapes and other works that formed the basis of the exhibition. As such not a brilliant new idea, but another variation of a continuing investigation of the Australian bushscape.[1]

The Daubists re-used the work of other people as a basis for this analysis in much the same way as lots of artists recycle all sorts of found objects and ready-mades. Their art form involved painting directly onto the canvasses of other artists, and in some cases cutting up the original and rearranging the segments.

In the first exhibition of Daubism in 1991, driller Jet Armstrong painted a crop circle over a painting of the Olgas by Charles Bannon – an artist, print-maker, and the father of the State Premier at the time, John Bannon. He called the resulting work, *Crop Circles on a Bannon Landscape.* driller Jet Armstrong inserted an inverted crucifix over a painting of the

---

1 Rimmer, M. 'Interview with Manne Schulze', Sydney, 25 March 1999.

Flinders Ranges by Charles Bannon, and renamed the work *The Crop Circle Conspiracy Landscape*. He also subsequently cut up a painting by Charles Bannon and used the pieces to form a new work, which depicted the Queen holding a wine glass and carrying out an obscenity.

In the first Adelaide exhibition, Manne Schulze daubed photographs. He moved onto reusing found paintings in the follow-up show. The other two painters – Chris Gaston and Andy P – produced, in their own judgment, 'sloppy' pastiches of landscape paintings.

In response, Charles Bannon took legal action against the Daubists in the Federal Court of Australia on the grounds of false attribution and defamation. He won an interlocutory injunction against driller Jet Armstrong and the gallery, but then reached a settlement with the Daubists. An anonymous buyer purchased the work for $650 on the condition that it be returned to the painter.

In his fight against the Daubists, Charles Bannon received help and support from the National Association for the Visual Arts (NAVA). This professional organisation is a national lobby group for the visual arts industry in Australia. Since 1984, it has sought to improve the status of the individual artist, arguing for the integrity of the artist, their social worth and economic independence. In particular, it has been active in setting up a copyright collecting society for visual artists called VI$COPY, the implementation of a moral rights regime, and the introduction of a right of resale, or droit de suite.

The dispute over Daubism was understood differently within various interpretative communities, social fields, and discursive domains. It operated within a number of institutions: the artistic community, the legal system, and the media. Part 1 considers the dispute over Daubism in the artistic community of Adelaide. It examines the debate over the meaning and nature of landscape painting in terms of the movements of

romanticism, modernism, and post-modernism. Part 2 examines the dispute over Daubism in the legal system. Charles Bannon sued driller Jet Armstrong in the Federal Court alleging that the treatment of his painting was defamatory and a breach of the *Copyright Act* 1968 (Cth). Part 3 focuses upon the dispute over Daubism in the media. Charles Bannon used *The Adelaide Advertiser* and other syndicated papers to support the litigation and to push for the introduction of a moral rights regime. In response, the Daubists have used the media to defend their reputation, and oppose the implementation of moral rights.

PART 1
CROP CIRCLES ON A BANNON LANDSCAPE: THE ARTISTIC COMMUNITY

The art of appropriation is the process whereby artists borrow images from other sources, and incorporate them into new work. Sometimes it is used to comment critically upon the original work and the political and economic system that created it. At its most extreme, it consists of the wholesale copying of an image from a single source, while in other contexts, it involves appropriating only part of a work, or simulating the 'signature' style.[2] The anthology, *What is Appropriation?*, gives a sense of the range and diversity of appropriation art within Australia.[3] The practices of quotation, borrowing, and copying have been employed in a diverse range of contexts – landscapes, political art, feminism, ethnicity,

---

2 Anderson, P. 'On the Legal Limits of Art', *Arts and Entertainment Law Review*, 1994, Vol. 5, p. 72.

3 Butler, R. (ed.) *What is Appropriation? An Anthology of Critical Writings on Australian Art in the '80s and '90s*. Sydney: Power Publications, 1996.

race and identity. Its practitioners include post-modernists like Imants Tillers,[4] queer painters such as Juan Davila,[5] digital photographers such as Hou Leong[6] and Indigenous iconoclasts – Gordon Bennett,[7] Destiny Deacon,[8] and Tracey Moffatt.[9] There has been a division within the artistic community about the legitimacy of such methods. The dispute over Daubism was a microcosm of a larger debate about appropriation going in the artistic community. It touched upon the anxieties about authorship and copying that were present in the artistic community.

Aesthetics

The dispute over Daubism prompted a debate in the artistic community over the nature of landscape painting in Australia. The romantics depict nature as an Arcadia, an idyll, a pastoral scene. In his painting of Olgas, Charles Bannon hopes to inspire sublime feelings of awe. He suggests

---

4 Tillers, I. 'Locality Fails', *Art & Text*, 1982, Vol. 6, p. 51; Tillers, I. 'Fear of Texture', *Art & Text*, 1983, Vol. 10, p. 8; Tillers, I. 'In Perpetual Mourning', *Art & Text*, 1984, Vol. 11, p. 22; Tillers, I. *Imants Tillers: Works 1978-1988*. London: Institute of Contemporary Art, 1988; Tillers, I. 'Imants Tillers as a Site of Conflict', *Art And Australia*, 1990, Vol. 27 (3), p. 422; and Tillers, I. *Diaspora in Context*. Sydney: Museum Of Contemporary Art, 1995.

5 Davila, J. *Hysterical Tears*. Melbourne: Greenhouse Books, 1985; Davila, J. *The Mutilated Pieta*. Sydney: Art And Text Monograph, 1985; Davila, J. 'Aboriginality: A Lugubrious Game?', *Art & Text*, 1987, No. 23, p. 53; Davila, J. *Juanito Laguna*. London: Christendale Gallery, 1995; Davila, J. 'Dear A&D Reader', *Art and Cultural Difference Hybrids and Cultures. Art and Design Profile, No. 43*. London: Academy Group, 1995; and Davila, J. 'The Art Curator, our Cultural Transponder', *Arena Journal*, 1996, No. 6, p. 117.

6 Leong, H. 'Photographic Essay: An Australian', in Barnes, J. (ed.) *Asian and Pacific Inscriptions: Identities, Ethnicities, Nationalities. Meridian*, 1995, Vol. 14 (2), pp. 111-120.

7 McLean, I. and Bennett, G. *The Art of Gordon Bennett*. Sydney: Craftsman House, 1996; McLean, I. *White Aborigines*. Cambridge: Cambridge University Press, 1998; and McLean, I. 'Gordon Bennett's Home Decor: The Joker in the Pack', *Law/Text/Culture*, 1998, Vol. 4 (1), p. 286.

8 Langton, M. *Well I Heard It on the Radio and I Saw It on the Television: An Essay for the Australian Film Commission on the Politics and Aesthetics of Filmmaking by and about Aboriginal People and Things*. Sydney: Australian Film Commission, 1993.

9 Newton, G. and Moffatt, T. *Fever Pitch*. Sydney: Piper Press, 1995.

that the Australian landscape is a wilderness untouched by human contact. The modernists are interested in the alienation of people from nature. They emphasise the intrusion of urban expansion and industrialisation onto the rural landscape. The post-modernists go further and claim that nature is a simulation in the age of mass media. By superimposing a crop circle onto a painting of the Olgas, driller Jet Armstrong suggests that the natural landscape is not a sublime wilderness untouched and unsullied by human contact. He indicates that the pastoral image is a product of invention, paranoia and trickery. The crop circle is a symbol of paranormal superstitions, conspiracy theories, and scientific hoaxes.

Charles Bannon defended his work in terms of romantic authorship, individuality, and possession. He emphasised the professional status of the artist: 'My concern is the principle involved in someone defacing or altering a professional artist's work, whether good or bad, and exhibiting it under his own name and creative output.'[10] Charles Bannon spoke about the appropriation of his work in terms of violation and desecration. He felt that driller Jet Armstrong had done the equivalent of 'adding some drivel to Shakespeare's *Macbeth* and calling it your own'.[11] The literary comparison to the Bard is an interesting one. Charles Bannon assumes that Shakespeare's *Macbeth* is a work of romantic genius and originality, and by extension suggests that his own art deserves a similar respect. However, he overlooks the evidence that the Bard borrowed much of his material for the Scottish play from other

---

10 Harris, S. 'Arts Uproar over Defaced Painting', *The Adelaide Advertiser*, 27 September 1991, p. 1.

11 Magazanik, M. 'Court Grants Injunction over Changing Landscape', *The Age*, 28 September 1991, p. 3.

historical and dramatic works.[12] Charles Bannon was conscious that he might be portrayed as encouraging censorship. He declared that he was not an enemy of any art school and was a champion of all art. However, he noted: 'I don't think anyone has the right to grab anyone else's painting and do what the hell they like, which indeed is what happened'.[13] The Adelaide artist ignores that much of modern art and post-modern art is based upon the reuse and re-cycling of past work.

The Daubists were critical of the romantic ideas of authorship and creativity. Manne Schulze declares:

> The notions of the artist as a sublime creator and his/her art being sacrosanct, as well as the still prevalent pseudo-religious veneration and relic-like treatment awarded to some art objects, can be traced back to social conditioning.[14]

He was unimpressed by the display of wounded professional pride by Charles Bannon.[15] Furthermore, it was suggested that Charles Bannon was being a little precious about the sanctity of the art. It is not uncommon for painters to paint over another canvas. Charles Bannon himself acknowledged that in his student days he bought canvases and stretches at sales and painted new paintings over other works. He said: 'But I never added, detracted, or trivialised another's work or held it up for ridicule'.[16] Even a painter who espouses romantic ideals of authorship and creativity is not above a form of Daubism.

---

12 Bate, J. *The Genius of Shakespeare*. London: Macmillan Publishers Ltd, 1997.

13 Staff Reporter. 'Controversial Painting Centre of Legal Wrangle', *The Adelaide Advertiser*, 28 September 1991, p. 2.

14 Schulze, M. 'The Death of Daubism? The Case against the Introduction of Moral Rights', *Artlines*, 1997, Vol. 2 (4), p. 6.

15 Rimmer, M. 'Interview with Manne Schulze', Sydney, 25 March 1999.

16 Harris, S. 'Arts Uproar over Defaced Painting', *The Adelaide Advertiser*, 27 September 1991, p. 1.

Manne Schulze is well aware of a long standing tradition in modernist art to appropriate pre-existing images – the ready-mades of Dada, the theft of popular culture in pop art, and the political subversions of the Situationists.[17] He has been particularly influenced by the work of the Danish Situationist Asger John:

> The person who should be mentioned as the daddy of Daubism is the Dane Asger Jorn. He was a member of a subgroup of the Situationists, the Affichists, in the late fifties and early sixties. They were interested in the basics, what makes art art. Stuff like: why is it that graffiti is considered vandalism, while quite similar material is presented in galleries for good money? Specifically they were into tearing apart and then reassembling of the brightly coloured posters (affiches) that were thrown up by the infant consumer societies in post World War II Europe. And out of his interest in graffiti, Asger Jorn started to paint over other people's paintings. He even had a name for the products: detournements, which translates as diversions. In line with the revolutionary vibes of the sixties he intended them to be conscious investigations into plagiarism and subversion. Some active analysis of some of society's value systems, I guess.[18]

The Daubists are inheritors of the modernist movements of Dada, pop art, and Situationism. They share a similar anarchic approach; they use ready-mades; and they also display a subversive attitude towards the political and economic system.

Under attack in the media, driller Jet Armstrong claimed that the paintings made 'a classic post-modern art statement'.[19] He said: 'In fact, I

---

17 Knabb, K. (ed.) *The Situationist International Anthology*. Los Angeles: Bureau of Public Secrets, 1981; Wollen, P. and Francis, P. (ed.) *On the Passage of a Few People Through a Rather Brief Moment in Time: The Situationist International 1957-1972*. Cambridge, Mass: The MIT Press, 1989; and Sadler, S. *The Situationist City*. Cambridge, Massachusetts: The MIT Press, 1998.

18 Rimmer, M. 'Interview with Manne Schulze', Sydney, 25 March 1999.

19 Sproull, R. 'Jet's Brush with Bannon Fame Draws Artistic Ire', *The Australian*, 27 September 1991, p. 3.

would probably go as far as to say that they probably signify the death of landscape painting'.[20] Manne Schulze concurred with driller Jet Armstrong that Daubism belonged to the movement of post-modernism. The practices of the group serve to undermine notions of authorship, originality, and art. Manne Schulze explains that Daubism was sympathetic to post-modern art theory:

> Daubism needs to be seen in this tradition of inquisitive investigation into the very nature of art. The Daubist act of over-painting, or more generally, the re-using and recycling of originals sits comfortably with this analysis. It is a neutral and clinical process which does not intend to ridicule or 'deface' the original (although the appearance of the original might be changed in the process), or tarnish the honour and reputation of the author of the original. Instead of being an act of philistinism, the Daubist principle has been and still is to embrace original material which would not have seen the inside of an art gallery under normal circumstances, and by re-contextualising it, to lift it to a new plane so it can be appreciated from a fresh point of view. Daubism creates the new by using the old.[21]

However, the claim by the Daubists that landscape painting is dead is contentious. There remain a number of promising artistic modes and methods with which to investigate nature – the minimalism of Fred Williams,[22] the hyper-realism of Jeffrey Smart,[23] the lambent work of

---

20 Ibid.

21 Schulze, M. 'The Death of Daubism? The Case against the Introduction of Moral Rights', *Artlines*, 1997, Vol. 2 (4), p. 5.

22 McCaughey, P. *Fred Williams 1927-1982*. Sydney: Murdoch Books, 1996.

23 McDonald, J. *Jeffrey Smart: Paintings of the '70s and '80s*. Sydney: Craftsman House, 1995; and Capon, E. *Jeffrey Smart Retrospective*. Sydney: Art Gallery of New South Wales, 1999.

Mandy Martin, the figurative painting of Gary Shead,[24] and the naivety and whimsy of William Robinson.[25] In light of such work, this pronouncement of the death of landscape painting seems to be hyperbole.

However, there has been resistance from some critics to the theories of post-modernism practised by groups such as the Daubists and featured in critical art theory journals such as *Art & Text*. In his career as a reporter, art critic, and television presenter, Robert Hughes has inveighed against the evils of post-modernism.[26] He abhors post-modernism because it has come to challenge the fundamentals of his artistic faith: firm critical standards for art, based on the premise of a demonstrable tradition of great works or masterpieces; a belief and a pride in the unity and continuity of Western art, the possibilities of moral or spiritual or social or political meaning in art.[27] However, Robert Hughes has been hoist by his own petard. He was accused of plagiarising a review of the exhibition held at the National Gallery of Australia, 'New Worlds from Old, 19th Century Australian and American Landscape Painting', by Patricia Macdonald in a column in *Time Magazine*.[28] In response, Robert Hughes offered a humble apology to the author. He observed: 'I am not a great believer in post-modernist "appropriation" and I can only ask you to believe that this was due to inattentiveness, and

---

24 Grishin, S. *Garry Shead: The D.H. Lawrence Paintings*. Sydney: Craftsman House, 1993; and Grishin, S. *Garry Shead: Encounters with Royalty*. Sydney: Craftsman House, 1997.

25 Fern, L. *William Robinson*. Sydney: Craftsman House, 1995.

26 Hughes, R. *Nothing if not Critical*. London: Collins-Harvill, 1990.

27 Britain, I. *Once an Australian: Journeys with Barry Humphries, Clive James, Germaine Greer and Robert Hughes*. Melbourne: Oxford University Press, 1997, p. 226.

28 Slattery, L. 'Robert Hughes' Critical Face Turns a Reddish Hue on Landscape', *The Australian*, 6 November 1998, p. 1; Slattery, L. '"Unconscious Cannibal" Says Sorry', *The Weekend Australian*, 7-8 November 1998, p. 3; and Slattery, L. '"Cannibal" Eats his Own Words', *The Weekend Australian*, 7-8 November 1998, p. 28.

not to premeditated larceny'.[29] His defence was that the taking of the review was excusable because it was unconscious. It is little wonder that the art critic was the target of the Daubists in their latest exhibition in 1997.

Ethics

It is common for artistic disputes between artists to be settled, if not resolved within the visual arts community of painters, critics, dealers, gallery owners, and curators. The members of the society can be held accountable to the ethical standards and norms of their peers. Therefore, along with taking legal action for copyright infringement, Charles Bannon could have addressed his art peers about the daubing of his paintings. Social pressure could have been placed on the Daubists to offer an apology, relinquish their exhibition space, or lose public funding from the government arts funding bodies. If such action was ineffective, the landscape painter could still take legal action.

Charles Bannon did argue that the daubing of his painting was a violation of 'natural justice', quite apart from being an infringement of copyright. He alleged that the Daubists had transgressed the ethical standards and norms of the artistic community, and should therefore be treated with opprobrium.

driller Jet Armstrong denied that it was his intention to cause offence: 'It has got nothing to do with that Charles Bannon painted it or that he is the Premier's father or anything personal at all'.[30] Similarly,

---

29 Slattery, L. '"Unconscious Cannibal" Says Sorry', *The Weekend Australian*, 7-8 November 1998, p. 3

30 Donovan, Z. 'New Art Controversy Features the Queen', *The Adelaide Advertiser*, 20 January 1992, p. 3.

Manne Schulze absolved his colleague of any ethical wrongdoing or misdemeanour:

> As far as I am concerned, driller Jet Armstrong did not intend to make fun of Charles. He just did something to paintings that were rejected at auction and then passed on to him. And in no way did he try to obscure the identity of the original. The whole thing was just blown out of proportion by the legal action of the first family and by Charles' idea of what was going on, which totally missed the point.[31]

However, in the face of mounting acrimony, driller Jet Armstrong sought to mollify his critics. He agreed that he was morally bound to ask Charles Bannon for his permission to carry on with the exhibition, even though he was not legally bound. However, driller Jet Armstrong stopped short of giving an apology. He was not ready to disown the work that he had created according to the principles of Daubism. Charles Bannon was not placated by this conditional sign of respect granted by driller Jet Armstrong.

Publicity of the dispute was not without consequences for the artists. The Daubists were first exhibited at the Chesser Gallery by Garth Pye; and then at the Art Images Gallery by Colin Burgen. However, the group then encountered difficulties in finding space for their exhibitions in Adelaide. Vena Swain said that she would refuse to hang such paintings because it was reprehensible.[32] Another Adelaide gallery owner Paul Greenaway was unwilling to hold an exhibition of Daubism. Manne Schulze observed: 'Paul Greenaway still thinks that the whole Daubism idea was pushed to a state of fame and infamy by *The Adelaide Advertiser*,

---

31 Rimmer, M. 'Interview with Manne Schulze', Sydney, 25 March 1999.

32 Harris, S. 'Arts Uproar over Defaced Painting', *The Adelaide Advertiser*, 27 September 1991, p. 1.

and that there is not much substance behind it partially because it has been done in various forms in the past'.[33] The Adelaide galleries seemed reluctant to exhibit Daubism because they did not want to be tarnished by any controversy. They were also concerned about the political and legal repercussions – such as the threat of a legal action for secondary infringement of copyright for displaying illegal work.[34] The Sydney galleries demonstrated less concern. The Michael Nagy Gallery was happy to show the third Daubism exhibition. This Sydney show was unaccompanied by any political scandal or legal action at all.

The Daubists and other appropriation artists can also be discouraged by a lack of public arts funding from government arts bodies. The Australia Council plays an active role in copyright law in terms of arts policy and funding. Its mandate was to carry out the restructuring necessary to ensure that Australian artists' incomes are improved by new technologies, that Australian copyrights are exploited to the full and that Australian talent is employed in the new broadcasting technologies.[35] The Australia Council also funds a number of advocacy organisations, including the Australian Copyright Council, the Arts Law Centre of Australia, and the National Indigenous Arts Advocacy Association. The State and Territory Government arts agencies also match this funding. The Australia Council has campaigned for the introduction of moral rights. It released a booklet in 1991 as a first step in

---

33 Rimmer, M. 'Interview with Manne Schulze', Sydney, 25 March 1999.

34 Overseas artists have encountered similar difficulties in gaining access to Australian galleries. The Serrano exhibition was forced to leave the National Gallery of Victoria after protests from the religious community in 1997. Similarly, the Sensation exhibition was recently cancelled at the National Gallery of Australia because of political pressure from Richard Alston, the Minister for Communications, the Information Economy, and the Arts.

35 Australian Government. *Creative Nation: Commonwealth Cultural Policy.* Canberra: Department of Communications and the Arts, 1994.

educating the artistic community about possible abuses of rights and the moral obligations one artist should observe when dealing with the work of another.[36] The Australia Council's process of peer assessment is also informed by a respect and deference for copyright law. The denial of public funding would be a discouragement to artists who practice appropriation. The Australia Council has also influenced State and Territory Government arts agencies in regard to this policy about copyright infringement.

The dispute over Daubism was not resolved in the artistic community. More prominent artists have weathered storms of appropriation because of their status and reputation in the artistic community. Imants Tillers, for instance, has received little criticism for his strategies of appropriation. His paintings continue to receive glowing critical reviews; his paintings are hung in respected Australian galleries; and his work is sold for significant sums of money by dealers. By contrast, the Daubists were more vulnerable to ethical criticism and condemnation because they were on the fringe of the artistic community. As Manne Schulze points out: 'driller Jet Armstrong was an outsider in the Adelaide art scene, because he never attended art school. And suddenly this self-acclaimed artist, without the formal tertiary education and without any help from friends or cronies, overtook all these important-artists-in-waiting, and lots of people couldn't handle it'.[37] Yet, the Daubists had little to lose because they were outsiders. They have no expectation of government funding or easy access to exhibition space. As a result, Charles Bannon was dissatisfied with the ethical measures

---

36 Sproull, R. 'Jet's Brush with Bannon Fame Draws Artistic Ire', *The Australian*, 27 September 1991, p. 3.

37 Rimmer, M. 'Interview with Manne Schulze', Sydney, 25 March 1999.

available against the Daubists. He shifted the dispute from the visual arts community into the realm of the legal system.

PART 2
SHOOTOUT AT THE ERIC MINCHIN LANDSCAPE: LEGAL RELATIONS

Charles Bannon was represented in the Daubism dispute by the barrister, Robyn Layton. She has a distinguished record as a solicitor, a barrister, and a policy-maker. After starting off as a solicitor in the South Australian law firm Johnston Withers, Robyn Layton went onto become a barrister, and a Queen's Counsel. She specialises in industrial relations law and administrative law. Furthermore, Robyn Layton has a close personal connection to Charles Bannon. She was the first wife of his son, John Bannon. On behalf of Charles Bannon, Robyn Layton sought an interim injunction from Justice von Doussa, the Federal Court judge hearing the case over the Daubism dispute. His Honour granted an interim injunction against driller Jet Armstrong and his gallery to stop them from exhibiting the painting or selling it to buyers. A full case would have raised questions of economic rights, moral rights, and the droit de suite.

Economic Rights

In the legal action, the Daubists were in a strong legal position, because it did not appear that they had violated the economic rights of the artist, Charles Bannon. They had not used or reproduced a substantial part of his work. An arts lawyer, Natasha Serventy, commented that the issue of

copyright infringement did not arise if the owner of the painting had not reproduced the work of Charles Bannon:

> If Armstrong owns the works and has the property right to the works, he has the right to do with them what he will and that includes cutting them up, painting them over, improving them, destroying them, exhibiting or selling them. But the fact that Charles Bannon is disturbed by what has happened to his work is in fact evidence, if you like, for some aspects of moral rights. It seems as though the whole idea of it is quite a subversive one and more of a political statement than a desire to improve upon the work.[38]

Furthermore, had the practice involved a reproduction of the work, the Daubists could have availed themselves of the defence of fair dealing for criticism and review. In light of their opponents' strong position, the lawyers acting for Charles Bannon were forced to rely upon radical arguments about false attribution and defamation.

First the Daubists question the relevance of the legal culture to artistic practice. Manne Schulze comments:

> It becomes very difficult for the law to have clearly justifiable opinions. What a judge would be interested in would be the classical issues – was there an infringement of copyright? was it done for financial gain? was the integrity of the original author harmed? Judges can only assess situations according to established criteria. Obviously, contemporary art is about establishing new criteria. The legal side cannot see all these things, because they cannot be specialists in a field that hardly exists. But it should be the job of committed artists to establish new perspectives and paradigms.[39]

---

38 Sproull, R. 'Jet's Brush with Bannon Fame Draws Artistic Ire', *The Australian*, 27 September 1991, p. 3.

39 Rimmer, M. 'Interview with Manne Schulze', Sydney, 25 March 1999.

An artist will infringe the economic rights of the owner of an original work if they use or reproduce a substantial part of that work without permission. For instance, the Canberra artist Hou Leong encountered legal difficulties because he did not first get permission or authorisation before scanning his Chinese face onto a series of copyrighted photographs of Australian icons and archetypes. [40] The photographer of the 'I'm Australian as Ampol' image asserted his right of restraint as grounds for payment of a licence fee. Hou Leong was advised by the Arts Law Centre of Australia that he was open to legal action for a copyright infringement because he had reproduced a substantial part of the work. He was forced to negotiate and gain copyright permission to use the series of photographs.

Second, the Daubists support an expansive reading of the doctrine of fair use. In reply to such accusations, artists engaged in appropriation have sought protection from the defence of fair dealing. They claim that they are not guilty of copyright infringement because they are engaged in criticism and comment. However, there has only been limited protection provided under the defence of fair dealing.

The United States decision of *Rogers* v *Koons* is a cause célèbre about copyright law and post-modern art.[41] The case involved a photographer, Art Rogers, who alleged that an artist, Jeff Koons, and his gallery had infringed his copyright in a photograph of a couple with a litter of puppies by creating a sculpture called a 'String of Puppies'. Jeff Koons argued that he was part of a tradition of post-modern art, which

---

40 Davies, T. (ed.) 'Hou Leong' in *Artlines*, 1995, Vol. 1 (1), p. 8; Leong, H. 'Photographic Essay: An Australian', in Barnes, J. (ed.) *Asian and Pacific Inscriptions: Identities, Ethnicities, Nationalities. Meridian*, 1995, Vol. 14 (2), pp. 111-120; and Romney, J. (ed.) 'Protect the Parodist', *The Arts Law Centre Newsletter*, 1995, Vol. 9, p. 1.

41 *Rogers* v *Koons* (1992) 960 F. 2nd 301; *United Feature Syndicate Inc.* v *Koons* (1993) 817 F. Supp. 370; and *Campbell* v *Koons* (1993) No 91 Civ. 6055 (RO), 1993 WI 97381.

incorporated popular images and icons into art work to comment critically both on the incorporated art and the political and economic system that created it. The Court of Appeals rejected Jeff Koons' defence that his work was a fair use of copyright material for the purposes of criticism or comment. It held that the copied work must be, at least in part, an object of the parody, and not just a critique of society. It found that Jeff Koons' sculpture was not a parody of the photograph or its owners, although it accepted that the work was a satire of society. The Court of Appeals stressed that Jeff Koons did not transform the original work by turning the photograph into a sculpture. It found that the work was just a copy or a pastiche. The Court of Appeals was also hostile towards Jeff Koons' substantial profit from his intentionally exploitative use of Rogers' work. It emphasised Jeff Koons' conduct in tearing the copyright mark off a Rogers notecard prior to sending it to the Italian artisans to create the work.

The case of Jeff Koons has divided and fragmented the artistic community.[42] He has been hailed as a martyr in the cause of artistic expression and free speech by some commentators. The artist has also been condemned as a pariah who has flouted the authority of copyright law with contempt. It might be thought that the Daubists would show some solidarity with Jeff Koons given that they are both working within

---

42 Buskirk, M. 'Commodification as Censor: Copyrights and Fair Use', *October*, 1992, Vol. 60, p. 83; Carlin, J. 'Culture Vultures: Artistic Appropriation and Intellectual Property Law', *Columbia – VLA Journal of Law and the Arts*, 1988, Vol. 13, p. 103; Harmon, L. 'Law, Art, and the Killing Jar', *Iowa Law Review*, 1994, Vol. 79, p. 367; McLean, W. 'All's Not Fair in Art and War: A Look at the Fair Use Defense after *Rogers* v *Koons*', *Brooklyn Law Review*, 1993, Vol. 59, p. 372; Patry, W. and Perlmutter, S. 'Fair Use Misconstrued: Profits, Presumptions, and Parody', *Cardozo Arts and Entertainment Law Journal*, 1993, Vol. 11, p. 667; Sherman, B. 'Appropriating the Postmodern: Copyright and the Challenge of the New', *Social And Legal Studies*, 1995, Vol. 4, p. 31; and Wang, E. '(Re)productive Rights: Copyright and the Postmodern Artist', *Columbia – VLA Journal Of Law and the Arts*, 1990, Vol. 14, p. 261.

the framework of post-modern art. However, that it is not the case. In an interview, Manne Schulze displays little sympathy for the plight of Jeff Koons, because of a belief that his work undermines the cause that they are supporting:

> The Jeff Koons case is a very strange one. Jeff Koons is basically a businessman. He has come up with a few striking post-modern icons – like his famous bunny. But I do not think that he is the best artist on the planet. That is my personal viewpoint. In this specific case, he obviously used a photograph of a distinct photographer. He did not do anything to that photograph. He just had it turned into a sculpture by artisans. My guess would be that the original inputs and ideas came more from the photographer than from Koons who just got hold of the photograph and passed it onto his carvers. In this particular case, my personal opinion is that the photographer should have received copyright fees. Jeff Koons went to court, stonewalling, insisting on his right of artistic expression. He has done more harm to the cause than anything else. It is a clear breach of copyright as far as I am concerned.[43]

Manne Schulze attempts to distinguish the case of Jeff Koons from the Daubists in a number of respects. He does not want the group to be associated with this disreputable artist. First, Manne Schulze emphasises that the Daubists are interested in working with original artistic works. They are not interested in the mass marketing of copies. Second, Manne Schulze stresses that the Daubists are engaged in the transformative or productive use of copyright works.[44] He suggests that Jeff Koons is merely involved in the reproduction of artistic works. Manne Schulze falls back on the old distinction between money and art to distinguish between a 'good' and a 'bad' post-modernist. He claims that Jeff Koons is

---

43 Rimmer, M. 'Interview with Manne Schulze', Sydney, 25 March 1999.

44 *Campbell* v *Acuff-Rose Music, Inc.* (1994) 127 L Ed 2d 500.

complicit with the capitalist marketplace. By contrast, Manne Schulze suggests that the Daubists display a critical engagement.

Third, the Daubists are rather ambivalent about whether artists engaging in artistic appropriation should pay fees to obtain licenses to use copyright work. Manne Schulze is concerned that the visual arts has become dictated by commercial interests, so that art has been turned into a commodity. However, he concedes that private contracts between owners of art and creators can prevent the grievance caused by the possibility of having one's work recycled. By contrast, the professional organisation for visual artists is much more enthusiastic about licensing of copyright work. Since the late 1980s, NAVA advocated the establishment of a visual arts copyright collecting society. It has argued that collective administration would overcome visual artists' lack of understanding of legal rights, weakness of bargaining position, and inadequate enforcement mechanisms. After a report by Shane Simpson, the Federal Government set up a collecting society for the visual arts called VI$COPY in 1995.[45] It was set up under the Creative Nation program, and continues to receive support as a new company in the copyright industry from the current government. It remains to be seen whether VI$COPY will be a viable broker between copyright owners and users.

False Attribution

In the absence of any moral rights legislation, Robyn Layton brought an action for damages or an injunction under s 194 of the *Copyright Act* 1968 (Cth) on the grounds that there was a breach of duties in relation to false attribution of authorship. She argued that driller Jet Armstrong and the

---

45 Simpson, S. *Review of Australian Collecting Societies*. Canberra: The Minister For Communications and the Arts and the Minister for Justice, 1996.

gallery was in breach of s 190 of the *Copyright Act* 1968 (Cth) because the painter superimposed his own signature over the name of Charles Bannon, in such a way to imply that he was the author of the work. Alternatively, she argued that driller Jet Armstrong and the gallery was in breach of s 191 of the *Copyright Act* 1968 (Cth) because they were falsely attributing the authorship of a work that had been altered without the permission of the copyright owner.

Such claims seem to be well-founded. However, the case law suggests that this set of statutory provisions only have a limited operation. In *Crocker* v *Papunya Tula Artists*, the Federal Court rejected a claim of false attribution in relation to the authorship of a commentary on a catalogue of Aboriginal art, stating that s 191 required a 'material alteration' to have been made and that the alterations in this case were minor and did not affect the character or reputation of the author in any way.[46] Furthermore, the statutory provisions at the time conferred no positive right on an artist to be known as the author of the work. Charles Bannon would have no remedy had the signature been erased altogether. There would have been nothing to stop the Daubists from daubing over his paintings in the future if they got rid of his name altogether. However, that loophole has been closed with the introduction of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth).

Defamation Law

Due to the limited moral rights protection available, Robyn Layton also relied on defamation law to protect the artistic integrity of the painting by

---

46 (1985) 5 IPR 426.

Charles Bannon. She argued that this was a 'ground-breaking action'.[47] There were a number of limitations in this case.

First, defamation law has been applied to the written and spoken word and cartoons but it is not usually applied to artistic works. However, in spite of the unusual nature of the publication, the form in which the defamation is communicated is irrelevant.

Second, the Daubists argued that they were not attacking the personal reputation of Charles Bannon or his art style at all. Rather, they were commenting upon the nature and philosophy of landscape painting.

Third, although Charles Bannon may have considered that the Daubists had harmed his reputation, it is possible that a reasonable person would not consider it sufficiently offensive to warrant a finding that the defendant had been defamed.

Fourth, in defence to the action in defamation, the Daubists could have raised the defence of fair comment.[48] They could argue that the comment is a statement of opinion, fairly held, on a matter of public interest. The Daubists could give range to idealistic notions of the freedom of artistic expression and political speech. Manne Schulze said: 'It would equal censorship and constitute a serious restriction on the freedom of expression'.[49] However, there would be a debate over whether the Daubists were fair towards Charles Bannon, or motivated by feelings of spite or ill will.

Finally, even if the defamation action was successful, there would be no guarantee of anything more than nominal damages. In the

---

47 Staff Reporter. 'Controversial Painting Centre of Legal Wrangle', *The Adelaide Advertiser*, 28 September 1991, p. 2.

48 Kenyon, A. 'Defamation, Artistic Criticism and Fair Comment', *Sydney Law Review*, 1996, Vol. 18, p. 152.

49 Rimmer, M. 'Interview with Manne Schulze', Sydney, 25 March 1999.

contemporaneous case of *Meskenas* v *Capon*, the court found that Edmund Capon had defamed in his criticism Vladas Meskenas' painting of Rene Rivkin, which was entered into the 1988 Archibald Prize competition for portraiture.[50] However, it was a pyrrhic victory because the jury only awarded $100 to Meskenas. This fate could have also befallen Charles Bannon.

Moral Rights

In the wake of the Daubism dispute, Charles Bannon sought to highlight the lack of moral rights legislation in Australia: 'It was my firm intention to bring this ambiguity and discrepancy in the law into public arena and politicise it'.[51] Susan Reid, of NAVA, supported a call by Charles Bannon for more protection for the moral rights of the artists.[52] The professional organisation agitated for the introduction of a scheme of moral rights.

In response to this vigorous lobbying from the visual arts community, the Federal Government released a Discussion Paper on moral rights. Not surprisingly, the prime example in the Discussion Paper was the Daubists. It presumes that the dispute over Daubism was a representative case of moral rights violation.[53] It cites the dispute as evidence that there was insufficient protection under the present law, and there is a need for the introduction of a scheme of moral rights protection. The Federal Government introduced the *Copyright Amendment Bill* 1997 (Cth) into Parliament. However, after protest from the film industry, this

---

50 *Meskenas* v *Capon* (unreported, District Court of New South Wales, 28 September 1993).

51 Ryle, G. and Maley, N. 'Art Row Over, But Debate Goes On', *The Adelaide Advertiser*, 4 October 1991, p. 3.

52 Ibid.

53 Australian Government. Proposed Moral Rights Legislation for Copyright Creators: Discussion Paper. Canberra: The Attorney-General's Department, Canberra, 1994.

bill was withdrawn. After further consultation, the Federal Government introduced the *Copyright Amendment (Moral Rights) Act* 2000 (Cth), which has since passed into law.

Under a regime of moral rights, Charles Bannon could maintain that driller Jet Armstrong was culpable for violating the moral right of attribution.[54] He could allege that the Daubist failed to name him as the artist of the paintings in a clear and reasonably prominent way. In support of his case, Charles Bannon could point out that driller Jet Armstrong erased his signature, and he was not given enough credit. He could complain that it would be unsatisfactory that the artist's signature alongside that of driller Jet Armstrong because dual attribution would be give rise to uncertainty and confusion. In reply, the Daubists could claim that on occasion they do provide proper acknowledgment of the origins of the paintings that they daub. For instance, driller Jet Armstrong refers to Charles Bannon in the title of the painting, *Crop Circles on a Bannon Landscape*. The problem here seems one of excessive attribution. However, the Daubists are rather contrary about the credits that they provide for the paintings. They supply their own titles for the daubed works; they do not refer to the originals. Moreover, the Daubists sometimes omit to acknowledge the source of the artistic works at all. For example, driller Jet Armstrong renamed a daubed painting of the Flinders Ranges by Charles Bannon, *Crop Circle Conspiracy Landscape*. Such inconsistencies could expose the movement to legal actions.

Furthermore, Charles Bannon could also claim that the Daubists were guilty of the infringement of the moral right of integrity.[55] He could give range to his romantic feelings of violated authorship and complain

---

54 S 193 of the *Copyright Amendment(Moral Rights) Act* 2000 (Cth).

55 S 195AI of the *Copyright Amendment(Moral Rights) Act* 2000 (Cth).

that his work was subjected to derogatory treatment, which was prejudicial to his honour and reputation. The Daubists could claim that the act of over-painting is a neutral and clinical process which does not intend to ridicule the original, or tarnish the honour and reputation of the author of the original. They could reiterate their claims that recycling a work of art will lift it into a new context so that it can be appreciated from a fresh point of view. Although they might take such artistic intentions on notice, the courts might not take kindly to the claims of the Daubists. They would be unwilling to accept that the defacement of a painting was 'reasonable in all the circumstances'.[56] It is possible that the courts would also take prim objection to the salacious content of the work of the Daubists. For instance, it could take offence at the Charles Bannon painting cut by driller Jet Armstrong and turned into a picture of the Queen holding a wine glass and carrying out an obscenity. Thus the Daubists could be punished under the moral rights regime for failing to respect the integrity of the work that they are using to daub over.

In protest, the Daubists threatened to exploit the waiver provisions in the *Copyright Amendment Bill* 1997 (Cth), which provided that the creator can waive all or any of his or her moral rights for the benefit of everyone, a particular person or persons or a particular class of persons.[57] They saw the waiver provisions as an opportunity of subverting the moral rights legislation that was proposed by the Federal Government. Manne Schulze planned to attach waivers to the works exhibited at his new exhibition to enable buyers to engage freely in some daubing of their

---

56 S 195AS of the *Copyright Amendment(Moral Rights) Act* 2000 (Cth); and S 195AT of the *Copyright Amendment(Moral Rights) Act* 2000 (Cth).

57 Senate Legal and Constitutional Legislation Committee. *Copyright Amendment Bill No.1*. Canberra: Parliament House, 1997.

own. He would be flattered if another person would have daubed one of his own works:

> If someone would do something to one of my art works, and re-exhibit it, I would say, 'Beautiful'. Instead of being stored away or exhibited on a lounge room wall, it again sees the light and is re-exhibited. I would be pleased that someone would think that my work is worthy of re-using. Obviously that indicates what different views there are about one's personal outpourings.[58]

The Daubists hope to encourage an endless process of recycling of art works. However, the waiver provisions were removed from the moral rights legislation – mainly due to the protests for screenwriters in the film industry. However, there were a number of measures designed to control the operation of moral rights – including consent clauses,[59] and industry agreements.[60] So the Daubists would now have to give specific consent to let individuals alter or modify their artistic works.

Right of Resale

Not only does the Daubism dispute touch on matters of moral rights, but it also raises the questions of a right of resale. In this case, Charles Bannon was upset that driller Jet Armstrong had been given some of his paintings at an auction, daubed them, and sought to sell them for money at the Daubists exhibition. Quite apart from his moral concerns about the use of the work, the painter was concerned that there was no possibility of any economic recompense from the resale of the paintings. The newspaper reports made much of the fact that driller Jet Armstrong was

---

58 Rimmer, M. 'Interview with Manne Schulze', Sydney, 25 March 1999.

59 S 195AW of the *Copyright Amendment(Moral Rights) Act* 2000 (Cth).

60 S 195AR (3)(f) and s 195AS (3)(g) of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth).

selling the work for $650. Yet, without a right of resale, the Daubist was legally entitled to sell someone else's work and even make a profit.

NAVA has passionately lobbied the Federal Government to implement a right of resale or the 'droit de suite' in Australia, which is provided for under the *Berne Convention for the Protection of Literary and Artistic Works* 1886.[61] It points out that there is a continuing problem with the lack of legislation to protect the right of creative producers to receive a royalty from the subsequent sales of their work after its initial purchase. NAVA claims that copyright law discriminates against visual artists because it is based upon the model of literary works.[62] It argues that artists are unfairly treated in comparison to authors and composers because the value of the art depends upon the uniqueness of its physical embodiment, not its mass reproduction – as in books or sound recordings. NAVA argues that a right of resale would remedy the prejudice against visual artists under the present system of copyright law. It believes that the droit de suite would give visual artists the counterpart to the right of reproduction or performance in other art forms. NAVA maintains that the right of resale is a way to ensure that the visual artist is fairly rewarded and is encouraged to create further works. It would allow the visual artist to maintain a continuing relationship with their work.

---

61 Ricketson, S. 'Moral Rights and the Droit de Suite: International Obligations and Australian Obligations', *Entertainment Law Review*, 1990, Vol. 3, p. 78; Oman, R. and Others. 'Copyright Office Hearings on the Droit de Suite', *Columbia-VLA Journal of the Law and the Arts*, 1992, Vol. 16, p. 185; Perlmutter, S. 'Resale Royalties for Artists: An Analysis of the Register of Copyrights Report', *Columbia-VLA Journal of the Law and the Arts*, 1992, Vol. 16, p. 395; and Hughes, S. 'Droit de Suite: A Critical Analysis of The Approved Directive', *European Intellectual Property Review*, 1997, Vol. 19 (12), p. 695.

62 This problem is long-standing and pervasive. See Perlmutter, S. 'Resale Royalties for Artists: An Analysis of the Register of Copyrights Report', *Columbia-VLA Journal of the Law and the Arts*, 1992, Vol. 16, p. 395.

NAVA endorses the 1991 report of the Australian Copyright Council on *The Art Resale Royalty and its Implication for Australia.*[63] It agrees that such a scheme be limited to artistic works. It notes that the royalty should be calculated as a fixed percentage between 3 per cent and 5 per cent of the full sale price of public art above a specific threshold. The right would be inalienable, last the full term of copyright, and be applied from the date of the legislation. Civil remedies would be available when the scheme was not complied with. NAVA believes that VI$COPY is well equipped to deal with the monitoring, collection and distribution of the royalties. It foresees that there are no longer any practical constraints to prevent such a system being effected in Australia. There has been no support for this proposal from the Federal Government yet.

In the face of these calls by the professional association for visual artists, the Daubists have been opposed to the introduction of a right of resale in Australia. Manne Schulze argues that visual artists do not deserve special treatment. He points out that the idea of droit de suite is based upon romantic myths about the artist. Manne Schulze contends that the right of resale will benefit the elite group of art stars and celebrities who are popular and command high prices for their current works. He argues that such a right would not benefit the mass of artists who really need help:

> The idea of passing on some fee to the artist each time a work of art is sold has something to do with the bad financial situation of the artist. If the artist is originally poor, and later in life becomes well-established, the logic is that the artist should participate in the gains made from his or her earlier work .... What I do not understand is why artists should receive a special position in society,

---

63 Wyburn, M. *Resale Royalty – A New Right for Artists.* Sydney: The Australian Copyright Council, 1989.

> especially since this special position is not maintained in discourse and discussion about art. It is only brought up in this specific context. Who really cares about the masses of artists on this planet apart from the top few percent who are treated like kings and queens? The masses of artists are basically just ignored. The argument about the right of resale is brought up whenever it suits the establishment – the gallery system, the museums, and the wealthy artists. I think that it just becomes a specific administrative tool.[64]

However, Manne Schulze does not mention the impact that a right of resale would have on Daubism and similar artistic practices. It is arguable that the droit de suite would act as a financial disincentive to the art of appropriation because it would increase the cost of purchasing the raw materials to create new art works. So it is understandable why the Daubists would oppose the right of resale.

Summary

In the end, the dispute was resolved between the parties outside the arena of the Federal Court. So rather than rely upon the decision-making ability of the Federal Court, the barrister Robyn Layton preferred to maintain control over the controversy, and seek a settlement. Her claims about copyright law and defamation law were allowed to stand unopposed and unchallenged outside the courtroom. The lawyer Robyn Layton brokered a settlement. A buyer bought the work for $650 on the condition that it be returned to Charles Bannon. The identity of the purchaser was anonymous – the artist denied that he had bought the painting back himself. driller Jet Armstrong agreed to settle the case with Charles Bannon because he could not afford to run a legal case. He was upset about the lack of access to justice:

---

64 Rimmer, M. 'Interview with Manne Schulze', Sydney, 25 March 1999.

> I was placed in a situation where I had no other option but to accept. I don't have the money to fight for my right to express myself. I'm also upset that Charles Bannon will not let people decide for themselves whether or not what I've done is wrong. I have sold it. It is now out of my control.[65]

Driller Jet Armstrong received bad legal advice, and was scared that going to court was going to cost him a lot of money. He did not know of his strong legal position that he had not reproduced the original work, and he had criticised the work, not the author. The rules of copyright law, and defamation law, were undermined by legal practices. Robyn Layton used the threat of legal power to persuade driller Jet Armstrong to submit and accept her offer of a settlement. Her opponents did not have the legal expertise to question whether this claim was valid.

PART 3
THE CROP CIRCLE CONSPIRACY LANDSCAPE: THE MEDIA

It is striking that the Daubism dispute was played out not only in the artistic community and the legal system, but in the media. Charles Bannon and the Daubists debated the merits of the legal action, and the need for moral rights legislation in the public domain. The media was guided by a number of norms and standards about appropriation. Robert Hughes comments that the public is 'conditioned by its museums, by the art market and by the pervasive journalistic attitude that finds works of

---

65 Ryle, G. and Maley, N. 'Art Row Over, but Debate Goes On', *The Adelaide Advertiser*, 4 October 1991, p. 3.

art interesting only if they are fabulously expensive or forgeries, or ideally both'.[66] The mass media was not interested in the aesthetic issues about Australian landscape painting or ethical questions about the rights and wrongs of Daubism. It paid scant attention to the legal technicalities about copyright law and defamation law. The mass media was interested in the political and economic connotations of the Daubism dispute. It emphasised that the daubing of the paintings was an attack upon the personal reputation of Charles Bannon, the first family, and the integrity of the State of South Australia. It also stressed the financial rewards at stake in the dispute.

Politics

The local newspaper, *The Adelaide Advertiser*, was keen to pursue controversies like the Daubism dispute. It wanted to gain the attention of arts readers and advertisers who patronised its local competitor, the monthly arts paper, *The Adelaide Review*. *The Adelaide Advertiser* provided extensive coverage of the conflict, and its developments. Samela Harris broke the story about the Daubism dispute in her article 'Arts Uproar over Defaced Painting'.[67] It received generous front-page coverage, with a picture of driller Jet Armstrong with his controversial work. The following day there was a discussion of the litigation brought by Charles Bannon against the Daubists in the Federal Court.[68] There was also a cartoon by the resident cartoonist Atchinson which linked the Daubism dispute in a conceit with the scandal over the State Bank faced by John

---

66 Hughes, R. *Nothing if not Critical*. London: Collins-Harvill, 1990.

67 Harris, S. 'Arts Uproar over Defaced Painting', *The Adelaide Advertiser*, 27 September 1991, p. 1.

68 Staff Reporter. 'Controversial Painting Centre of Legal Wrangle', *The Adelaide Advertiser*, 28 September 1991, p. 2.

Bannon, the State Premier of South Australia. A week later, there was a report upon the resolution of the dispute.[69] They emphasised the wider implications of the dispute for the introduction of moral rights legislation protecting visual artists. Furthermore, *The Adelaide Advertiser* has been willing to revisit the aftermath of the Daubism dispute. It reported upon a new controversy, in which driller Jet Armstrong had cut up one of the paintings of Charles Bannon.[70] It also covered the new exhibition of the Daubists in *The Adelaide Advertiser*.[71] The stories by *The Adelaide Advertiser* were picked up by national newspapers, such as *The Australian*[72]and *The Age*.[73] As a consequence of this attention, the Daubism dispute went beyond the provincial, incestuous circles of South Australian society, and became a matter of national importance.

However, the Daubists were also guilty of being a little naive and unsophisticated in its use of the mass media. Manne Schulze reflects that the Daubists were taken advantage of by the provincial newspaper, *The Adelaide Advertiser*:

> Adelaide is a funny system. Almost everyone who has something to say knows somebody else. driller Jet Armstrong was friends with some of the journalists who reported on this case. Initially he thought that it was just good advertising. He did not consider the negative fall-out. For example, the wedge driven in the artistic community. It is easy to say in hindsight but driller Jet Armstrong could

---

69 Ryle, G. and Maley, N. 'Art Row Over, but Debate Goes On', *The Adelaide Advertiser*, 4 October 1991, p. 3.

70 Donovan, Z. 'New Art Controversy Features the Queen', *The Adelaide Advertiser*, 20 January 1992.

71 Harris, S. 'Dabbling in Darling Daubs', *The Adelaide Advertiser*, 11 November 1997.

72 Sproull, R. 'Jet's Brush with Bannon Fame Draws Artistic Ire', *The Australian*, 27 September 1991, p. 3.

73 Magaznik, M. 'Court Grants Injunction over Changing Landscape', *The Age*, 28 September 1991, p. 3.

possibly have gone into the more theoretical aspects of Daubism at the time. He could have explained to the artistic community more of his ideas.[74]

The Daubists were concerned about the standards and norms at work in the mass media. Manne Schulze reflects that the media frenzy shifted the focus of the dispute away from the analysis of the significance of landscape painting in the post-modern world. He observes that 'the act of recycling the work of one artist by another was portrayed as cultural vandalism, and the symbolic meaning of over-painting the work in question was interpreted as a personal attack against not only Charles Bannon, but the whole first family and even the integrity of the South Australian Government'.[75]

The media represented the Daubists as transgressive artists, calling them 'vandals', 'graffitists' and 'thieves'. This imagery lent support to Charles Bannon, and his push for the introduction of moral rights. The accusation that the Daubists were vandals implied that they were wantonly damaging private property. It conjured up images of barbarians sacking and plundering the civilisation of art. The allegation that the Daubists were engaged in graffiti denied that the group had any artistic intentions. It also reinforced the message that they were defacing the private property of others. The media also suggested that the Daubists were breaching law and order. Much was made of the fact that driller Jet Armstrong was formerly a policeman who now was violating the laws of copyright and defamation law. The media emphasised the price of the paintings exhibited by the Daubists. It suggested that they were engaged in commercial chicanery by recycling paintings.

---

74 Rimmer, M. 'Interview with Manne Schulze', Sydney, 25 March 1999.

75 Schulze, M. 'The Death of Daubism? The Case against the Introduction of Moral Rights', *Artlines*, 1997, Vol. 2 (4), pp. 4-7, 21

Furthermore, the media pilloried the Daubists – they were turned into figures of fun and ridicule. They emphasised that the Daubists were fringe dwellers in the artistic community. This suggested that they were unrepresentative extremists who should not be listened to.

The media ignored the collective and collaborative nature of the Daubist group, and focused upon one individual. There are prominent photographs of driller Jet Armstrong in *The Adelaide Advertiser*, posing as a bohemian with a beret and a goatee beard beside his painting *Crop Circles on a Bannon Landscape*. The media attention divided the members of the Daubist group. Manne Schulze observes that some artists resented that driller Jet Armstrong was in the limelight:

> driller Jet Armstrong was in the Advertiser almost every day for a long while. He has more or less maintained that public presence over the years, a biggish fish in a very swell glass bowl. And the one thing that high public profile resulted in was envy. Envy by people who can only dream about being the centre of attention. People who'll never get their 15 minutes of fame.[76]

As a result of the media attention, the Daubists fragmented and fractured, and reformed into a smaller organisation. driller Jet Armstrong and Manne Schulze continued to work under the banner of the group. However, the other two painters did not participate in the latest exhibition that was entitled, 'Daubism 7', and advertised as 'Daubism Hits Sydney'.

The mass media depicted Charles Bannon as a grand old man, or an Old Master, of the artistic community of South Australia. They boosted and lifted the reputation of the artist, describing him as a

---

76 Rimmer, M. 'Interview with Manne Schulze', Sydney, 25 March 1999.

respected landscape painter who had won the Blake Prize for Religious Painting in 1954 for his painting of Judas Iscariot, and the Barmera Prize in 1955. Little mention was made that the artist had given up painting for a long while and had instead devoted his attentions to printmaking. To a sympathetic audience, Charles Bannon claimed that he had been personally defamed by the daubing of his landscape paintings. He maintained that driller Jet Armstrong had cast aspersions that he was an inferior and incompetent landscape artist. At the same time, Charles Bannon sought to take the high moral ground, and claim that the daubing of the paintings was an affront to the professional status of artists generally. He turned his personal grievances into a crusade to help the lot of painters everywhere.

The mass media also considered that the Daubists were lampooning John Bannon, the Premier of the State Government of Australia. The first newspaper article referred to the defacement of a painting by 'the Premier John Bannon's father, respected Australian landscape artist, Charles Bannon'.[77] Despite their political bluster and swagger, the Daubists did not intend to make any attack upon John Bannon, the leader of the Australian Labour Party in South Australia. It was just a coincidence or accident that he happened to be the son of Charles Bannon. However, the media was interested in the incidental connection between the Daubist dispute and John Bannon.

A political cartoon published in *The Adelaide Advertiser* draws the connection between the Daubist dispute and the State Premier of South Australia.[78] It features a portrait of John Bannon, with the graffiti 'State Bank' and 'SGIC Workcover' written over his face, under the caption,

---

77 Harris, S. 'Arts Uproar over Defaced Painting', *The Adelaide Advertiser*, 27 September 1991, p. 1.

78 Atchison. 'The Cave-Ins', *The Adelaide Advertiser*, 28 September 1991.

'Stop Press: Another Bannon Defaced'. At the time, the State Premier and the Treasurer of South Australia, John Bannon, was fighting for his political survival over the State Bank of South Australia scandal in 1991.[79] He stepped down as leader a year later as a result of a Royal Commission into the bank, a blow-out in the State deficit, and a lack of popularity. In light of this background, it seems that the Daubists were swept up in the furore over the banking scandal. Their work could be misread by eager journalists as an attack upon the integrity of the State Government.

Economics

The Daubists are conscious that there is an economy of celebrity at work in the mass media. Creative artists such as Andy Warhol, Jeff Koons, Andreas Serrano and the Sensation Exhibition have sought to market and distribute their artistic works through the power of fame, charisma, and publicity.[80] Manne Schulze comments:

> The visual arts are a strange mix of fashions, trends and business. The artists, dealers, and curators have to come up with certain marketing angles. They have to establish 'brand names' and iconise artists. But things have become more and more boring in recent times. There just is not much left that one can possibly do because basically everything has been done already.[81]

The Daubists sought to gain attention and publicity in the mass media through up-ending and dethroning figures of authority. They paradoxically obtained a public presence by mocking men and women

---

79 Ryan, C. 'Crow-Eaters Forced to Eat Crow', *The Sydney Morning Herald*, 12 February 1992, p. 8; and Parkin, A. and Patience, A. (ed.) *The Bannon Decade: The Politics of Restraint*. Sydney: Allen And Unwin, 1992.

80 Stallabrass, J. *High Art Lite: British Art in the 1990's*. London: Verso, 1999.

81 Rimmer, M. 'Interview with Manne Schulze', Sydney, 25 March 1999.

who were already established celebrities – such as Charles Bannon, Robert Hughes, Gary Shead, and even the Queen. The Daubists certainly enjoyed the limelight in the mass media. As Manne Schulze concedes: 'There is a good side. One gets publicity. Artists would like to be in the media every now and then, because that is what enhances their reputation'.[82] However, the Daubists deny that they are interested in fame for its own sake. They do not want the stigma of being called sensationalists and exhibitionists. The Daubists maintain that they are a ginger group which generates public debate and discussion within the artistic community. As Manne Schulze notes: 'The Daubism issue requires a ratbag and a stirrer attitude, because it gets into all these political and, as we know, even legal issues'.[83]

In the wake of the dispute, driller Jet Armstrong has become an established public presence on the Adelaide arts scene. He also writes commentary for the street press and is well known as a DJ. Manne Schulze became interested in the legal issues surrounding the Daubist affair:

> Personally, I only became more interested in the legal issues a few years after the Bannon/driller incident when I ended up having a relaxed lunch with an intellectual property rights lawyer from Adelaide, Bill Morrow.[84] He put the whole issue into context for me, and it dawned on me that there were dodgy assumptions and inconsistencies in the laws applying to Daubism. That is when I decided to summarise my own view point. I thought that there was a lack of insight in legal circles of what one can do or even should do in the visual arts. If nobody else does it, who is going to do it? I thought it had to be me.[85]

---

82 Ibid.

83 Ibid.

84 Morrow, B. 'Originality: 'Primary, Initial, First'', *Alternative Law Journal*, 1995, Vol. 20 (4), p. 162.

85 Rimmer, M. 'Interview with Manne Schulze', Sydney, 25 March 1999.

Enlightened by this dialogue, Manne Schulze became a self-publicist, campaigning for copyright law reform in the media. He spread his message on underground channels of communication – such as manifestos, magazines, and alternative radio. The Daubists have sought to correct the public record. However, they have been a little more cautious and circumspect in the managing the media.

In one of his recent Adelaide exhibitions, driller Jet Armstrong daubed a painting by Eric Minchin, renaming the work *Shootout at the Eric Minchin Landscape*. He has also superimposed characters from the *Life Be in It* campaign onto the Australian landscape. He has also painted a huge mural on the corner of Frome and Rundle Streets in Adelaide entitled *Daubist Mural Number One*. In the latest Sydney exhibition, Manne Schulze decided to incorporate found works, ranging from landscapes to minimal paintings, into larger canvases. He cut an imitation Hans Heysen into several panels and rearranged them into a work called *Archetypal Shapes 1 (with Oil on Board by H. Heysen)*. He also alluded to the Dada movement in his painting, *Still Hot (after All These Years) (with Unsigned Nude)*. In another line of production apart from the Daubist paintings, Manne Schulze also creates three-dimensional, wall-mounted assemblages and free-standing sculptures.[86] He subverts and parodies such figures as Renaissance sculptures, saintly icons, and childhood characters.

To promote the exhibition, Manne Schulze sent out flyers and pamphlets labelled 'Daubism Hits Sydney' to the mainstream media. Ironically, Samela Harris from *The Adelaide Advertiser* reproduced the

---

86 Turner, J. 'Child's Play', *World Art*, 1997, Vol. 12 (3), p. 24.

press release by the artists, without acknowledgment.[87] Manne Schulze released a polemical tract entitled, 'The Death of Daubism? The Case against the Introduction of Moral Rights'. He offers a historical background to the push for the introduction of moral rights, and a partisan account of the dispute over Daubism. Manne Schulze questions the philosophical basis of moral rights, which posits a personal connection between the artist and their work. He observes that the treatises of Idealist philosophers like Hegel and Kant are of little significance for artistic practice in the materialistic reality of the late 20th century. Manne Schulze concludes that the moral rights legislation will be unable to outlaw Daubism:

> Whatever the outcome of the current debate, artists will keep re-using 'found' images. Daubism is only the most concerted effort based on this concept whose time not only has come, but which is well advanced and appears in many forms and disguises. Outlawing Daubism would lead to a rather silly cat and mouse game which ironically could represent the perfect epitome of the current state of the arts.[88]

The article was featured in *Artlines*, a journal published by the advocacy organisation Arts Law Centre of Australia. It draws upon a mixture of art history, legal doctrine, and journalistic opinion to communicate its message to the public. The artist attracted the attention of the Arts Law Centre of Australia.[89] He also conducted interviews with a couple of community radio stations in the Sydney region.

---

87 Harris, S. 'Dabbling in Darling Daubs', *The Adelaide Advertiser*, 11 November 1997.

88 Schulze, M. 'The Death of Daubism? The Case against the Introduction of Moral Rights', *Artlines*, 1997, Vol. 2 (4), p. 21.

89 Waters, C. 'To Daub or Not To Daub – A Moral Rights Dilemma', *Art Monthly Australia*, 1998, Vol. 108, p. 25.

The Daubists were unable to revive or rekindle the controversy over their work that had occurred in Adelaide. Manne Schulze was disappointed, though, that the Sydney exhibition was not more sensational.[90] There were a number of reasons why there was a lack of interest in the work in Sydney. First of all, the Daubists failed to galvanise the artistic community in Sydney. The artists, critics, and galleries were much more urbane and cosmopolitan in their aesthetic tastes. They were familiar with the practices of appropriation art. Therefore it was not particularly shocked or outraged by the daubing of found objects and ready-mades. Second, the Daubists did not attract the hot attention of litigation. Their antagonist, Charles Bannon, had passed away. His relatives showed no interest in pursuing the dispute. The other artists who were daubed did not take any legal action. Instead, there was a cool debate over the anticipated introduction of a regime of moral rights. Third, the Daubists did not capture the attention of the Sydney media. There was no political sub-text to the Sydney exhibition because John Bannon was no longer State Premier of South Australia. So the exhibition was not able to push beyond the confines of the cultural domain into the wider domain of public discourse and argument.

CONCLUSION

The dispute over Daubism is significant in terms of formal law, even though it did not result in a binding decision of a court. It was an important discursive event. The controversy sponsored debate in the artistic community, the legal system, and the media. The experience of

---

90 Rimmer, M. 'Interview with Manne Schulze', Sydney, 25 March 1999.

the Daubists provides a salutary lesson for copyright activists. It shows that a small vanguard of artists will find it difficult to bring about social change by themselves, however committed and passionate they may be. The Daubists needed to build alliances and coalitions. They could have sought to rally and organise support in the artistic community. The Daubists also required a good legal advocate to translate their artistic claims into legal language. It would have helped them fend off the legal threats of Charles Bannon and Robyn Layton. The Daubists also recognised the importance of good media presentation. They needed access to mainstream channels of communication to press their case more forcefully.

The Daubist dispute touches on questions of copyright law and new technologies. Manne Schulze comments that the artistic practices of daubing and appropriation should be set in the context of the digital age:

> In this day and age the storerooms of museums overflow with deteriorating art. Digital processes and advanced printing techniques generate copies more 'real' and of better quality than the originals. Therefore the idea of trying to preserve the one exact original state of an art piece reeks of ill-founded sentimentality and impractical retro vision. The Daubists envisage an enlightened future in which it will be considered normal to recycle works of art over and over again.[91]

However, the Daubists are in some respects a retro, nostalgic group. They see themselves as archivists, conservationists, and curators of original works of art. The Daubists do not exploit the digital technologies of reproduction and dissemination. They are not really interested in the copies that simulate the originals. By contrast, a number of their contemporaries are wired to the possibilities of electronic art. They seek

---

91 Schulze, M. 'Daubism Hits Sydney', Media Release, November 1997.

to use digital technologies to copy, manipulate, and replicate works of art out into the electronic ether. The question of copyright law and digital works will be visited in Chapter Six.

The Daubist dispute also ran parallel to the controversies over the authorship, collaboration, and appropriation of Indigenous art. However, such matters were complicated by questions of racism, colonialism, and imperialism. In the Daubism debate, driller Jet Armstrong argued that Australian landscape paintings were idealised visions of nature based upon inappropriate European models. He said that landscape paintings were 'white man's dreaming' and 'little pretty pictures', which only represented a small part of the world.[92] In a pamphlet, the Daubists proclaims: 'One could say that white Australia itself is a daub on this continent'.[93] They hint that Australia is a palimpsest, in which Aboriginal and Torres Strait civilisations has been written over by Western colonisers. However, the Daubists steer clear from the appropriation of Indigenous art and culture. Manne Schulze observes: 'It becomes a bit tricky because Indigenous people have been exploited ever since Australia was settled two hundred years ago'.[94] It would seem that the appropriation of Indigenous culture is different in nature and kind from the appropriation of European art. In light of this situation, the question of copyright law and Indigenous culture will be explored in Chapter Seven in the context of a case study of the Indigenous performing arts company, Bangarra Dance Theatre.

---

92 Harris, S. 'Arts Uproar over Defaced Painting', *The Adelaide Advertiser*, Friday, September 27, 1991, p. 1.

93 Schulze, M. 'Daubism Hits Sydney', Media Release, November 1997.

94 Rimmer, M. 'Interview with Manne Schulze', Sydney, 25 March 1999.

CHAPTER THREE

THE ABCs OF ANARCHISM: COPYRIGHT LAW AND MUSICAL WORKS

The practice of digital sampling involves the copying of sounds from one recording to another through the use of digital technology. It has become more widespread among artists and musicians over the last two decades.

In the 1980s, the practice of sampling raised a number of legal questions. Will a musician infringe the economic rights of the owner of the musical work and the sound recording if they use or reproduce a part of that work without their permission?[1] Will a sampler violate the moral rights of an original work if they fail to attribute the author? Does the re-use of a sound recording harm the integrity of the work?[2] Will a musician risk offending performers' rights if they record and use a performance without permission?[3] Some of these concerns were resolved by the industry practice of paying licence fees for sampling music.[4]

---

1 Bently, L. 'Sampling And Copyright: Is the Law on the Right Track?', *Journal of Business Law*, 1989, p. 113, p. 405; Sanjek, D. "Don't Have to DJ no More': Sampling and the 'Autonomous' Creator', *Cardozo Arts and Entertainment Law Journal*, 1992, Vol. 10, p. 607; and Keyzer, P. 'The Protection of Digital Samples under Australian Intellectual Property Law', *Australian Intellectual Property Journal*, 1993, Vol. 4, p. 127.

2 Hall, M. 'Copyright: Moral Rights', *Australian Intellectual Property Bulletin*, 1997, Vol. 9 (10), p. 148; Hutchings, A. 'Authors, Art, and the Debasing Instinct: Law and Morality in the Carmina Burana Case', *Sydney Law Review*, 1997, Vol. 19 (3), p. 385; Adeney, E. 'Moral Rights/Statutory Licence: The Notion of Debasement in Australian Copyright Law', *Australian Intellectual Property Journal*, 1998, Vol. 1, p. 21; and Adeney, E. 'The Moral Right of Integrity of Authorship: A Comparative View of Australia's Proposals to Date', *Australian Intellectual Property Journal*, 1998, Vol. 9, p. 179.

3 Gruzauskas, D. 'Performers' Rights; The Right of Personality and the Possibility of a Proprietary Right', *Australian Intellectual Property Journal*, 1995, Vol. 6, p. 92; Sherman, B. and Bently, L. *Performers' Rights: Options for Reform.* Canberra: Australian Government, October 1995; and Lawrence, R. and Welsh, K. 'Temptation and Exploitation: Apple House Music, The Copyright Loophole, and Legal Bootlegging', *Perfect Beat*, 1996, Vol. 2 (4), p. 43.

4 Abramson, C. 'Digital Sampling and the Recording Musician: A Proposal for Legislative Protection', *New York University Law Review*, 1999, Vol. 74, p. 1660.

In the 1990s, the debate over copyright law and musical works re-emerged in relation to digital sampling and electronic music.[5] It challenged the norms of the musical community, the legal system, and the media. Electronic music contested the ethos of the record industry. It questioned the viability of existing models – the combination of the songwriter and the composer, and the collective of a band. Electronic music relied upon technology. Instead of the composer and the lyricist, the disc jockey and the engineer assumed the status of authors of musical works and sound recordings. Electronic music challenged the industry agreement in relation to digital sampling. The digital technology allowed the sampling of musical works without license fees. Electronic music also threatened to break down the economic structures of the record industry. The major record companies were concerned that such digital technologies undermined the revenue derived from intellectual property rights.

This paper follows in the tradition of cultural studies into digital sampling and copyright law. In *Citadel Culture*, O.K. Werckmeister considers the example of the German electronic pop group, Kraftwerk, which first became prominent in the 1970s.[6] He observes that the group invested the profits of their early successes into the rapidly advancing technology of synthesisers, rhythm machines, measuring and mixing devices. The band Kraftwerk laid the foundation for dance, electronica,

---

5 Carnachan, R. 'Sampling and the Music Industry: A Discussion of the Implications of Copyright Law', *Te Mata Koi: Auckland University Law Review*, 1999, Vol. 8 (4), p. 1033; Kaplicer, B. 'Rap Music and De Minimis Copying: Applying the Ringgold and Sandoval Approach to Digital Samples', *Cardozo Arts and Entertainment Law Journal*, 2000, Vol. 18 (1), p. 227; McKenna, T. 'Where Digital Music Technology and Law Collide: Contemporary Issues of Digital Sampling, Appropriation and Copyright Law', *The Journal of Information, Law, and Technology*, 2000, Vol. 1, p. 1, http://elj.warwick.ac.uk/jilt; and Arts Law Centre of Australia. *Push the Button: Music Seminar*. Sydney: Harbourside Brasserie, 7 December 2000.

6 Werckmeister, O.K. *Citadel Culture*. Chicago: University of Chicago Press, 1991.

and trance music. In *The Black Atlantic,* Paul Gilroy considers black genres of music in the age of digital simulation.[7] He suggests that hip-hop culture grew out of the cross-fertilisation of African American and Caribbean cultural traditions. Paul Gilroy observes that hip hop culture has provided the raw material for a bitter contest between black vernacular expression and repressive censorship of artistic work. Notably, there has been a copyright trial involving 2 Live Crew, a Florida-based rap group lead by Luther Campbell.[8] In *Music from the Borders,* Philip Hayward considers the exploration by the Melbourne band, Not Drowning Waving, of aspects of the musical and political culture of Papua New Guinea.[9] He is interested in the exchange of music, commodity and heritage between the Australian and the Papua New Guinean cultures.

This paper considers the strategies and the struggles of a number of the electronic artists in the musical community. Part 1 considers the example of the United States group Negativland. This band adopted oppositional politics in its litigation against the record company distributing the works of the Irish band U2. Part 2 focuses upon the Australian case of Antediluvian Rocking Horse. This group engaged in dialogue with the Federal Government, record companies, and music publishers over copyright law reform. Part 3 looks at the tactics of the Great Britain band Chumbawamba. This collective signed to a record company EMI in the hope of reaching a wider audience for its political message. The Conclusion evaluates the material and symbolic efficacy of the various strategies of the copyright activists.

---

7 Gilroy, P. *The Black Atlantic: Modernity and Double Consciousness.* London: Verso, 1993.

8 *Campbell* v *Acuff-Rose Music, Inc.* (1994) 127 L Ed 2d 500.

9 Hayward, P. *Music at the Borders: Not Drowning Waving and their Engagement with Papua New Guinean Culture (1986-96).* Sydney: John Libbey & Company Ltd, 1998.

PART 1

THE LETTER U AND THE LETTER 2: NEGATIVLAND

Negativland is an American band of bricoleurs whose art consists of sampling and mixing recorded audio material.[10] They gained fame and notoriety after being sued for parodying the work of Irish rock anthem band, U2. In 1991, Negativland released a single called *U2* that featured a U-2 spy plane, the lettering 'U2' and Negativland's name. The recording included 35 seconds of the 1987 hit U2 song, 'I Still Haven't Found what I Am Looking For', cut against DJ Casey Kasem disparaging the band, and other inane commentary. The recording company Island filed a suit against Negativland, claiming that the song's cover art violated trademark protection and that its music's 'unauthorised use of a sound recording' violated copyright law. Negativland agreed to pay $25,000 and half of the wholesale proceeds in an out-of-court settlement. In 1995, Negativland articulated its credos in a 270-page book and manifesto and a CD called *Fair Use*. They became champions for the progressive reform of copyright law and the fair use doctrine because of the experience of litigation.

Aesthetics

The public campaign of Negativland tapped into a debate in the musical community over the legitimacy of sampling. The terminology of this debate was ideologically charged and loaded. Pop stars, recording

---

10 Negativland. *Fair Use: The Story of the Letter U and the Number 2*. Concord: Seeland, 1995; Sloop, J. and Herman, A. 'Negativland, Out-law Judgments, and the Politics of Cyberspace' in Swiss, T., Sloop, J. and Herman, A. *Mapping the Beat: Popular Music and Contemporary Theory*. Oxford: Blackwell Publishers Ltd, 1998, p. 291; and Podger, M. 'N©! Interview With Negativland', *Voiceworks*, Vol. 39, p. 14.

companies, and media conglomerates deployed the language of romantic individualism and private property rights. They were fearful that the emergence of new forms of technology would threaten artistic creativity and commercial viability. They claimed that 'sampling' is just as bad as 'piracy', 'bootlegging' and 'counterfeiting'. Negativland relied upon the terminology of visual arts and music. They draw a distinction between 'sampling', and 'bootlegging'. 'Sampling' referred to the partial reproduction of existing sound recordings for inclusion into a new sound recording. The activities of 'piracy', 'bootlegging' and 'counterfeiting' connoted the unauthorised wholesale commercial reproduction and distribution of sound recordings. The confusion of the terms was intended to criminalise the technique of audio collage. It served to divide those who belonged to the community and those who do not: the outlaws.

First, the critics of Negativland appealed to notions of romantic authorship and possessive individualism. Besides stopping piracy and counterfeiting, the corporate music industry wanted to stop unpaid sampling in music. Andrian Adams from EMI and Paul McKibbins from Rilting Music Inc. asserted that sampling without permission is theft:

> Through a series of wildly specious arguments, Negativland seeks to promote the idea that they should be able – through the technique of 'sampling' – to use others' creative and interpretative work for their own commercial gain without the inconvenience of payment or permission. To those who put in the time, energy, creative effort, and money necessary to create their music in its original form, this is intellectual and physical theft.[11]

---

11 Adams, A. and McKibbins, P. 'Sampling without Permission Is Theft', *Billboard*, 5 March 1994, in Negativland. *Fair Use: The Story of the Letter U and the Number 2*. Concord: Seeland, 1995, p. 158.

The representatives of the recording companies deployed a range of seductive and emotive language in their depiction of appropriation. They invoked the figure of the romantic author, and stressed the amount of creative and interpretative work that went into the creation of new work. They used rhetoric about the recording artist being a victim of new reproductive technologies to garner public sympathy and support. The recording companies employed the discourse of private property rights, emphasising the need for the author and the owner to receive commercial rewards. The practice of sampling was stigmatised with invective such as theft, stealing, and piracy. The underlying suggestion was that no amount of copying was ever acceptable without the act of payment or the grant of permission.

Second, Negativland placed themselves in the artistic tradition of modernism. The group observes: 'Appropriation in the arts has now spanned the entire century, crossing mediumistic boundaries, and constantly expanding in emotional relevance from beginning to end regardless of the rise and fall of "style fronts"'.[12] Negativland seeks to legitimise the subversive practice of sampling by using the terminology of the visual arts. It claims that appropriation is justified by a number of avant-garde movements – cubism, Dadaism, surrealism, and pop art. Negativland attempts to vindicate the practice of sampling by reference to past musical traditions. It insists that the whole history of music is typified by creative theft and borrowing in folk music, blues, jazz and rock. However, Negativland does not just absorb and assimilate influences like these movements. It transcends and goes beyond the tradition of modernism.

---

12 Negativland. *Fair Use: The Story of the Letter U and the Number 2.* Concord: Seeland, 1995, p. 195.

Third, in a manifesto called *Fair Use*, Negativland adopts an artistic credo of post-modernism. It raises the aesthetic validity of appropriation in opposition to copyright laws prohibiting the free re-use of cultural material. Negativland subjects the media to comment, criticism, and manipulation:

> The act of appropriating from this media assault represents a kind of liberation from our status as helpless sponges which is so desired by the advertisers who pay for it all. It is a much needed form of self-defense against the one-way, corporate consolidated media barrage. Appropriation sees media, itself, as a telling source and subject, to be captured, rearranged, even mutilated, and injected back into the barrage by those who are subjected to it. Appropriators claim the right to create with mirrors.[13]

Negativland is concerned that mass culture is primarily propelled by economic gain and the rewards of ownership. Corporate publishing and management entities enhance their own and their client's income by exploiting intellectual property rights. Negativland contends that artistic communication is choked and inhibited by the private ownership of mass culture. The capacity of an artist to experiment and create new work is constrained where popular icons and imagery are no longer freely available, but subject to clearance fees. Negativland argues that art should not be dictated to by business. The private dominion over intellectual property results in cultural homogeneity and stagnation.

Legal Relations

Island Records and music publisher Warner-Chappell Music instigated legal action against Negativland and SST Records Ltd in respect of the

---

13 Id at p. 196.

unauthorised and unattributed sampling of U2's song 'I Still Haven't Found what I'm Looking For'. First, the plaintiffs claimed that the defendants were guilty of copyright infringement. Second, the plaintiffs argued that the defendants were engaged in misleading and deceptive conduct because of the packaging and labelling of the CD gave the impression that it was a U2 album. Finally, the plaintiffs were concerned that the band's image would be tarnished by the expletives, curses, and scatological language.

The matter was never resolved in court. Negativland was forced to settle over the U2 recording because it could not afford the tremendous costs involved in fighting for its rights in court. They agreed to pay $25,000 and half of the wholesale proceeds to Island Records and the music publisher Warner-Chappell Music. Negativland believed that there was an imbalance of power in the legal process, because musicians are unable to bear the financial and non-financial costs of litigation. It observed: 'Thus, when a corporation goes after a small business or low-income individuals, the conflict automatically rolls outside of the court system because of the defendant's inability to pay the costs of mounting a proper defense'.[14] Negativland observed that the dispute was resolved through bargaining power, without regard to the legality of the issue, let alone the morality. The danger is that the formal rules and principles of copyright law will be undercut and undermined by the practices of opportunistic parties.

After the litigation with U2, Negativland argued that the doctrine of 'fair use' should be liberalised and expanded to allow any partial usage for any reason. They supported the tenor of the decision of the United States Supreme Court in the 2 Live Crew case.

---

14 Id at p. 24.

The Supreme Court of the United States decision in *Campbell* v *Acuff-Rose Music* provided a coherent theory and explanation for the fair use doctrine.[15] The case concerned whether a rap song, 'Pretty Woman', recorded by the group, 2 Live Crew, was a fair use of Roy Orbison's song, 'Oh Pretty Woman'. The Supreme Court of the United States emphasised that the fair use doctrine supported the transformative use of copyright material. Justice Souter stressed that the question was 'whether the new work merely "supersede[s] the objects" of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message'.[16] The Supreme Court moved away from the past emphasis in fair use decisions upon the commercial nature of the use. It specifically rejected the argument that *Sony* v *Universal City Studios* called for a presumption that every commercial use of copyrighted material was unfair.[17] It claimed that the authority calls for 'a sensitive balancing of interests', so that the commercial use of an activity was weighed along with other factors in fair use decisions.[18]

The Supreme Court held that parody, like other comment or criticism, deserves fair use protection. Justice Souter found that parody has an obvious claim to transformative value, because 'like less humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one'.[19] However, this progressive finding was subject to a number of conservative conditions. First, the Supreme Court differentiated between parody and mere

---

15 *Campbell* v *Acuff-Rose Music, Inc.* (1994) 127 L Ed 2d 500.

16 Ibid.

17 *Sony Corporation Of America* v *University City Studios Inc.* (1984) 78 L Ed 2d 574.

18 *Campbell* v *Acuff-Rose Music, Inc.* (1994) 127 L Ed 2d 500.

19 Ibid.

humour. Justice Kennedy noted: 'It is not enough that the parody uses the original in a humorous fashion, however creative that humour is.' Second, the Supreme Court drew a distinction between parody and satire. Justice Kennedy affirmed the view in *Rogers* v *Koons* that 'the parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole (although if it targets the original, it may target those features as well)'.[20] Third, the Supreme Court discriminated between parody and pastiche. Justice Kennedy warned: 'If we allow any weak transformation to qualify as parody, however, we weaken the protection of copyright'.[21] The narrow definition of parody highlights the limits of interpretation in the discipline of the law.

Flowing on from its concern with the defence of fair use, Negativland mounted a campaign against the introduction of an industry-wide ethic regarding the digital sampling of copyright works. It was concerned that the standard did not take into account exceptions to copyright infringement. The Recording Industry Association of America (RIAA) issued guidelines to CD plants on what to look out for to prevent CD piracy and counterfeiting:

> 1. Conduct routine review of all orders to determine legitimacy.
> 2. Consult the RIAA, as necessary, concerning sound recording ownership.
> 3. Retain advance order payment for an order if it, or any part of the order, is determined by you to be infringing.
> 4. Refer all acts of infringement and related documents to appropriate law enforcement authorities and the RIAA (acting on behalf of it's members)

---

20 Id at p. 527

21 Id at p. 500.

5. Confiscate and destroy all product (determined to be infringing by you) including the original master recording.[22]

In response to criticism from Negativland and its supporters, the RIAA amended it's 'Anti-piracy good business practices for CD mastering and manufacturing plants' to add the rider that in some instances sampling may qualify as fair use under copyright law. It recommended that the CD manufacturers handle such situations in consultation with their attorneys.

Media

Negativland employed the tactics of culture jamming in its battles over copyright law.[23] It sought publicity for the litigation over the U2 recording, and copyright law reform in a number of different channels of media:

> Suing artists in public can create bad 'anti-art' publicity for the litigators, thus undoubtedly preventing them from threatening or suing every usage they would like to (it is perhaps because of the publicity Negativland generated around the U2 lawsuits that Negativland has NOT been sued for continuing to do the same thing they got sued for in 1991).[24]

Negativland marshalled and organised consumer protests. They invited citizens to contact the people preventing the release of the U2 album – such as Island Records, the group U2, the announcer Casey Kasem, and the RIAA. Negativland assumes a public orientation, seeking to

---

22 Negativland. 'Do We Really Have to Sue the RIAA?', 17 August 1998, http://www.negativland.com/riaa/dowesue.html

23 Dery, M. 'Culture Jamming: Hacking, Slashing and Sniping in the Empire of Signs', *Essential Media*, http://www.essentialmedia.com/Shop/Dery.html

24 Negativland. 'Do We Really Have to Sue the RIAA?', 17 August 1998, http://www.negativland.com/riaa/dowesue.html

disseminate discourse into wider social fields and communicating with wider publics.

Negativland printed two books about the controversy: *The Letter U and the Number 2* which sold 4000 copies, and *Fair Use: The Story of the Letter U and the Number 2,* which has sold 6,200 copies. They also featured in the documentary film by Craig Baldwin about appropriation and culture jamming called *Sonic Outlaws.* In a review, James Boyle reflects upon the rich ironies at play in this documentary record:

> *Fair Use* is packed with ironies. Negativland persuaded Francis Gary Powers Jr., the son of the man who flew the real U2 spy plane, to write a generous if bewildered introduction that nevertheless makes the point that U2's record company were suing Negativland in part for appropriating a name that U2 themselves had appropriated. At another moment, some of the members of Negativland, in an inspired combination of agitprop and covert infiltration, actually worked their way into an interview being given by U2's Dave Evans (a.k.a. 'The Edge') to the alternative magazine Mondo 2000.[25]

James Boyle observes that Negativland are 'copyright pessimists' who are sceptical of expansive claims of intellectual property. He also notes that the band share an intellectual affinity with critical legal scholars like Ronald Bettig who are concerned about the commodification of culture.

Negativland interviewed U2's The Edge for *Mondo 2000* Magazine. Mark Hosler and Don Joyce questioned the guitarist about the sampling of satellite broadcasts by U2 on their Zoo TV Tour. The Edge responded:

> I mean, in theory I don't have a problem with sampling. I suppose when a sample becomes just part of another work then it's no problem. If sampling is, you know, stealing an idea and replaying the same idea, changing it very

---

25 Boyle, J. 'The Relations of Reproduction', *Times Literary Supplement,* 4 July 1997.

> slightly, that's different. We're using the audio and images in a completely different context. If it's a live broadcast, it's like a few seconds at the most ... You know, like in music terms, we've sampled things, people sample us all the time, you know, I hear the odd U2 drum loop in a dance record or whatever. You know, I don't have any problem with that.[26]

After the identity of his interviewers was revealed, the Edge was sympathetic to the plight of Negativland. He stressed, though, that the group did not have control over the actions of the recording company and the music publishers who were bringing legal action against the group. However, James Boyle observed that there remained a difference of opinion between Negativland and U2: 'The members of Negativland saw themselves as Brechtian figures, shouting "this is just a play!" at the audience; U2 saw them as hucksters selling imitation Rolexes to rubes'.[27]

Negativland has maintained a lively and provocative web-site on the internet.[28] This portal has become a locus for a community of fans and supporters. Negativland has provided a sample of their banned U2 song on the web-site. They have ensured that the work has a wide distribution over the internet through file-sharing programs and streaming media. Negativland has maintained a resource of intellectual property materials. This archive would be of assistance to any artist or musician who runs into similar copyright difficulties. Negativland also provides links to its allies. For instance, it lists RTmark, a group of cultural terrorists who fund individuals to bring blacklisted or illegal cultural production into the marketplace, such as the Barbie Liberation Organisation who

---

26 Negativland. *Fair Use: The Story of the Letter U and the Number 2*. Concord: Seeland, 1995, p. 83.

27 Boyle, J. 'The Relations of Reproduction', *Times Literary Supplement*, 4 July 1997.

28 Sloop, J. and Herman, A. 'Negativland, Out-law Judgments, and the Politics of Cyberspace' in Swiss, T., Sloop, J. and Herman, A. *Mapping the Beat: Popular Music and Contemporary Theory*. Oxford: Blackwell Publishers Ltd, 1998, p. 291 at p. 305.

mischievously switched the voice boxes of 300 GI Joe and Barbie dolls. Negativland also operates a thriving mail order business through its portal for work released on their label Seeland Records. So, in spite of their avowals that art is not a business, they have supported their political protests through this commercial enterprise.

After the trauma of the U2 litigation, Negativland released the album *Dispepsi*. That album contains numerous samples of Pepsi commercials and questions the culture of consumerism. Negativland took care to consult with lawyers and academics such as Keith Aoki, James Boyle, and Alan Korn before launching into the Pepsi album. Such caution and prudence was unnecessary in the end. Pepsi was not moved to take legal action against Negativland, even though it might have had strong grounds for bringing actions in copyright and trade mark infringement. Alluding to the work of Beck, the cola company commented that the Negativland album was 'no *Odelay* but it's a pretty good listen'.[29] Pepsi did not want to leave itself open to bad publicity that might have harmed its consumer support. It effectively neutralised the threat of Negativland by not rising to their provocation.

PART 2
MUSIC FOR THE ODD OCCASION:
ANTEDILUVIAN ROCKING HORSE

Susan King is a 29-year-old musician, electronica DJ and visual artist. She grew up in Washington DC, and lived in St Kilda, Melbourne, for a decade. After starting out as an advertising student at RMIT, Susan King

---

29 http://www.negativland.com/reviews/reviews_dispepsi.html

formed a DJ partnership with Paul Wain called Antediluvian Rocking Horse. She released a number of albums including *Music for the Odd Occasion, Music for Transportation* and the forthcoming *Forward into the Furniture.* She presented a radio program 'Forward into the Furniture' on 3PBS FM. Susan King has developed a sophisticated understanding of copyright law. She addressed the Eighth Biennial Australian Copyright Symposium in Sydney in November 1998 on the topic of copyright law and digital sampling. Her manifesto was published by both the Australian Copyright Council and the Arts Law Centre of Australia. Suan King also participated in a forum over MP3s and sampling at the 'This Is Not Art' festival in Newcastle in October 2000. Susan King has also been a producer for a program on the internet radio station, bigfatradio.com.

Aesthetics

Antediluvian Rocking Horse is a DJ partnership of Susan King and Paul Wain. This Melbourne group are musical conceptualists with a taste for techno electronic beats and a Dada sense of humour. Antediluvian Rocking Horse recorded its first album, *Music for the Odd Occasion* in 1995 with composer Ollie Olsen under the techno label Psy-Harmonics. It featured cut-ups, layers, and rearranges vinyl, CDs, tapes, movies, radio and broadcast media. This collaboration with Ollie Olsen was founded upon a number of affinities – a penchant for collaboration, an eagerness for musical experimentation, an interest in digital sampling, and a shared political and artistic spirit of anarchism.

Norwegian-born, Melbourne-bred musician, Ollie Olsen, is one of the key figures in the Australian electronic music.[30] He has not been interested in becoming part of the commercial, popular music scene. Ollie Olsen prefers to remain an outsider who is investigating a variety of genres – from punk to electronica and avant-garde music.[31] He has appeared in a number of groups over the years – including The Reals, The Whirlywirld, Orchestra of Skin and Bone, No, and Third Eye. He also has collaborated with a number of artists as a producer – including Michael Hutchence on the Max Q project. Since being the musical director for Richard Lowenstein's *Dogs in Space*, he has also written the theme music for the ABC television program 'RAW-FM'. and the Ana Kokkinos cinematic film *Head On*.

In 1993, Ollie Olsen formed the acid-house label Psy-Harmonics and the techno-trance label Psychic Harmonies. He reflected that the record labels were made possible by the Max Q collaboration with Michael Hutchence.[32] Many of the acts on Psy-Harmonics and Psychic Harmonies, such as Third Eye, Lumu Janda, Mystic Force, and Zen Paradox, had secured international distribution deals through some of Europe's leading dance labels. However, it appears that Psy-Harmonics is still very much a labour of love for Ollie Olsen. He admitted in an interview that it is still difficult to generate money.[33] The record labels are administered by the recording company, Polygram Publishing. There is a paradox here. Ollie Olsen gains his credibility and integrity from working 'underground' and shunning popular music; but that is only made possible by the finance from the mainstream recording companies.

---

30 McFarlane, I. *The Encyclopaedia of Australian Rock and Pop*. Sydney: Allen and Unwin, 1999, p. 466.

31 Lovegrave, M. *Michael Hutchence*. Sydney: Allen and Unwin, 1999, p. 107.

32 Id at p. 117.

33 http://www.cia.com.au/peril/texts/features/Ollie.htm

In 1996, Ollie Olsen worked as the producer for Antediluvian Rocking Horse album, *Music for an Odd Occasion* on the Psy-Harmonics label. He brought his background, with its wide diversity of musical interests and influences, to bear upon the production. Susan King notes that the album *Music for an Odd Occasion* is a mixture of sampling and techno music:

> Our album does have a very techno element to it because Ollie's label is a techno label. We had tailored our concepts to techno music, which suited me because I enjoy going out and listening to it.[34]

The result is a hybrid work, which crosses a number of genres and forms. Certainly it reflects the preoccupations of Susan King and Paul Wain in Dada, retro music and culture jamming. But it also bears traces of the producer Ollie Olsen's preoccupations with acid-house, techno, and trance music.

The artistic credo of Antediluvian Rocking Horse is one of Dadaism. This movement seeks the discovery of authentic reality through the abolition of traditional cultural and aesthetic forms through a technique of comic derision. In her speech, Susan King emphasises the spirit of play, chance and intuition behind its album:

> 'Music For The Odd Occasion' is quite absurd. It's meant to make you laugh. It's when one laughs that one learns, like a coin dropping into a slot and a light going on. So we are really serious about making you laugh. It lacks any obvious pretensions to social significance. This album is not going to deflect our national obsession with the worship of consumerism, it's not going to inspire any moral revelations among corporate policy makers, investment bankers, or politicians; it's not going to put an enthusiasm for the democratic process back into our

---

34 Rimmer, M. 'Interview with Susan King', Melbourne, 29 December 1998.

> population. But, maybe even this little effort at nonsense is worthwhile in some less-definable way, and deserves to exist for less predictable reasons. Yet, this album is entirely illegal and is not supposed to exist at all, without the permission of the people who made the original source material.[35]

As Robert Hughes notes, 'It is essential to grasp that Dada was never an art style, as Cubism was; not did it begin with a pugnacious socio-political programme, like Futurism. It stood for a wholly eclectic freedom to experiment; it enshrined play as the highest human activity, and its main tool was chance'.[36] Antediluvian Rocking Horse elects to engage in amateur play rather than professional politics. Susan King emphasised that the best response is a creative response. It seems that Antediluvian Rocking Horse would prefer to deal with such issues in terms of aesthetics above all else.

Legal Relations

In contrast to Negativland, Antediluvian Rocking Horse has not been threatened with any legal action for copyright infringement. Susan King swears: 'Heaven forbid we are successful. That's when they [lawyers] come after us because that is when we have something to take'.[37] She believes that the group has escaped litigation because it was crafty in selecting obscure music for its sources, and it did not enjoy commercial success. Instead of being the subject of litigation, Susan King has engaged in a public debate about copyright law reform. She has discussed the implications of the practice of digital sampling for economic, moral, and performers' rights.

---

35 King, S. 'Quiet Pillage: The Case for Free Noise', *Artlines: A Bulletin on Art and Law in the Digital Age*, 1997, Issue 2 (4), p. 1.

36 Hughes, R. *The Shock of the New*. London: Thames and Hudson, 1991, p. 61.

37 Rimmer, M. 'Interview with Susan King', Melbourne, 29 December 1998.

Economic rights

Susan King is concerned that musical publishers and their lawyers exploit the legal ambiguity and uncertainty about the meaning of 'substantial similarity' – the test for copyright infringement of a work. For instance, the recording company EMI sued Random House for copyright infringement over the unauthorised use of musical lyrics in Christos Tsilokas' book *Loaded,* by reproducing lines from a Pet Shop Boys song 'And we were never being boring/We were never being bored'.[38] Random House settled out-of-court for $7,000 for the unauthorised use of musical lyrics in Christos Tsilokas' book, and withdrew the material from the second edition of the novel. This result is shocking given that there is no clear legal authority that the use of a couple lines of a musical work constitutes copyright infringement.

Susan King endorses the efforts of Negativland to reform the defence of fair use in an effort to protect artists and musicians:

> As the law stands it, it is pretty good. There are, though, more effective methods than fair use. My main gripe with fair use is that it comes down to being on the defence. Fair use is only a defence. This means that you are put in a compromising position when you are trying to defend yourself. How to alleviate that? I have no idea. The only way, it seems, is not through statute law but through common law. That takes a matter of time. That still precipitates artists being put in compromising positions for things to change.[39]

Her point about the burden of proof behind the defence of fair use is pertinent.

---

38 Tsilokas, C. *Loaded.* Vintage: Sydney, 1995.

39 Rimmer, M. 'Interview with Susan King', Melbourne, 29 December 1998

Antediluvian Rocking Horse did not seek clearance, authorisation or licence from the copyright owners for the samples. This was in keeping with its artistic ethos that appropriation was a legitimate art form. Susan King was concerned that licensing would compromise the creative process behind musical works based upon digital sampling.[40] She feared that the group would be frustrated by the difficulties of identifying owners, negotiating permission to use work, and paying licence fees. However, Antediluvian Rocking Horse was willing to see whether licensing would work. They were happy for a Japanese recording company to solve the commercial and practical difficulties involved licensing all the sounds that were used in its commissioned DJ mix, *Music for Transportation* in 1999.[41] Antediluvian Rocking Horse takes the pragmatic attitude that licensing is reasonable, so long as a party is willing to take the time and the money to gain permission for the use of the copyright works.

It is important to consider whether the courts will validate such licensing arrangements which have developed in response to the activity of digital sampling. Brad Sherman and Lionel Bently observe:

> Where practices have developed between parties who are of equivalent power, the courts are less likely to interfere with such arrangements, even if these practices appear to contradict a literal reading of the rules of copyright. The situation may be different, however, if the parties are not of equal power. If licensing practices emerged as a result of fears about litigation costs or general industry propaganda, for example, it is highly unlikely that the law would accede to such 'arrangements' by holding that such licensing was necessary.[42]

---

40 Ibid.

41 Ibid.

42 Bently, L. and Sherman, B. 'Cultures of Copying: Digital Sampling and Copyright Law', *Entertainment Law Review*, 1992, Vol. 3 (5), p. 158 at 161.

It is critical that the licensing of digital sampling results in a distribution of culture, power, and money which is fair, just, and equitable. It is important to ensure that such arrangements do not allow record companies to engage in avaricious economic rent-seeking.

Moral rights

The Federal Government introduced the *Copyright Amendment (Moral Rights) Act* 2000 (Cth) to recognise the moral rights of copyright creators. It is worth considering what impact the introduction of a moral rights regime will have on the musical practice of digital sampling.[43]

Susan King is ambivalent about the introduction of the moral right of attribution. She believes that giving credit comes down to an individual discretion, decency and ethics. Susan King fears that providing full attribution of sources for commercial reasons may detract from the mystery of artistic works:

> I can see other situations where it is impossible and unnecessary. It could detract from the piece as well ... For me, art is something that keeps on giving. It is never obvious in its entirety at once in the first time new experience. It is something that you might go away from, and the next time that you interact with it, it is different from what it was the first time. There is something new there that you didn't hear of before. Over six months it gives to you because not all the mystery is revealed all at once. That is art in a sense to me. If you are spelling everything out for commercial reasons, something is definitely being lost. It is just about subtlety, I think.[44]

---

43 Bently, L. 'Sampling and Copyright: Is the Law on the Right Track?', *Journal of Business Law*, 1989, p. 113, p. 405

44 Rimmer, M. 'Interview with Susan King', Melbourne, 29 December 1998.

Susan King offers an original insight here. It is normally taken for granted that the moral right of attribution will serve to enhance the integrity of a work. Susan King suggests that such laws may have the inadvertent effect of devaluing artistic work by making its meanings transparent and obvious. She believes that the audience should not be deprived of the joy of decoding the secret, subliminal sub-texts that are embedded in a musical work. Such aesthetic justifications may be considered to be unreasonable if they are out of step with industry standards.[45]

Susan King is anxious that the moral right of integrity might create problems because her digital sampling might be considered a debasement of other musical work. She is heartened, though, by the decision of the Federal Court in the case dealing with a techno remix of *Carmina Burana*.

The Federal Court considered the meaning of debasement in the intriguing matter of *Schott Musik* v *Colossal Records*.[46] The case concerned whether a techno dance adaptation made by the group Excalibur of the 'O Fortuna' chorus from Carl Orff's *Carmina Burana* debased the original work. It involved s 55 (2) of the *Copyright Act* 1968 (Cth), which provided that the entitlement to a compulsory licence for a record does not apply 'in relation to a record of an adaptation of a musical work if the adaptation debases the work'.

At first instance, Justice Tamberlin found that Excalibur preserved substantial and essential elements of the original intact, and communicated an exuberance and rhythmic character consistent with the spirit of the work. On appeal, the Federal Court upheld the finding of Justice Tamberlin. There was disagreement, though, over the proper test

---

45 S 195AR (f) of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth).

46 *Schott Musik International GBH & Co and Others* v *Colossal Records Of Australia Pty Ltd And Others* (1996) 36 IPR 267; on appeal, (1997) 38 IPR 1.

for debasement. Justice Hill favoured an objective test, but Justice Wilcox and Justice Lindgren supported a subjective test. Susan King agreed with the judges that the techno remix of *Carmina Burana* should not be considered to be a debasement:

> That was so defensible really because they had sold it to advertising companies previously. Everyone knows that that is the lowest life form. If you sold it already, what are you complaining about? I can say that because I dropped out of advertising.[47]

However, the Federal Court refused to consider whether the original work was debased by associations with advertisements, films, and adaptations licensed by the copyright owners. It found 'the fact that on a future hearing of the work a listener is plagued with visions of Nescafe coffee beans, Arnold Schwarzenegger or Michael Jackson does not necessarily mean that the work is to be regarded as already diminished or debased'.[48]

Digital sampling sometimes even raises related questions of defamation. The leader of the extreme right wing political party, Pauline Hanson, sued the Australian Broadcasting Commission for defamation over a song called 'A Backdoor Man', which featured samples of her speeches arranged by a drag queen called Pauline Pantsdown.[49] Pauline

---

47 Rimmer, M. 'Interview with Susan King', Melbourne, 29 December 1998.

48 *Schott Musik International GBH & Co and Others* v *Colossal Records Of Australia Pty Ltd And Others* (1996) 36 IPR 267 at 280.

49 Eisenberg, J. 'The Perils of Pauline', *Communication Update*, 1998, No. 148, p. 18; Eisenberg, J. 'Sex, Satire and Middle-Class Morality: Reflections on Some Recent Defamation Cases', *Media International Australia*, 1999, Vol. 92, p. 19; Wark, M. *Celebrities, Culture and Cyberspace: The Light on the Hill in a Postmodern World*. Pluto Press Australia, 1999, p. 338; Stratton, J. 'I Don't Like It: Pauline Pantsdown and the Politics of the Inauthentic', *Perfect Beat*, Vol. 4 (4), p. 3; Hunt, S. '(I'm A) Back Door Man', *Perfect Beat*, 2000, Vol. 4 (4), p. 29; and Hunt, S. and Stratton, J. 'Two Paulines to Choose from: An Interview with Simon Hunt/Pauline Pantsdown', *Perfect Beat*, Vol. 4 (4), p. 34.

Hanson argued that the song imputed that she was a homosexual, a prostitute involved in unnatural sexual practices, associated with the Ku Klux Klan, was a man and a transvestite and involved in sexual activities with children. At first instance, Justice Ambrose of the Supreme Court of Queensland held that an injunction was warranted because the song was capable of being defamatory and the damage to Hanson and her family by continued publication could not be adequately compensated by damages.[50] Upholding this injunction, the Court of Appeal held that the ordinary listener would believe that the main subject of the song was the sexuality of Pauline Hanson, not her conservative political views.[51] It dismissed an express disclaimer on the radio station that the song was a satire. The High Court of Australia refused leave to hear an appeal on the grounds that the material was satirical and fair comment.[52]

Performers' rights

However, Susan King does not advocate the complete abolition of copyright law. She believes that there is room for minimal regulation of the reproduction and distribution of musical works: 'A more generous and enlightened approach to copyright would have it prohibit straight-across bootlegging, provide cover version royalties, and practically nothing much else'.[53] She concedes at least some limited protection for performers' rights.

---

50 *Hanson* v *Australian Broadcasting Corporation* (unreported, Supreme Court of Queensland, 1 September 1997).

51 *Australian Broadcasting Corporation* v *Hanson* (unreported, Supreme Court of Queensland Court of Appeal, 28 September 1998).

52 *Australian Broadcasting Corporation* v *Hanson* (unreported, High Court, special leave to appeal, 24 June 1999).

53 King, S. 'Quiet Pillage: The Case for Free Noise', *Artlines: A Bulletin on Art And Law in the Digital Age*, 1997, Issue 2 (4), p. 1.

Currently, performers only enjoy the right to prohibit the recording of their live performance and the right to control an unauthorised recording and transmission of their live performances under the *Copyright Act* 1968 (Cth).[54] The protection for musicians against bootlegging is therefore limited. In *Sony Music Productions Pty Ltd* v *Tansing*, the Federal Court refused to grant an injunction against Apple House Music for releasing onto the Australian market unauthorised recordings of Michael Jackson.[55] There were a number of grounds for this decision. First, there was no protection for Michael Jackson in Australia under Part XIA of the *Copyright Act* 1968 (Cth) as the United States was not a signatory to the Rome Convention. Second, the bootlegged recording did not amount to misleading and deceptive conduct under s 52 of the *Trade Practices Act* 1974 (Cth) because of express disclaimers on the recording which stated the non-authorised nature of the work. Third, the Federal Court declined to rule whether there was a right of publicity in Australia – the inherent right of every human being to control the commercial use of his or her personality.

In *Musidor BV* v *Tansing*, the Federal Court refused to entertain the possibility that the Rolling Stones could bring an action for trade mark infringement against Apple House Music.[56]

These decisions attracted the ire of the music industry.[57] In response to the decision, the Federal Government passed the *Copyright (World Trade Organization Amendments) Act* 1994 to close the loophole

---

54 Part XIA of the *Copyright Act* 1968 (Cth).

55 (1993) 27 IPR 640, 649.

56 (1994) 29 IPR 203.

57 Gruzauskas, D. 'Performers' Rights; The Right of Personality and the Possibility of a Proprietary Right', *Australian Intellectual Property Journal*, 1995, Vol. 6, p. 92; and Lawrence, R. and Welsh, K. 'Temptation and Exploitation: Apple House Music, The Copyright Loophole, and Legal Bootlegging', *Perfect Beat*, 1996, Vol. 2 (4), p. 43.

created by the requirement that a performer had to be an Australian citizen or resident. It also imposed a criminal penalty on record and CD manufacturers who set up a library of performances which were not previously protected by the performers' rights provisions. Furthermore, the Federal Government released a Discussion Paper called 'Performers' Intellectual Property Rights' about whether performers should receive comprehensive economic and moral rights in respect of sound recordings of their performances.[58] A review by Brad Sherman and Lionel Bentley questions whether such legislation should cover digital sampling.[59]

Media

In contrast to Negativland, Antediluvian Rocking Horse is rather more ambivalent about using the mass media as an alternative forum to the legal system. Susan King believes that publicity is a good method of dealing with cases of litigation:

> I would tell the world. Do not sue them. Tell the world. That is fine. If you have really been bitten, you are going to feel angry and the natural response is to be vitriolic if the opportunity presents itself. If the opportunity does not, your response may be a creative response which is especially directed at that person. Feel better about yourself and get on with it. As long as you are an artist and creative, you can still write another song.[60]

However, she has a number of reservations about the use of publicity. Antediluvian Rocking Horse prefers the anonymity and obscurity of

---

58 Attorney General's Department. *Performers' Intellectual Property Rights: Scope of Extended Rights for Performers under the Copyright Act* 1968. Canberra: Australian Government Printing Services, 1997.

59 Sherman, B. and Bently, L. *Performers' Rights: Options for Reform.* Canberra: Australian Government, October 1995.

60 Rimmer, M. 'Interview with Susan King', Melbourne, 29 December 1998.

being a Melbourne band to the cult of celebrity that surrounds the musical industry. They shun the stardom of pop icons and the lesser fame of cult figures. Antediluvian Rocking Horse is also averse to the agitprop of Negativland. They do not want to manufacture and perpetuate scandals. Antediluvian Rocking Horse is also concerned about the manipulation of public opinion. They do not want to encourage their fans to cause mischief and mayhem.

Antediluvian Rocking Horse has a relationship with Negativland, the American group of agent provocateurs. The Australian group samples the music of the American band and adopts its manifesto in its polemic 'Quiet Pillage: The Case for Free Noise'. This is an act of homage and criticism. Susan King sent the album off to Negativland with a note saying that they had sampled their work. Sympathetic to the music and the anti-copyright stance of the Australian DJs, Negativland released the album in America in 1997 through its label Seeland Records.

Susan King approached the Australian Copyright Council about getting a copyright activist to speak at one of their copyright symposiums. She subversively suggested that they might like to fund Mark Hosler, a member of Negativland, to come to Australia. Susan King liked the delicious irony of this arrangement. The Australian Copyright Council is an advocacy organisation, which has traditionally been aligned to copyright owners and collecting societies. It would be a subversive act if they would fund a radical troublemaker like Mark Hosler to come to Australia.

Susan King worked closely with a Melbourne publicist, Samantha Grapsis, to promote a tour of Australia by Mark Hosler in 1997. She did a brilliant job of promoting and publicising his visit to Melbourne. Mark Hosler visited Melbourne in order to promote and publicise a progressive view of copyright law. He collaborated with Antediluvian Rocking Horse

in its DJ sessions. He attended the Australian release of a film documentary about Negativland by Craig Baldwin about appropriation and culture jamming called *Sonic Outlaws*. He also made public statements in the media to promote the validity of appropriation.

Mark Hosler declined, though, to participate in the copyright symposium held by the Australia Copyright Council. He was happy to preach to the converted. He did not want to address an audience which included the Attorney-General, Daryl Williams, the head of Sony, and lawyers. Susan King was disappointed that Negativland did not want to engage in dialogue with copyright owners, advocacy organisations, and policymakers:

> It is the opportunity to speak to the public. They are not the enemy. They are peers. I started realising more differences between who we were as artists and who Negativland were as artists and what they wanted to be doing with their art. Their view of it was that it was 'us against them'. I think that whole way of thinking is detrimental to the whole issue. I was a bit disappointed at having discovered that. I see people who are interested in intellectual property and work within that field as peers in a certain way. So I thought that it was a good opportunity to address peers about some aspects that they may not have considered because simply no one had presented it to them before.[61]

The differences between the approaches of the two groups are pronounced: Negativland prefers a politics of opposition and confrontation, whereas Antediluvian Rocking Horse adopts an ethos of dialogue and compromise.

In the absence of Mark Hosler, Susan King stood up at the copyright symposium, and defended the practice of digital sampling. She

---

61 Ibid.

appropriated some of the polemic of Negativland in her manifesto 'Quiet Pillage: The Case for Free Noise'. Susan King told the audience: 'Copyright is a rather myopic, even juvenile idea. And as we evolve ... we will have moved past a point where even the concept of copyright makes sense'.[62] She believes that musicians should have a speaking position in relation to copyright law reform:

> But art is what artists do, and we can only hope for laws that recognise this. Just as the dictionary recognizes new words – even slang – that come into common usage. Until then, we are stuck with copyright laws which were designed solely by publishing interests and cultural manufacturers who maintain virtually unopposed lobbyists in Parliament to ensure that their present stranglehold on the reuse of culture will remain intact. These cultural representors claim to be upholding the interests of artists in the marketplace. And Parliament – with no exposure to an alternative point of view – always accommodates them.[63]

Susan King believed that the closed, insular community of policymakers, lawyers, and copyright owners needed to be exposed to the aesthetic practices of contemporary musicians. Her hope was to encourage copyright owners to foster a creative climate in which artists would be free to do whatever interests them.

After the speech, Susan King endured a harrowing question and answer session at the copyright symposium. She was well prepared for questions related to her interest in collage. One member of the audience queried the disk jockey about who she would react to McDonalds sampling one of her tracks for their advertisements. In response, she replied: 'I think that a lot of artists are just far too possessive of what they

---

62 King, S. 'Quiet Pillage: The Case for Free Noise', *Artlines: A Bulletin on Art and Law in the Digital Age*, 1997, Issue 2 (4), p. 1.

63 Ibid.

have done in some sense'.[64] Susan King found it difficult to deal with enquiries outside her field of expertise. She was asked questions about other matters – such as architectural plans – that had been raised at the copyright symposium. Susan King's intervention was a success in that she gained access to a forum of legislators, policymakers, and interest groups. Her address, though, did not result in any change in the copyright policy of the government, the record companies, or the advocacy groups. It would take an organised, concerted action to bring about tangible reform.

PART 3
TUBTHUMPING:
CHUMBAWAMBA

Chumbawamba is a collective of musicians from Leeds in Great Britain. It consists of the vocalists Lou Watts, Alice Nutter, Danbert Nobacon and Dunstan Bruce, the guitarist Boff Whalley, the bassist Neil Ferguson, the drummer and programmer Harry Hamer, and the horns player Jude Abbott. Chumbawamba is a group of popular anarchists who came together in Thatcherite Britain in the 1980s. It supported a number of causes – the miners' union and the Liverpool Dockers; the removal of the British monarchy; the anti-fascist movement; and programs for the homeless. Chumbawamba joined the independent label, One Little Indian, and released a series of albums, such as *Anarchy*, *Swinging with Raymond*, and *Showbusiness*. They mixed the media static of sampled sounds with vocal harmonies and a horns section. Chumbawamba signed

64 Rimmer, M. 'Interview with Susan King', Melbourne, 29 December 1998.

to the major record company EMI in 1997 and produced the popularly successful album *Tubthumper*. They have since released a single for the 1998 World Cup and the album *What You See Is What You Get*. The band is, as a result, more accessible to the public than a group such as Negativland.

Aesthetics

After working under its own label, Agit-Prop, and the independent record label, One Little Indian, Chumbawamba joined the major recording company, EMI, in 1997 to release the album *Tubthumper*. Alica Nutter explained that, after much agonised debate and discussion, the band decided that the best way to spread its message was to become influential:

> The main argument against politicos signing to majors is, that as a tactic for subverting the mainstream, it rarely works. Bands sign to majors and they disappear never to be heard of again. Bands and artists had exerted a massive influence on our lives ... To be truly influential you have to be popular; that was one of Chumbawamba's failings, we recognised the power of popular culture but we weren't actually popular. After 15 years of trying to push subversive ideas under the backdoor we decided to see what would happen if we barged through the front door and signed with a major.
>
> We have very little faith in capitalism, alternative or otherwise, so our main concern was to get a short term contract which guaranteed creative control, and which ensured we weren't ripped-off. The way the industry works is that if something doesn't sell the label drops you, so we thought we'd save the advance and use it to carry on when we were booted off the label.[65]

---

65 Practical Anarchy Online. 'An Interview with Alice Nutter', 1998, http://www.infoshop.org/PA/texts/chumba.html

Chumbawamba was prudent and circumspect in its dealings with the major record company EMI. It did not want to be subject to an oppressive, long-term contract like George Michael,[66] Elton John,[67] and Holly Johnson from the band Frankie Goes to Hollywood.[68] The band therefore negotiated a short-term contract, which provided protection for creative control.

Chumbawamba had to abridge its liner notes in the North American version of their album *Tubthumper*, because of a concern by American lawyers that they had no copyright clearances.[69] Alice Nutter observed:

> We decided to make our writing a better experience for us; we wanted to become more poetic. But we knew in order to explain what we were talking about we needed extensive sleeve notes. We spent months producing a highly political booklet that went with the album. It was all about a community of dissent from famous people to everyday people; from George Bernard Shaw and Simone de Beauvoir to people involved in anti-road struggles in Britain today. We worked really hard at explaining all of the ideas in the songs.
>
> But when it came time for the American release, the lawyers said this will take another seven months to get clearance on every quote in the booklet. We didn't record this for a major label. Universal took a finished album and it had been ready a year since we recorded it. So, we had to make a decision on whether to wait or not. We threw a bit of a fit and said, 'Why do you have to get clearance on Plato; he's been dead forever?'
>
> We didn't have the problem anywhere else. The album came out all over Europe and Asia with the sleeve notes. People there got the album we wanted; in

---

66 *Panayiotou* v *Sony Music Entertainment (UK) Ltd* (unreported, Chancery Division, 21 June 1994).

67 *Elton John* v *Richard Leon James* [1991] FSR 411.

68 *Zang Tumb Tuum Records* v *Holly Johnson* (unreported, Chancery Division, 10 February 1988); and *Zang Tumb Tuum Records* v *Holly Johnson* (unreported, Court Of Appeal, 26 July 1989).

> America they didn't. You don't have an idea immediately what the album is about and to me, that's frustrating. And for the rest of Chumbawamba it's frustrating because the last thing in the world we are is lap liberals; we're anarchists.[70]

The quotes, dialogue and explanations were taken out of the booklet because of probable libel action. It seemed that absolute clearance was required for every quotation. For instance, the reprint of part of a talk by Tony Blair was deemed unacceptable unless they had written agreement for the speaker to use the quote in this context. Chumbawamba found such legal exclusions to be pathetic. In response, the group left a message to check their web-site for the original text.

Chumbawamba has had difficulties releasing a compilation of their back catalogue, *Uneasy Listening*. The band cited licensing issues with the various independent record labels when the songs were released. Chumbawamba is trying to negotiate the release of the album *Uneasy Listening*, which is a compilation of punk, pop, and jazz from all their years together. The independent record company One Little Indian exercised an exclusive license over the albums *Anarchy, Swinging with Raymond* and *Showbusiness* for seven years. It was demanding exorbitant sums of money for the use of the musical works on the albums for the purposes of a compilation. The major record label EMI was unwilling to accept such charges because they would not be able to make a profit on the album. They were also concerned about the absence of a hit song on the compilation. Chumbawamba hopes to extract the album from this mess.

---

69 Chumbawamba. 'Frequently Asked Questions', July 2000, http://www.chumba.com/-faq.htm

70 Ibid.

Furthermore, Chumbawamba denied rumours that they withheld permission from musicians wanting to cover or sample their music. Boff declared: 'We've never threatened to sue any DIY kids or eat their babies or steal their old purple tins either'.[71] The story arose out of a group of people who had the idea to make an Anti-Chumbawamba EP. A representative of the bands was afraid of litigation and sought permission for a cover version of their work. Chumbawamba did not care about this critical use of their work. Boff observed: 'Obviously it would have been a much better story if Chumbawamba had taken some DIY kids (read: cynical middle-aged ex-punks) to court and pulped all their vinyl, but sadly for them that isn't so. It may be worth reiterating that despite Chumbawamba's signing to major companies, we completely and fully support the DIY community'.[72] Alice Nutter added: 'We've never ever tried to sue anybody and put a clause in our contract that the record company couldn't sue anybody without our consent'.[73] The group never wants to be in the position of U2 who argued that they had little control over Island Records' litigation against Negativland.

Legal Relations

Since the hit of *Tubthumper,* the British band Chumbawamba has experienced difficulties in relation to the management of the economic rights under copyright law. It has faced a greater risk of litigation because It has achieved commercial success and developed an international reputation.

---

71 Ibid.

72 Ibid.

73 Ibid.

Economic rights

The question arises: Why were the lawyers for Chumbawamba so paranoid about being sued for copyright infringement of literary works and musical works? The reason is that in the United Kingdom, copyright owners have argued that the sampling of musical works will amount to copyright infringement, even where only small parts of the song or lyrics are sampled.

In *Hyperion Records Ltd* v *Warner Music (UK) Ltd,* the plaintiff sought to redefine the notion of a musical work to its most diminutive meaning.[74] He argued that copyright was vested not only in the whole of the sound recording 'A Feather on the Breath of God' and the whole of the track 'O Euchari', but copyright also consisted of the seven or eight notes in the introduction of the 'O Euchari' track. Hugh Laddie QC, sitting as a deputy judge of the High Court, rejected this submission:

> If the copyright owner is entitled to redefine his copyright work so as to match the size of the alleged infringement, there will never be a requirement for substantiality. That does not mean that a recording of eight notes could not be a copyright sound recording: it is possible that it could. However, I do not accept that it is legitimate to arbitrarily cut out of a large work that portion which has been allegedly copied and then to call that the copyright work. I believe Jean Luc Goddard is reported as having said: 'Of course, a film should have a beginning, a middle and an end, but not necessarily in that order'. In my judgment, a copyright sound recording must have a beginning, middle and end.[75]

This decision provides guidance as to the nature of a musical work. However, Hugh Laddie found that it was arguable on the facts as to

---

74 (unreported, Chancery Division, 17 May 1991).

75 Id, p. 6.

whether seven or eight notes, lasting a mere four seconds, could be considered to be a substantial part of the plaintiff's sound recording.

In *Ludlow Music Inc.* v *Williams*, the copyright owners sought to redefine the test of substantial similarity, so that it would be satisfied with even a small sampling of a particle of a musical work.[76]

Robbie Williams and Guy Chambers co-wrote a composition entitled 'Jesus in a Camper Van'. They were concerned that a couple of lines of the number came from 'I Am the Way (New York Town)' by Loudon Wainwright III, which in turn was a parody of the Woody Guthrie song 'I Am The Way'. The Richmond organisation demanded 50 per cent of the copyright ownership of the Robbie Williams song, even though only a small part of the lyrics of 'Jesus in a Camper Van' was derived from the earlier work and there was no musical similarity between the works at all.

Sitting as a deputy judge, Nicholas Strauss QC provided summary judgment in favour of the copyright owner, Ludlow Music Inc. He found that the copying of one out of the four verses was substantial, even allowing for the fact that a line was derived from the original Woody Guthrie song. Nicholas Strauss QC denied that the case required a full trial. He dismissed the call for further examination whether Loudon Wainwright III was really the originator of the lines. Such a decision seems harsh given the small use of the lyrical works, the acknowledgment of the song-writer, and the onerous demands of the copyright owner.

The British band The Verve sampled an orchestration on their song 'Bittersweet Symphony' from The Rolling Stone's 'The Last Time'.[77]

---

76 (unreported, Chancery Division, 2 October 2000).

77 Carnachan, R. 'Sampling and the Music Industry: A Discussion of the Implications of Copyright Law', *Te Mata Koi: Auckland University Law Review*, 1999, Vol. 8 (4), p. 1033.

Before the release of the album, the band entered into a licensing agreement to use the sample by Decca, the company which owns the copyright in the actual recordings of 'The Last Time'. However, after the album was successful, the former manager for The Rolling Stones, Allen Klein, refused to license the underlying musical and literary works.

In a settlement, the Rolling Stones demanded one hundred per cent of the royalties and revenues received from the use of the track, 'Bittersweet Symphony'. The money would be divided between Mick Jagger and Keith Richards. The Rolling Stones received all the benefits from the song, including the use of the song in a Nike commercial. Alan Klein also used the song to hawk Vauxhall automobiles. To add even more insult to injury, when 'Bittersweet Symphony' was nominated for a Grammy this past year, Mick Jagger and Keith Richards were named the nominees and not The Verve.

Such cases have a number of interesting themes. First, the copyright owners are making mischievous claims about fundamental concepts of copyright law – such as the nature of the musical work, and the notion of substantial similarity.[78] By and large, these assertions went unchallenged. Second, the performers were granted no leniency for acts of good faith – like Robbie Williams providing acknowledgment to Loudon Wainwright III, or The Verve gaining clearance for a sound recording. This can be contrasted with the case of *Campbell* v *Acuff-Rose Music*, in which the court recognised that 2 Live Crew had made every effort to obtain clearance of the musical work.[79] Third, the copyright owners are engaging in rather egregious acts of economic rent-seeking.

---

78 Vaver, D. *Copyright Law*. Toronto: Irwin Law Inc., 2000, pp. 144-145.

79 *Campbell* v *Acuff-Rose Music, Inc.* (1994) 127 L Ed 500.

They are staking large claims in commercially successful musical works, even though their own contribution was minimal.

Moral rights

Chumbawamba also raises questions of moral rights through the practice of sampling musical works, often to make a political or satirical point.

In *Morrison Leahy Music Limited* v *Lightbond Limited,* George Michael and Morrison Leahy Music Limited sought an injunction against Lightbond Limited from releasing samples of his work on the hits album *Bad Boys Megamix.*[80] The plaintiffs argued that Lightbond Limited should be denied a compulsory licence on the grounds that it subjected the work of George Michael to derogatory treatment.

Justice Morrit examined whether the sampling of parts of the music altered the character of the work. He weighed evidence from the plaintiffs that the sampling had completely altered the character of the original compositions against evidence from the defendants in the form of letters of recommendation from disc jockeys who argued that the authenticity of the originals was faithfully preserved, even though only snatches had been taken from them. Justice Morrit also considered whether the lyrics had been modified by being taken from their context and put into a different context. There were three instances where the words 'bad boys' had been transposed onto the lyrics.

Justice Morrit was quite willing to entertain the possibility that the remix of the work of George Michael amounted to derogatory treatment. He granted an injunction until there could be a trial. The result is quite different from the outcome in the Australian successor, *Schott Musik*

---

80 (unreported, Chancery Division, 21 March 1991).

International GBH & Co And Others v *Colossal Records Of Australia Pty Ltd And Others*.[81]

Performers' rights

Chumbawamba has responded to questions about the unauthorised distribution of their musical work. The group has sought to draw a distinction between bootlegging and MP3s:

> Bootlegging and MP3 are two different genres. In bootlegging someone is usually trying to make a quick buck from releasing a crap quality live recording or some dodgy studio out-takes, whereas MP3 is more about people downloading music free of charge. We'd be much less likely to object to MP3 than to a bootlegger because selling records without our permission is vastly different to people having access to our stuff for free. Having said that, our record companies and publishers probably take a different view as they don't make any dosh out of MP3. Well, not yet anyway.[82]

The distinction between bootlegging and MP3 format music along purely commercial grounds does not entirely hold up. For instance, some file-sharing companies may be run for profit, just as much as any bootlegger. Furthermore, the sound quality of MP3 music may be just as bad for the integrity of a musical work as a bootlegged song. The situation is more complicated than the members of Chumbawamba are willing to credit.

Although generally intolerant of bootlegging, Chumbawamba was grateful that an unofficial album called *Jesus H Christ* – an early forerunner to *Shhh* – was bootlegged. One of the members observed: 'We were pleasantly surprised when this happened as for us to put out that

---

81 (1997) 38 IPR 1.

82 Chumbawamba. 'Frequently Asked Questions', July 2000, http://www.chumba.com/-faq.htm

album would have been fraught with difficulties and legal problems'.[83] The problem with the album *Jesus H. Christ* was that publishers refused to permit the group to cover and sample songs by Kylie Minogue, Paul McCartney and Abba.

Media

Some of the fans of Chumbawamba were sceptical that the group had maintained its integrity and purity after it signed to EMI and became a popular success. Susan King is impressed that the group remained true to their commitment to anarchist politics after the success of their album, *Tubthumper*. She points out that the punk band used the money from commercial licences for advertisements for charity and political organisations:

> Basically, they wrote one shit-hot song in 'Tubthumping'. It is very catchy. They have been doing punk music for fifteen to twenty years. That is a long, long time. They are sworn anarchists and have very definite political ideas. They are an inspiration, definitely. Having been so successful with this one track, they have been able to do some really good things that need attention. They could have so easily said, 'Finally we have got some of the cream. All right!' But they have actually gone out there, and used the money from commercial licenses for advertisements for charity. They are just an ethically sound group of people.[84]

By contrast, Susan King is critical of the group Deep Forest for failing to use the money that it earned to help the Indigenous people featured upon its album. The DJ articulates an ethical credo in relation to the commercial use of sampling. She believes that there is a social duty and a responsibility to use wealth and money for socially good ends to counter

---

83 Ibid.

84 Rimmer, M. 'Interview with Susan King', Melbourne, 29 December 1998.

the evil done with it. Thus distinctions can still be drawn between ethical and unethical sampling.

Chumbawamba has a broad political platform. It supports a number of causes – including the reform of copyright law. Chumbawamba and Negativland have been long time fans of each others' work and in the past each group has sampled from the other without asking permission. With anarchists Chumbawamba leaping into the corporate music world and becoming highly visible in the wake of their international hit single 'Tubthumping' selling over 4 million copies, the two groups decided to collaborate on an EP album together. Working together via face-to-face meetings, and every long distance method known to the world's postal and computer services, they produced *The ABCs of Anarchism* EP.

Chumbawamba and Negativland sampled a wide range of sources in making *The ABCs of Anarchism*. The liner notes lists a number of sources used in making the recording, ranging from activists like Doris Lessing and Noam Chomsky to television and radio noise, pop music like the Spice Girls, punk samples from the Sex Pistols, and children's television such as the 'Teletubbies', and the 'Cookie Monster'. The first track of this collaborative EP is the 13 minute long *The ABCs of Anarchism* – an informative and confused investigation of an often misunderstood political point of view. The second track, 'Smelly Water', is a tuneful five minutes about the effects of contaminates on our drinking water supply with Chumbawamba providing the melodies and Negativland doing their cut-up collage thing. The third track '© Is or Stupid' is an attack upon copyright law. The design of the CD displays the Teletubbies with monetary and political signs on their head – such as the dollar, the pound

note, the copyright symbol, and the anarchist sign. It also features a children's fable about copyright litigation, and activism.

Since touring the United States on the wave of success of *Tubthumper*, Chumbawamba has developed an intense dislike of American popular culture. Its new album *What You See Is What You Get* is a poison pen letter to the land of the free. It finds little to recommend about the United States. Although happy with the new album, Chumbawamba has encountered difficulties in getting exposure for the sound recording because of the lack of a radio friendly song, such as 'Tubthumping'. The record company EMI rejected the song, 'She's Got all the Friends that Money Can Buy', as a suitable single. It suggested that the band instead record a version of, 'Pass It Along', in which the band answers in the chorus the Microsoft ad 'Where Do You Want To Go Today' with 'Somewhere You Can Never Take Me'.

Chumbawamba is interested in the digital distribution of its musical works through MP3 technology. It has run into opposition, though, from its record labels. Chumbawamba comments that major record companies such as EMI and Universal are hostile to the digital distribution of its musical works: 'When *What You See Is What You Get* was first released, EMI slapped a "copying is killing music" logo on it without discussing it with the band first; when we contacted the label and explained we didn't believe or agree with the sentiment the label agreed to remove it from subsequent pressings'.[85] They believe that the independent record label One Little Indian would be just as reluctant to put its back catalogue – such as *Anarchy, Swinging with Raymond,* and *Showbusiness* – up on a web-site. Chumbawamba found, though, that its

---

85 Chumbawamba. 'Frequently Asked Questions', July 2000, http://www.chumba.com/-faq.htm

fans put up its album on the internet. They were untroubled by the development of its fans downloading music. Chumbawamba was surprised to hear that Metallica were suing fans for downloading their album from the internet. They believed that the heavy metal band could afford to let a few of its cybernauts get hold of the album for nothing.

Chumbawamba has belatedly entered into the debate over file sharing programs such as Napster, Freenet and Gnutella. The Leeds anarchists have produced a remix of the song, 'Pass It Along', which samples opponents of file sharing, such as Metallica, Eminem, Dr Dre, The Beatles, and Madonna. Denying the assertion that file sharing is killing music, Chumbawamba vocalist Dunstan Bruce said: 'What? Killing music the way that home taping killed music in the seventies? It's not passing music around for free which is killing music, but the industry which is stifling creativity by only ever thinking in terms of dollars and pounds'.[86] The song is a critique of the recording artists and musicians who claim MP3 songs downgrade the artistic integrity of musical works. It could be read as an act of protest against the record company EMI for frustrating the release of its album, *What You See Is What You Get*. The intervention in the debate over file sharing could be an effort to promote copyright law reform.

---

86 Ibid.

CONCLUSION

The technology of digital sampling has given rise to a number of 'cultures of copying'.[87] Negativland are political anarchists who use litigation to highlight the deficiencies of copyright law. This is a high-risk strategy. Negativland risks being destroyed in litigation through its direct opposition to the recording industry. By contrast, Antediluvian Rocking Horse are dadaists who seek to avoid litigation over copyright infringement. They attempt to engage in a dialogue with the establishment in order to influence copyright law reform. Chumbawamba are populists who seek to convey a political message to a mass audience. They seek to overcome legal difficulties through contractual terms. The groups understand the importance of collaboration, networking, and alliances. They have made an informal coalition in an effort to counter the global influence and sway of recording companies, music publishers, and collecting societies.

There seems to be a change underway in the jurisprudence regarding copyright law and digital sampling. This shift may be a response to the change in the technological base of the music industry.[88] The first response of the legal system was one of resistance to digital sampling. The general principles of copyright law were interpreted in a strict and narrow fashion in the context of musical works to outlaw the practice of digital sampling. This reached its height in the Negativland litigation. The second approach has allowed a certain degree of accommodation of digital sampling within the logic of copyright law.

---

87 Bently, L. and Sherman, B. 'Cultures of Copying: Digital Sampling and Copyright Law', *Entertainment Law Review*, 1992, Vol. 3 (5), p. 158.

88 Kretschmer, M., Klimis, G. and Wallis, R. 'The Changing Location of Intellectual Property Rights in Music: A Study of Music Publishers, Collecting Societies and Media Conglomerates', *Prometheus*, 1999, Vol. 17 (2), p. 163.

This is evident in a number of decisions – the expansion of fair use by the Supreme Court of the United States in *Campbell* v *Acuff-Rose Music, Inc.*,[89] and the narrow reading of debasement by the Federal Court in *Schott Musik* v *Colossal Records*.[90] A third, emerging attitude is that digital sampling should be accepted under copyright law, because it is impossible to regulate such a technology. This approach is embraced by groups such as Negativland, Antediluvian Rocking Horse, and Chumbawamba.

The concerns and anxieties about digital sampling have been displaced onto emerging technologies, such as file-sharing programs. Susan King entertains complex views about the electronic distribution of musical works on the internet:

> There is a lot of excitement at the moment about it being the death-knell of major record companies. If everyone who has access to downloading MP3s onto a player, there is not going to be any need for these big record companies and that they will be all dismantled. I don't think that it is going to happen that way.[91]

Susan King is positive that the distribution of MP3s on the internet will bring about a new genre and aesthetics in relation to free music. However, she fears that the new technologies will undermine the integrity of the albums produced by musicians because they will no longer have any control over the track order and the first single. Such issues will be explored in Chapter Six on digital works in relation to file sharing and other new technologies.

---

89 *Campbell* v *Acuff-Rose Music, Inc.* (1994) 127 L Ed 500.

90 *Schott Musik International GBH & Co and Others* v *Colossal Records Of Australia Pty Ltd And Others* (1996) 36 IPR 267.

91 Rimmer, M. 'Interview with Susan King', Melbourne, 29 December 1998.

Antediluvian Rocking Horse does not engage in the sampling of the music of Indigenous peoples. They are still working out what they think about the practice of the appropriation of Indigenous art, culture and heritage. Tentatively, Susan King believed that collaboration between the Western musicians and Indigenous people was tolerable, as long as there was an artistic and financial equity: 'I fully condone or endorse interactions between the West and other cultures, as long as people are not basically ripped off'.[92] She was concerned that some musicians, such as Deep Forest, took from other cultures without giving anything back. However, Susan King was unsure whether there needed to be special protection under copyright law in relation to the art, culture and heritage of Indigenous people. She felt that she would be in a better position to make up her mind after talking to Indigenous people about their feelings on the matter. Such issues will be addressed in the final chapter on Indigenous culture and heritage in the context of a case study in relation to Bangarra Dance Theatre.

---

92 Ibid.

CHAPTER FOUR
HERETIC: COPYRIGHT LAW AND DRAMATIC WORKS

The dispute between the playwright David Williamson and the director Wayne Harrison over the production of the play *Heretic* was played out in the theatre community, the legal system, and the media. It articulated a number of anxieties about the nature of authorship, collaboration, and appropriation.

David Williamson and Wayne Harrison decided to collaborate upon a play about the intellectual dispute between the Australian academic Derek Freeman and Margaret Mead, the author of *On The Coming Of Age In Samoa.*[1] The production, though, was fraught with difficulties. The script required major revision. The design needed to be transformed to accommodate these changes. The lighting director was replaced. Simon Chilvers, the actor playing Derek Freeman, succumbed to illness and had to be replaced by Robyn Ramsay. Liz Alexander, the actress playing Margaret Mead, was devastated by criticism of her performance in the previews. There were also sensitive and delicate negotiations over the proper representation of the central, real-life characters, Derek and Monica Freeman.

David Williamson complained that the production by Wayne Harrison and his collaborators took liberties with the script. He was bitter that the character of Margaret Mead was transformed into public icons of

---

1 Mead, M. *Coming of Age in Samoa.* New York: American Museum of Natural History, 1928, republished 1973; Freeman, D. *Margaret Mead and Samoa: The Unmaking of an Anthropological Myth.* Cambridge, Mass.: Harvard University Press, 1983; and Di Leonardo, M. *Exotics at Home: Anthropologies, Others, American Modernity.* Chicago: The University of Chicago Press, 1998.

the 1960s, such as Marilyn Monroe, Barbara Streisand and Jackie Kennedy. He considered that the addition of words to the text - such as 'Happy Birthday, Mr President' - without his authorisation was a breach of the ethical norms and standards that governed the theatre.

For his part, Wayne Harrison was distressed that his authority as the director of the play had been compromised. He thought that the interference of playwright in the direction of the cast was a breach of the protocols and conventions of the theatre. The conflict over the production of *Heretic* spilled into other spheres because it could not be contained by the ethical standards and norms of the community.

David Williamson was responsible for shifting the dispute over *Heretic* out of the theatre world and into the legal system. The playwright instructed his agent, Tony Williams, to seek an injunction against the Sydney Theatre Company for the breach of his contract, which stated only lines that he had written or approved could be used.[2] The agent retained David Catterns, a Queen's Counsel specialising in intellectual property.[3] This flamboyant barrister has appeared as counsel in a number of significant copyright cases during the 1990s.[4] The retention of David Catterns was intended to send a symbolic message that the playwright was serious enough about the dispute to resolve it in the courts. The Queen's Counsel served as a phantom menace in the controversy. David Williamson informed the Sydney Theatre Company of the pending legal

---

2 Kiernan, B. 'Whose Play is it Anyway?', *The Sydney Morning Herald*, 6 July 1996, pp. 33-37.

3 Kiernan, B. *David Williamson: A Writer's Career*. Sydney: Currency Press, Revised Edition, 1996, p. 306.

4 Cases in which the barrister has appeared include *Yumbulul* v *Reserve Bank Of Australia* (1991) IPR 481; *Clune* v *Collins Angus And Robertson* ('the Whiteley case') (1992) 25 IPR 246; *Telstra Corporation Ltd* v *APRA* (1997) 146 ALR 649; *Galaxy Electronics Pty Ltd* v *Sega Enterprises Ltd* (1997) 37 IPR 462; *Schott Musik International GMBH & Co* v *Colossal Records Of Australia Pty Ltd* (1997) 38 IPR 1; and *Phonographic Performance Company Of Australia Limited* v *Federation Of Australian Commercial Television Station* (1998) 40 IPR 225.

proceedings. The general manager, Robert Love, obtained legal advice from the law firm Phillips Fox. He discovered that David Catterns was representing the playwright after he belatedly tried to engage his services for the Sydney Theatre Company in the dispute over *Heretic*. The general manager, Robert Love, told the artistic director, Wayne Harrison: 'David Williamson is totally serious about this. You have to decide what you are going to do - call his bluff or make the changes'.[5] It is worth investigating whether this threat of legal action was well-founded.

The media played a key part in shifting the dispute over *Heretic* out of the private realm of the theatre and the law into the public realm of news. As the biographer of David Williamson, Brian Kiernan, comments: 'While the *Australian* provoked it with misleading headlines, the *Herald* would be keen to keep it going'.[6] The media sought to exercise its authority over interpreting the debate by bringing the conflict into its jurisdiction and doing everything possible to keep it within that field. *The Australian* broke the news of the threatened injunction with a front-page article.[7] It quoted David Williamson as saying that the total production was 'not an interpretation but a distortion'. The media then encouraged the playwright and the director to engage in argument and counter-argument over the interpretation of the production of *Heretic*. The arts reporter Angela Bennie reported the response of Wayne Harrison to the criticisms of David Williamson in *The Sydney Morning Herald*. After the parties tried to withdraw from the public arena, she published an article which conveyed Wayne Harrison's point of view through extensive

---

5 Bennie, A. 'Fighting White Males', *The Sydney Morning Herald*, 6 April 1996, p. 21.

6 Kiernan, B. *David Williamson: A Writer's Career*. Sydney: Currency Press, Revised Edition, 1996, p. 311.

7 Westwood, M. 'Playwright Damns Heretic Production', *The Weekend Australian*, 30-31 March 1996, p. 1.

quotation from an interview earlier in the week. In response, David Williamson demanded a right of reply. The ongoing dispute over *Heretic* was subject to comment and criticism by the community of theatre critics, reporters, and editors.[8]

This paper considers the dispute over authorship and collaboration against the background of historical research into copyright law and dramatic works. In *The Genius of Shakespeare*, Jonathan Bates establishes the collaborative nature of William Shakespeare's genius.[9] He argues that his art was dependent not only on inherited literary materials, but also upon his place as one of many people within the theatrical profession. In an article on the work of Beaumount and Fletcher, Jeffrey Masten concurs that theatrical production in this period was a sustained collaboration.[10] It was a joint accomplishment of dramatists, actors, musicians, costumiers, prompters, and stage managers. In *Brecht and Company*, John Fuegi questions whether Bertolt Brecht engaged in plagiarism of copyright works.[11] He also explores the charges that the playwright assumed the credit for the work of his collaborators. Similarly, in *Brecht and Critical Theory*, Steve Giles details the law suit surrounding the film adaptation of *The Threepenny Opera*.[12] In *Damned to Fame*, James Knowlson considers the

---

8 McCallum, J. 'Liveliness Burned at the Stage', *The Australian*, 1 April 1996, p. 3; Lawson, V. 'Freeman Casts Heretic Critic as 'Fit for Flaying'', *The Sydney Morning Herald*, 5 April 1996, p. 13; Bennie, A. 'Writers Talk Up a Crisis', *The Sydney Morning Herald*, 8 October 1996, p. 11; and Editorial Opinion. 'Heretic and Players', *The Sydney Morning Herald*, 10 April 1996, p. 12.

9 Bates, J. *The Genius of Shakespeare*. London: Macmillan Publishers Ltd, 1997.

10 Masten, J. 'Beaumont and/or Fletcher: Collaboration and the Interpretation of Renaissance Drama', *Cardozo Arts and Entertainment Law Journal*, 1992, Vol. 10, p. 625.

11 Fuegi, J. *Brecht and Company: Sex, Politics, and the Making of the Modern Drama*. New York: Grove Press, 1994.

12 Giles, S. *Bertolt Brecht and Critical Theory: Marxism, Modernity and the Threepenny Lawsuit*. Bern: Peter Lang, 1997.

efforts of Samuel Beckett to control the productions of his work.[13] He notes that the playwright took legal action to prevent *Waiting for Godot* from being performed with the two lead roles played by women instead of men.[14] Recently, the British director Sir Peter Hall raised the ire of John Barton after he cut his fourteen hour epic about the Trojan wars in half, so that it could be performed in a day.[15] The dispute over *Heretic* seems a contemporary manifestation of an ongoing conflict over theatrical collaboration.

This paper investigates the claims of the various collaborators involved in the dispute over *Heretic*. Part 1 examines the arguments of the playwright David Williamson that his economic and moral rights in the dramatic work were violated by the production of *Heretic*. Part 2 considers the call of Wayne Harrison for greater recognition of the roles of the director and the dramaturg. Such claims are considered in the context of legal debate about the meaning of joint authorship. Part 3 focuses upon the question of whether the originating producer should retain rights in respect of a dramatic work. Part 4 reflects upon whether performers should enjoy comprehensive economic and moral rights in respect of their performances. Part 5 relates the point of view of the designer John Senzcuk. The Conclusion examines the ramifications of the dispute over *Heretic* in relation to copyright law and the performing arts.

---

13 Knowlson, J. *Damned to Fame: The Life of Samuel Beckett*. London: Bloomsbury, 1996, pp. 691-696.

14 Loughlan, P. 'Moral Rights (A View from The Town Square)', *Media and Arts Law Review*, 2000, Vol. 5 (1), p. 1 at p. 5.

15 Brooks, R. 'Two-Day Stage Epic Ends Hall's Beautiful Friendship', *The London Times*, 20 January 2001.

PART 1
FIGHTING WHITE MALES:
THE PLAYWRIGHT

David Williamson has built a reputation as a leading playwright in Australia. His early plays were first produced at alternative theatre venues - *The Coming of the Stork* at La Mama in 1970, *The Removalists* at La Mama in 1971, and *Don's Party* at the Australian Performing Group in 1971. David Williamson became an established playwright in Sydney in the 1980s and 1990s. His most acclaimed work included *The Perfectionist, Emerald City,* and *Money and Friends.* David Williamson has become to some extent a brand name. People come to see his plays, because of his authorship. Brian Kiernan argues that David Williamson has a special status and significance:

> Williamson still remained 'the hottest playwright in the country' for the media, but often with the insinuation (usually attributed to unspecified others) that this might not last, that he might already have passed his use-by date. Other playwrights, especially the prolific Louis Nowra had just enjoyed a string of critical successes, attracted no such attention. They, and writers generally, were perceived as just that - writers. But Williamson, perceived as a latterday, antipodean George Bernard Shaw, was readily cast into other roles: a spokesman for political causes, a commentator on social and cultural issues, an irresistible subject for society columnists and photographers, a target for cartoonists and the anonymous compilers of gossipy paragraphs.[16]

David Williamson became involved in the literary debates over William Shakespeare in the 1990s. His play *Dead White Males* represented a

---

16 Kiernan, B. *David Williamson: A Writer's Career.* Sydney: Currency Press, Revised Edition, 1996, p. 262.

Romantic defence of the Bard against the scepticism of post-modern literary critics.[17] David Williamson has also worked as a screenwriter. He has written a number of film scripts, including *Stork, Gallipoli, Phar Lap, Eliza Fraser* and *Travelling North.* He also wrote the television series, *Dog's Head Bay,* with Kristin Williamson. David Williamson has been the president of the Australian Writers' Guild. He played an active part in the campaign of the organisation to gain recognition for screenwriters as authors of films.

David Williamson casts the debate over the interpretation of *Heretic* in terms of romantic authorship and individual possession. He maintains that the authority of the writer and the validity of the written text that they produce are paramount. David Williamson thinks that it is his prerogative to stamp his personal interpretation over his work. For instance, he lectured the cast of *Dead White Males* and *Heretic* about the correct meaning of the texts.[18] McKenzie Wark comments that the playwright is anxious to preserve his interpretative authority:

> Williamson, like many professional writers, is hostile to the view that the reader makes the meaning of the text. According to Brian Kiernan's biography, when Williamson attended the reading of the script with the actors for the Sydney Theatre Company production, directed by Wayne Harrison, he brought with him 'a dozen very closely-typed pages on the background to the ideological issues of the play', and lectured the cast on the right line before the reading began ... A few things stick out as odd about this scene. If the writer constructs the meaning of the text, why do the cast need to be lectured? Surely the meaning of the play is clear, in and of itself. It doesn't seem as if the cast are to have any interpretative role in relation to the text, as far as Williamson is concerned.[19]

---

17 Williamson, D. *Dead White Males.* Sydney: Currency Press, 1995.

18 Wark, M. *The Virtual Republic: Australia's Cultural Wars of the '90s.* Sydney: Allen and Unwin, 1998, p. 200.

19 Ibid.

The author is represented in romantic terms as the individual, expressive origin of the play. The relationship of the author to the play is seen as direct and personal, and thus sacrosanct and inviolable. It is assumed that the written play takes priority and precedence over the production of the play. As Jonathan Bates observes: 'The Romantic idea of authorship locates the essence of genius in *the scene of writing*'.[20] It seems that the role of the performers and the director is to bring about the realisation of the written text. However, the romantic faith in the authority of the writer and the validity of the text has come under attack from other aesthetic movements.

At the National Playwrights Conference, the young playwright Alana Valentine put some of David Williamson's and Stephen Sewell's concerns into a more sensible perspective:

> As writers we must take on board the world we live in today. And that world is a world which questions how texts have and create multiple meanings. We must take on board this postmodernist world we live in. So when they say the author is dead, it only means the author in this context is not thought of as a single authority. That's all. The writer is a valid part of the creative process.[21]

Even David Williamson has been given cause to reconsider has prejudice against post-modernism. In regard to Wayne Harrison's version of *Heretic*, he was willing to contemplate that he was wrong: 'I might be a

---

20 Bate, J. *The Genius of Shakespeare*. London: Macmillan Publishers Ltd, 1997, p. 82.

21 Bennie, A. 'Writers Talk Up a Crisis', *The Sydney Morning Herald*, 8 October 1996, p. 11.

stone-age dinosaur who hasn't caught up with post-modernism. He could have taken theatre into a new age'.[22]

Economic Rights

An editorial stated that the dispute over Heretic raised an important question for public debate: 'What rights do writers have regarding their texts?'.[23]

As the author of the literary and dramatic work, *Heretic*, David Williamson enjoys a number of economic rights under the *Copyright Act* 1968 (Cth). He holds the right to reproduce the work in material form, and the rights to communicate that work to the public.[24] David Williamson can exploit the work, *Heretic*, through assignment of ownership and licensing. He can also bring legal action in respect of any infringement of his bundle of economic rights. Effectively the *Copyright Act* 1968 (Cth) rewards the playwright for producing original creative work in a tangible and material form. However, it fails to acknowledge the labour of any other collaborators in the theatre.

The economic rights of the playwright may be modified or supplemented by private arrangements. Individual contracts negotiated by creative artists can secure rights and privileges in advance of those provided by copyright law. Local practice can outstrip copyright law reform. Wayne Harrison comments:

> At present, the theatre company signs a contract with the playwright guaranteeing that everything created in the rehearsal room becomes the property

---

22 Stephens, T. 'Williamson Agrees to Disagree over Heretical Treatment of his Play', *The Sydney Morning Herald*, 30 March 1996, p. 7.

23 Editorial. 'Heretic and Players', *The Sydney Morning Herald*, 10 April 1996.

24 S 31 (1)(a) of the *Copyright Act* 1968 (Cth).

> of the playwright. This is despite the fact that the theatre company has no right to assign the creative rights of the actors in its employ. In the *Heretic* example this contractual arrangement became most ironic. For while David Williamson was prepared to criticise elements of the production in public he was busy including those same elements in the published version of the text.[25]

The case of David Williamson is illuminating. His contract provided that no textual alterations to the play could be made without the permission of the author. This clause is in effect a miniature version of the moral right of integrity. However, the clause is much more specific and focused in the sense that it is restricted to textual alterations, and does not deal with other forms of derogatory treatment. It is debatable that the changes to the script would have breached the clause in the contract that no textual alterations could be made without the permission of the author.

The Sydney Theatre Company could mount the argument that David Williamson consented to the alterations. Wayne Harrison maintained: 'But it isn't true that I created these personae without David's permission'.[26] He asserted that there are a number of facts which would support this interpretation of events.[27] First, Wayne Harrison argued that David Williamson was included in the design process before *Heretic* went into rehearsal. He observed that the playwright had the power to approve or veto any ideas for the production. Second, Wayne Harrison reflects that David Williamson went on holidays and gave him permission to workshop the play and take the initiative in solving problems encountered by the cast and uncovered in the text. He

---

25 Rimmer, M. 'Correspondence from Wayne Harrison', London, 24 February 1999.

26 Bennie, A. 'Question of Belief as Writer, Director Split over Heretic', *The Sydney Morning Herald*, 2 April 1996, p. 3.

27 Harrison, W. 'From the Director', *The Sydney Morning Herald, The Good Weekend*, Saturday, 27 July 1996, p. 8.

communicated any changes to the play by telephone and fax. Third, David Williamson saw a complete run through of the play in the rehearsal room on three occasions. He also praised the efforts of the director and the cast in public. It is debatable whether such facts, if accepted in a court, could establish explicit or implicit approval for the changes. In any case, Wayne Harrison also argued that he could not change the nature of the production for various reasons, because 'you reach a point of no return in a production week where you can't unravel major elements of a production without doing enormous damage to what you are trying to do'.[28]

In the end, David Williamson decided not to seek an injunction restraining the Sydney Theatre Company from putting on a production of *Heretic*: 'I was trying to exercise my rights as a writer. But in the face of such a negative reaction, all I could do was retreat'.[29] He argues that he was powerless to change anything substantial once he had retreated from the threat of legal action against the company:

> The picture of me as omnipotent and able to order directors such as Wayne [Harrison] around at will, is in fact far from the truth. Writers in theatre and film, even if they have impressive track records, are far less powerful than is often assumed. The critic John McCallum made an important point when he queried how lesser known and starting playwrights could ever make their voices heard, given the nature of this power imbalance.[30]

---

28 Bennie, A. 'Question of Belief as Writer, Director Split over Heretic', *The Sydney Morning Herald*, 2 April 1996, p. 3.

29 Williamson, D. 'Some Like It Hot... But I Don't', *The Sydney Morning Herald*, 9 April, 1996, p. 13.

30 Ibid.

The claim of David Williamson that writers are powerless without the capacity to assert legal rights is misleading in a couple of respects. The playwright is in a strong bargaining position because of the dependency of the theatre upon his work to generate box office revenue. He is also in a strong legal position because of the contractual provisions. So it seems a rhetorical pose for the playwright to represent himself as a weak and vulnerable victim in order to elicit the sympathy of the public.

Wayne Harrison comments that the dispute over *Heretic* prompted the Sydney Theatre Company to reconsider its contractual arrangements over copyright:

> What *Heretic* has done is force the Sydney Theatre Company to revise all its contracts, to determine what exactly are our legal rights, our legal obligations, something that has not been attended to in any detail over the last decade and a half.[31]

If a flagship company like the Sydney Theatre Company has been so lax, it is likely that many other companies have not given the subject much thought. There needs to be a greater consciousness of copyright law in the field of the performing arts.

Moral Rights

In his biography of David Williamson, Brian Kiernan comments: 'The larger issue (still to be legislated on) is that of author's moral rights, central to which is their right to protect their reputation by being able to ensure not only that their work is attributed to them but also that the

---

31 Cochrane, P. 'Wayne's Expanding World', *The Sydney Morning Herald*, 8 May 1996, p. 18.

work so attributed is theirs in its entirety'.[32] It is worth considering whether the production of *Heretic* would have amounted to an infringement of moral rights of David Williamson, because it would have harmed his honour and reputation as the author of the work.

At the time of the crisis, there was no law expressly requiring recognition of attribution of authorship, or preservation of the integrity of a work. Aggrieved artists had to rely upon an eclectic range of law - such as contract law, passing off, the *Trade Practices Act* 1974 (Cth), and defamation.[33]

The Federal Government has sought to remedy this situation with the introduction of a new scheme of moral rights, the *Copyright Amendment (Moral Rights) Act* 2000 (Cth). In the process of law reform, there does not seem to have been a lot of thought given to the relationship between moral rights and dramatic works. The *Discussion Paper on the Proposed Moral Rights Legislation For Copyright Creators* does not mention any examples of reported moral rights abuses in the context of theatre, dance or performance. The legislative debate over the introduction of moral rights was focused upon the film industry. The reason why this collective field of endeavour attracted so much attention was because of

---

32 Kiernan, B. 'Whose Play Is It Anyway?', *The Sydney Morning Herald*, 6 July 1996, p. 33-37.

33 David Williamson threatened to bring a defamation action against Bob Ellis who claimed that the playwright had plagiarised a line from rival Alex Buzo, in his film, *Gallipoli*. He also denied claims by Bob Ellis that the script for his play *The Removalists* was based on some improvised work by a collective of actors. However, the playwright did not initiate legal action in the end. He was mindful of the advice of Katharine Brisbane and Dr Philip Parsons that defamation proceedings could only result in a pyrrhic victory as in *O'Shaughnessy* v *Mirror Newspapers Ltd* (1970) 125 CLR 166: Kiernan, B. *David Williamson: A Writer's Career*. Sydney: Currency Press, Revised Edition, 1996, p. 215; Hill, K. 'Exit Playwright, Stage Left, Enter Alarms and Incursions', *The Sydney Morning Herald*, 27 April 1998, p. 3; Fray, P. and Nicholas, G. 'Openings', *The Sydney Morning Herald*, 28 April 1998, p. 24; and Hallett, B. 'Now the Carlton Crucible Circus Is Over, On With The Play', *The Sydney Morning Herald*, 29 April 1998, p. 5.

the large capital investment that goes into such work. By contrast, the performing arts companies rely upon subsidies for their survival and existence. However, the Federal Government has belatedly started to consider the implications of moral rights for dramatic works. It funded *The Performing Arts and Multimedia Pilot*, which considered questions of moral rights in the performing arts.[34]

David Williamson had no reason to complain about attribution or false attribution in relation to the production of *Heretic*. He received due credit for his authorship from the Sydney Theatre Company. However, David Williamson could argue that the production directed by Wayne Harrison harmed the integrity of the play, *Heretic*, to the detriment of his reputation. In an article, the playwright recalled:

> I gave both Wayne [Harrison] and Liz [Alexander] a firm but polite opinion that, after sitting in the audience, I was sure the impersonations were damaging the integrity and likeability of the Mead character, and that I would prefer that Mead be simply Mead, and that the extraneous lines I had written such as 'Happy birthday, Mr President' go.[35]

David Williamson was criticised for a lack of intellectual rigour in *Dead White Males* on the grounds that he reduced his antagonists to mere caricatures. He was concerned that his reputation would be harmed if the production of *Heretic* were crude and glib in its representation of Margaret Mead. However, it is arguable whether the distortion of one character amounts to derogatory treatment of the whole play.

---

34 Performing Arts Multimedia Library. *From Live Performance to the Digital Stage.* Melbourne: Cinemedia, August 1999, http://www.cinemedia.net/PAML.

35 Williamson, D. 'Some Like It Hot... But I Don't', *The Sydney Morning Herald*, 9 April 1996.

Wayne Harrison disputes the presumption that the playwright is the only one who can exercise moral rights. He contends that it is a dangerous act to give moral rights to just one collaborator in a collaborative art form such as theatre. It has the potential to disadvantage other collaborators. Wayne Harrison comments:

> Moreover, assertions like: 'The right to preserve the integrity of the work against derogatory treatment' are too subjective in the use of the words integrity and derogatory and exacerbate the 'problem' by assuming the primacy of the playwright. The only way a playwright can really ensure the 'integrity' of what is written is by reading/performing the text him/herself. The minute you seek collaborators you enter the territory of interpretation, subjectivity and trust. Choose your collaborators carefully, but don't impose a tyranny of integrity and singular moral rights on those you need to transform your skeletal 'map for a performance' into a play.[36]

Wayne Harrison claims that the interpretation of *Heretic* was reasonable in the context of the collaborative art form of the theatre. First, he claims that the device of Margaret Mead assuming various roles is dictated by the dream-like writing in the script. Second, he wanted to show that Margaret Mead was capable of using a culture's iconography as she saw fit.

It would be a difficult task for any court to resolve such aesthetic disputes. As Jeremy Eccles comments: 'The concept of a playwright's moral right to having the intentions be his or her words honoured is virtually unenforceable ... a lawyer's paradise'.[37]

---

36 Rimmer, M. 'Correspondence from Wayne Harrison', London, 24 February 1999.

37 Eccles, J. ''Heretic' Preceded by a Clash of Orthodoxies', *The Sunday Age, Agenda*, 14 July 1996, p. 7.

Summary

David Williamson attracted much public comment over his objections to the production of the play *Heretic*. Paul McGillick observed: 'Publicly, Williamson has always artfully oscillated between wounded innocence and imperial rage'.[38] He represented the playwright as a tyrannical figure, ready to fight any independent-minded collaborator who was unwilling to follow his text and stage directions. However, the truth was much more complicated and ambivalent than this caricature suggests.

David Williamson certainly believed that the text of *Heretic* should be respected by the director and the collaborators in the production. His actions, though, were contingent upon some very personal factors. David Williamson was sensitive to the views of family and friends whose opinion he trusted. He was also much swayed by the standards and norms of the theatrical community. David Williamson was advised by his agent to withdraw the play from being produced by the Sydney Theatre Company. He decided against preventing Wayne Harrison from staging *Heretic* because he did not want to let down the cast, the company and the public who had booked heavily. Although he may have been within his legal rights to seek an injunction, the playwright thought it would have been unethical to break faith with the performing arts community.

However, David Williamson was drawn into using the platform of the media to criticise the Sydney Theatre Company's production of *Heretic*. The playwright publicly said that the production was a 'distortion'. He expressed his 'grave misgivings' about the interpretation and the design of the play. However, David Williamson's public denunciation of the production of *Heretic* did not harm the demand for performances of the work. There was no call for a boycott as in the

---

38 McGillick, P. 'Heresy', *Meanjin*, 1996, Vol. 55 (2), p. 258.

literary controversies surrounding Helen Demidenko and Marlo Morgan. The dispute over the interpretation of *Heretic* had the effect of generating and stimulating further public interest in the play. The show took $1.1 million. Angie Bennie reflected that there was a pattern of behaviour: 'It seems that there cannot be a new Williamson play without a new Williamson brawl'.[39] She alluded to the previous attacks by David Williamson against his critics over such plays as *Money and Friends*, *Brilliant Lies*, and *Dead White Males*.[40] The critic insinuated that the playwright's cries of being artistic compromised were nothing more than posturing.

The relationship between David Williamson and Wayne Harrison was strained by this confrontation. Both parties felt deeply hurt by the controversy. There remained a real danger that David Williamson would refuse to participate in future productions with the Sydney Theatre Company. It is interesting that the conflict between the playwright and the director was finally resolved within the theatrical fraternity, rather than in the forums of the law or the media. Wayne Harrison asked David Williamson if he could direct one of his early plays, *Jugglers Three*, for the next season of the Sydney Theatre Company. He said that he had re-read the play and considered it worthy of a revival. This proposal was a symbolic act, at once an apology for past conflict, and a plea for reconciliation. David Williamson accepted this offer as 'a magnanimous gesture'.[41] He rewrote the play *Jugglers Three* and renamed the work *Third World Blues*. The revival brought about a personal and professional reconciliation between David Williamson and Wayne Harrison. The

---

39 Bennie, A. 'Ungodly Row over Heretic', *The Sydney Morning Herald*, 2 April 1996, p. 13.

40 Kiernan, B. *David Williamson: A Writer's Career*. Sydney: Currency Press, Revised Edition, 1996, p. 272, and p. 298.

moral order of the theatrical company was restored. Although the ethical standards of the community were at first ignored, they were in the end decisive in bringing about a semblance of harmony and reconciliation.

PART 2
RENT:
THE DIRECTOR

Wayne Harrison performed a number of roles at the Sydney Theatre Company, the premier theatre company of New South Wales. He acted as dramaturge, artistic director, and executive producer. After completing a Honours degree in drama and history at the University of New South Wales, Wayne Harrison became the first resident dramaturg at the Sydney Theatre Company in 1980. He formed Dramaturgical Services Incorporated with Dr Philip Parsons in 1986 to produce Elizabethan plays in circumstances that recreated as closely as practical the circumstances of their original productions.[42] After Wayne Harrison took up the job of artistic director of the Sydney Theatre Company in 1990, he and Dr Philip Parsons enlarged the scope of their productions under the title, 'Shakespier'. They encouraged the actors to improvise and workshop the works, with very little rehearsal time. They allowed the audience to eat, drink, and participate during performances in an imaginative collaboration. As the artistic director of the Sydney Theatre Company, Wayne Harrison collaborated with David Williamson on a number of occasions. He acted as dramaturg to the playwright and the

---

41 Williamson, D. *Third World Blues*. Sydney: Currency Press, 1997.

42 Staff writer. 'Stalwart of Sydney Theatre', *The Sydney Morning Herald*, 21 June 1993, p. 20.

director Aubrey Mellor in the play *Money and Friends*. He also acted as the dramaturg and director of the play *Dead White Males*, bringing a heightened theatricality and artificiality to the work. On the re-negotiation of his contract, Wayne Harrison also took on the role of executive producer of the Sydney Theatre Company. He assumed responsibility for legal issues, such as copyright law and contract. Wayne Harrison also maintained a significant presence in the media. He spoke on behalf of the Sydney Theatre Company. Wayne Harrison resigned from the Sydney Theatre Company in 1999. He was displeased that the board of the performing arts company wanted to confine his role to that of artistic director. Wayne Harrison took up a position with Back Row Productions (UK) in London, England, in 1999.

The authority of the writer and the validity of the text have come under attack from what has been called 'director's theatre'. 'Director's theatre' conceives of the theatre as a director's medium, in which the text is used only as one relatively minor part of an overall theatrical experience of gesture, movement, sound, lighting, costume, design and speech. The Australian theatre and festival director Barrie Kosky advocates 'director's theatre', in which the text was subservient to gesture, design, movement, lighting, and music. He envisions that a play is a visual and auditory experience, rather than a literary event. Barrie Kosky criticises playwrights such as David Williamson for their dependence upon a literary language and narrative:

> High treason is also committed if you dare challenge the supposed brilliance of contemporary Australian theatre.
>
> What better image is there for the current malaise in theatre than the newspaper advert for David Williamson's *Money And Friends*. A group of chattering, nattering couples standing around a Scrabble board, no doubt

> discussing their money and their friends. Thousands of years of rich theatrical tradition and we end up with a coffee-stained Scrabble board.
>
> If you don't believe in the theatre as a sacred space where gesture, word, symbol, light, movement and music operate on a totally democratic landscape - then rack off. If you don't believe in the theatre as a sacred space for ideas, complexities and unanswered questions - then rack off.[43]

The director is represented as the supreme artist, bringing together and uniting all the elements of the theatrical production in a single creative enterprise. The meaning of the text is modified and de-constructed by the design and the staging of the production. The director grandly assumes the status and prestige of authorship. Thus critics speak of 'Barrie Kosky's *King Lear*', ascribing the director the role of the author, even though they have not written the play. However, the practice of 'director's theatre' has affronted the pride of playwrights and writers.

Of course there has been a backlash against the presumption of performers and directors to overthrow the writer. The playwright Louis Nowra takes Barrie Kosky to task for his aesthetic arrogance:

> Kosky represents a new breed of directors who don't have an interest in a symbiotic relationship with a living writer because, quite simply, such a relationship requires that the director service the writer's vision and not the other way around. This is why many young directors want to tackle a classic text because it is easy to stamp their authority and ego on a canon piece by dismantling it and interpreting it anew.[44]

Louis Nowra admits that Barrie Kosky is a wonderful showman and magician whose theatrical productions are memorable for their virtuoso

---

43 Kosky, B. 'Kosky's Cure', *The Sydney Morning Herald*, 11 November 1996, p. 13.

44 Nowra, L. 'The Director's Cut', Spectrum, *The Sydney Morning Herald*, 3 February 2001, p. 2.

theatrical effects and astonishing reinterpretations of the class. However, he fears that such a director can overwhelm the text with their personal visions and obsessions. Louis Nowra concludes: 'If Australian theatre is to have a purpose and direction, then writers and directors should work in tandem'.[45]

At the Australian National Playwrights conference, Stephen Sewell offered personal support for the besieged David Williamson:

> In the last year I have felt more under attack as a writer than in the whole time I have been writing. There has been a substantial attack on us as theatre workers, on the written text. This sustained attack comes from what I call 'director's theatre'. I know I write for a process that involves a lot of input from a lot of people. And I want to be part of that process. It gives me joy to see my text take off and live because of the input of these people. But does that mean that I no longer have a right to that text? I know it works in the theatre as 'our' text, but it is my text, too. The writer must not be excluded from that 'our'.[46]

Thus 'director's theatre' has come under sharp criticism from those who think an undue emphasis on the role of the director stifles the creativity of writers and can lead to unbalanced interpretations of the written text.

For his part, Wayne Harrison disapproves of the practice of 'director's theatre'.[47] He embraces a collaborative form of theatre:

> I've never really gone to bat for the primacy of the director. Indeed the decade-long Elizabethan Experiment series I conducted with Dr Philip Parsons was

---

45 Id., p 3.

46 Bennie, A. 'Writers Talk Up a Crisis', *The Sydney Morning Herald*, 8 October 1996, p. 11.

47 Rimmer, M. 'Correspondence with Wayne Harrison', London, 24 February 1999.

> intended to be a major corrective to directors' theatre. I fight for collaborative theatre.[48]

The dispute over the play *Heretic* raised the question of whether the director should be considered to be a joint author of a dramatic work, along with the principal playwright.

The director and the dramaturg Wayne Harrison denied that the playwright, David Williamson, was the sole author of the play, *Heretic*. He emphasised that there were several authors. Although he did not assert that he was the co-author, Wayne Harrison claimed that he should be seen as one of the joint authors of the production:

> There is the author of the text and the author of the production. Take *Heretic*, for example. I believe what took place in the rehearsal room to be as important as David's words were. What takes place in the rehearsal room, especially with a new play, is as much part of the authorship of a play as what is there written on the page.[49]

Prior to the rehearsals Wayne Harrison collaborated with David Williamson in reworking the first draft of *Heretic* and transforming the work into a piece suitable for production by the Sydney Theatre Company. He was responsible for a number of changes to the play, including actual plot elements, dramatic structure, character details, themes, and even specific language. During rehearsals, Wayne Harrison and the cast of the play further workshopped and developed the play *Heretic*. They even added lines to accommodate the various personae of the main character Margaret Mead. In the published version of *Heretic*,

---

48 Ibid.

49 Bennie, A. 'Exit Stage Writers, Pursued by Smoke', *The Sydney Morning Herald*, 28 January 1998.

David Williamson acknowledged the input of Wayne Harrison in his capacity as a director and dramaturge. However, the playwright still claimed sole authorship in the copyright notice for the script.

Section 10 (1) of the *Copyright Act* 1968 (Cth) defines 'a work of joint authorship' as the product of the collaboration of two or more authors and 'in which the contribution of each author is not separate from the contribution of the other author or the contributions of the other authors'. This statutory recognition provides the possibility that there may be several authors of a work. However, the courts have narrowly interpreted the provisions regarding joint authorship. Lionel Bently comments:

> Copyright law denies authorship to the contributor of ideas and, in cases of collaborative works, frequently refuses to recognise contributors as authors in an attempt to simplify ownership. Because a single property owner means that assignments and licences of copyright are easier and cheaper to effect, copyright law prefers to minimise the number of authorial contributions it is prepared to acknowledge rather than reflect the 'realities' of collaborative authorship. To simplify ownership in this way may privilege certain contributions over others, but it provides a property nexus around which contractual arrangements can be made recognising the value of those other contributions.[50]

Judges have rigidly applied the requirement of material form.[51] They emphasise that a joint author must do more than contribute ideas; they must participate in the writing and share responsibility for the form of expression of the work. Moreover, judges have applied the criteria of

---

50 Bently, L. 'Copyright and the Death of the Author in Literature and Law', *Modern Law Review*, 1994, Vol. 57, p. 973.

51 *Kenrick & Co* v *Lawrence & Co*(1890) 25 QBD 99; *Tate* v *Thomas* [1921] 1 Ch 503; and *Evans* v *F Hulton & Co Ltd* [1923-1928] MCC 51.

originality in a stringent fashion. They have stressed that joint authorship envisages the contribution of skill and labour to the production of the work itself.[52] Such doctrines have been used to minimise the number of authorial contributions and concentrate copyright ownership.

In his discussion of joint authorship, Wayne Harrison refers to the celebrated lawsuit over the authorship of the Broadway musical *Rent*.

The dramaturg Lynn Thomson brought a suit against the estate of Jonathan Larson, claiming that she was the co-author of the Broadway musical, *Rent*, along with the principal playwright. She argued that in her work as a dramaturge she developed the plot and theme, contributed much of the story, created many character elements, and wrote a significant portion of the dialogue and song lyrics. Lynn Thomson demanded that the court grant her 16 per cent of the author's share of the royalties.

In *Thomson* v *Larson*, the Court of Appeals in the Second Circuit upheld a lower court's finding that Lynn Thomson was not a co-author of a joint work.[53] Applying the test of co-authorship from *Childress* v *Taylor*, Justice Calabresi agreed with the lower court that there were many signs of Jonathan Larson's view that he was the sole author of the musical *Rent*.[54] Those included: his retention of sole decision-making authority over changes to the play, his listing of himself as the author on *Rent* scripts, and his statement in a press interview that in the theatre, 'the writer is king'. However, Justice Calabresi declined to rule on the copyright issues. He had no occasion to rule whether Lynn Thomson had

---

52 *Cala Homes (South) Ltd* v *Alfred McAlpine Homes (East) Ltd* [1995] FSR 818; *Fylde Microsystems Ltd* v *Key Radio Systems Ltd* (1998) 39 IPR 481; and *Ray* v *Classic FM* (1998) 41 IPR 235.

53 (1998) 147 F 3d 195.

54 (1991) 945 F 2d 500.

copyright interests in the material she contributed or, alternatively whether Lynn Thomson had granted Jonathan Larson a licence to use the material that she contributed to *Rent* and, if so, on what terms. Such matters had not been raised in the lower court.

In the end, Lynn Thomson and the Larson Estate settled out of court on the 26th of August 1998. Although the settlement was a confidential agreement, there were media reports that the terms were favourable to the dramaturg.

In response to such legal decisions, creative artists have sought to reform and modify the operation of copyright law through their own practices and agreements. Wayne Harrison supports the adoption of contracts that recognise the contribution of directors and dramaturgs, along the lines of Tony Kushner in *Angels in America*:

> Several playwrights have pre-empted this dissolution by cutting their collaborators, usually dramaturgs, into the royalty package. Most notably Tony Kushner agreed to pay his dramaturgs 15% of his royalties for their input into *Angels in America*.[55]

The American playwright Tony Kushner debunks the myth of creation that a play is the product of individual genius and inspiration.[56] He agreed to pay 15 per cent of the royalties to the two dramaturgs who worked on *Angels in America.* He also gives generous credit to his collaborators on *Angels in America* in an afterword entitled 'With a Little Help from my Friends'. Tony Kushner testified as a witness in the *Rent*

---

55 Rimmer, M. 'Correspondence from Wayne Harrison', London, 24 February 1999.

56 Kushner, T. *Angels in America Part Two: Perestroika.* New York: Theatre Communications Group Ltd, 1994, pp. 150-151; Jonas, S, Proehl, G. and Lupu, M. (eds) 'Tony Kushner's 'Angels'' in *Dramaturgy in American Theater: A Source Book.* New York: Harcourt Brace, 1997, p. 472; and Jonas, S. 'Tony Kushner's 'Angels'' in Vorlicky, R. (ed.) *Tony Kushner in Conversation.* The University of Michigan Press: Ann Arbor, 1998, p. 157.

case that 'the awarding of compensation and credit to dramaturgs far from disrupting the collaborative process, enhances and honours it'.[57] He believed that the collaborators in the theatre should be equitably remunerated for their labour contributions. In an interview, Tony Kushner said that such practices were informed by a history of disputes over authorship of dramatic works: 'I have been instructed through ten years and more of pitched battles over intellectual ownership and giving people credit'.[58] His philosophy stands in stark contrast to most other playwrights like David Williamson.

Wayne Harrison was bewildered that David Williamson had recanted from his agreement to respect his production. He comments: 'I feel a bit like Alice who has fallen through the looking glass, to be honest with you'.[59] Wayne Harrison was incensed by the accusations that the Sydney Theatre Company had hijacked the play. He felt betrayed that the playwright had assailed the reputations of theatre workers who worked hard to enhance the play *Heretic* and the playwright's reputation. In response, Wayne Harrison publicly accused David Williamson of a weakness for conservatism. He claimed that the playwright was a political chameleon:

> David Williamson is more than a survivor - he's transformed himself from period to period, from decade to decade. He's still very much a person of the nineties, as much as he was of the seventies. That can only be put down to a talent or facility for being not just a reflector of public taste (although he's a very good litmus test of what the public mood is), but one step ahead of it. He's an

---

57 Smith, R. 'The Appeal Brief', Transcripts from the Rent Case, http://dramaturgy.net/rent

58 Jonas, S. 'Tony Kushner's 'Angels'' in Vorlicky, R. (ed.) *Tony Kushner In Conversation*. The University of Michigan Press: Ann Arbor, 1998, p. 158.

59 Bennie, A. 'Question of Belief as Writer, Director Split over Heretic', *The Sydney Morning Herald*, 2 April 1996, p. 3.

> interpreter of public opinion, while at the same time fashioning it. It's not a matter of conservative or reactionary politics, it's a matter of an uncanny ability to give voice to nascent changes in the public thinking. He analysed what was going on in the country and then transformed it into a theatrical statement that had huge emotional impact.[60]

Furthermore, Wayne Harrison pointed out that the playwright moved from director to director, company to company, to suit his own interests. The director noted that 'David Williamson is very powerful ... and to a certain extent because of his economic power he makes it up as he goes along, shedding collaborators when they have served their purpose, constantly renewing himself, subsequently re-presenting himself for media examination and analysis'.[61]

In retrospect, Wayne Harrison had reservations about the accountability of the media in the dispute over *Heretic*. He complained about 'just how ignorant the public, the media and even some of my own staff are about how new work is actually created', because of a confusion over the difference between a play and a production.[62] In correspondence, the artistic director and executive producer reflected:

> Personally, I find the media circus stressful, though I enjoy people debating the way our theatre works and the nature of the various relationships within it. I like theatre being on the front pages. But the level of media reportage during *Heretic* was abysmally low and it shocked me how little the so-called media experts knew about what we do and how we go about doing it.

---

60 Dessaix, R. (ed.) *Speaking Their Minds: Intellectuals and the Public Culture in Australia*. Sydney: ABC Books, 1998, p. 88.

61 Rimmer, M. 'Correspondence from Wayne Harrison', London, 24 February 1999.

62 Cochrane, P. 'Wayne's Expanding World', *The Sydney Morning Herald*, 8 May 1996, p. 18.

> The relevance of this is that most casual observers believe that David Williamson delivered *Heretic* to us as a finished product and our job therefore was simply to put that finished product on the stage. Nothing could be further from the truth. The script was an adventurous mess when it was finally delivered and subsequent drafts, which I worked on with David, only went a certain way towards solving the textual problems. The real solutions came in the rehearsal room when for whatever reason David was mostly absent and later apologised for this.
>
> I was prepared to go with David on this journey into unknown territory for I think it's part of our brief to encourage established writers to experiment. But the playwright, as a key collaborator, has an obligation to complete the journey.[63]

However, Wayne Harrison does not hold David Williamson liable for all the problems of *Heretic*.[64] He takes personal responsibility for the difficulties involved in the production of the play. Wayne Harrison confesses to the sin of hubris. He admits that it was unrealistic to expect that the Sydney Theatre Company could repeat the success of *Dead White Males*. Wayne Harrison confides that he broke one of his cardinal rules by programming an unwritten play in *Heretic*. He believes that the play needed a lot of time to incubate and demanded a small-scale production in an intimate venue. Wayne Harrison is nevertheless proud that the creative time was able to transform the play *Heretic* into a large-scale production in only a short period of time. He pays to credit to all the collaborators – including David Williamson – for achieving this great feat.

---

63 Rimmer, M. 'Correspondence from Wayne Harrison', London, 24 February 1999.

64 Rimmer, M. 'Supplementary Correspondence (II) From Wayne Harrison', London, 22 January 2001.

PART 3
MONEY AND FRIENDS:
THE PRODUCER

Wayne Harrison comments that the Sydney Theatre Company was forced to adopt a more commercial position in the performing arts marketplace after cuts in funding by the Federal Government and the State Government. He believes that the arts policy of the Federal and State governments has resulted in internecine battles among theatre practitioners for scarce public funding. The competition has lead to a process of natural attrition - the large theatre companies are contracting, the smaller companies ones are merging or disappearing.

Wayne Harrison is concerned that the Sydney Theatre Company is threatened by a crisis in arts funding. He adopted a range of initiatives to address this situation, including changing to a season of more popular repertoire. Wayne Harrison comments that the Sydney Theatre Company is dependent upon the production of David Williamson plays for both profile and box office success. He sounds at once grateful and resentful for this reliance upon the playwright:

> As government subsidy of major organisations such as the Sydney Theatre Company has shrunk, we've allowed another economy to develop, which is the Williamson economy. Many so-called subsidised theatre companies in Australia now rely on David Williamson to give them the profile and box office success they must have. They use that money to subsidise riskier work.
>
> At the same time, it can be a bit of a trap, in that you fall into the habit of programming his plays in the expectation that they will reach budget when often you don't actually know what the nature of the play in its final form will be ... You might program from the first draft or the detailed synopsis ... and if you are expecting a *Dead White Males* and get a *Sanctuary* instead, then there is no way

> you are going to meet your budget. You have to get a *Dead White Males* whether the play is one or not. It puts Williamson under enormous pressure to deliver, and to a certain extent, restricts his artistic freedom.
>
> It's also worrying that we've allowed ourselves to put most of our commercial eggs in one basket - when in fact we need to find other ways of subsidising our experimental work.[65]

The box-office sales generated by the production of plays written by David Williamson allows for cross-subsidisation of riskier artistic and commercial ventures. It is a paradox that the popular appeal of his work allows for the production of avant-garde work. The production of David Williamson plays serves to make up the shortfall produced by the shift in public funding to the marketing of the arts. It also protects the major organisations from the competition of alternative theatre[66] and arts festivals.[67]

The *Copyright Act* 1968 (Cth) provides that, in relation to a dramatic work, the writer shall be considered the author of a play for the purposes of economic rights, in the absence of any agreement to the contrary. It stipulates, in relation to cinematographic films, that the maker of the production will be considered to be the owner of economic rights. Similarly, the *Copyright Amendment (Moral Rights) Act* 2000 (Cth) provides that, in regard to a dramatic work, the writer shall be considered the author of a play for the purposes of moral rights. It also controversially provides that, in relation to a cinematographic film, the writer, the

---

65 Cochrane, P. 'Wayne's Expanding World' *The Sydney Morning Herald*, 8 May 1996, p. 18.

66 Harrison, W. 'The Theatre of War', *The Sydney Morning Herald*, 19 December 1994, p. 14.

67 Harrison, W. 'STC Boss Laments Leo's Show', *The Sydney Morning Herald*, 16 January 1999, p. 7; and Harrison, W. 'Cost of Festivals Higher than You Think', *The Sydney Morning Herald*, 16 January, 1999, p. 47.

director and the producer shall be considered the authors of the film and therefore have the moral rights. There is a double standard in the treatment of producers in relation to copyright protection of dramatic works and cinematographic works. The distinction seems to be based upon the relative public and private investment in the two forms of cultural production. The producer of a play is denied copyright protection because of a belief that a dramatic work is just concerned with live performance. The producer of a film receives copyright protection in order to facilitate the capital investment that is required to produce and market such a work to mass audience.

Wayne Harrison has campaigned for writers' and performers' agents to acknowledge the importance of the original producer in stage work. He believed that there was an obligation involved in acknowledging the collaborators who helped bring a work into existence, enabling it then to be exploited by future collaborators.

Wayne Harrison introduced a new policy for the Sydney Theatre Company in respect of the production of Australian plays.[68] He was selective in commissioning a number of original productions - including *Furious* and *Sweet Phoebe* by Michael Gow, *Blackrock* and *Chasing The Dragon* by Nick Enright, *Fred* by Bea Christian, as well as *Dead White Males* and *Heretic* by David Williamson. Wayne Harrison promoted the concept of originating writer's royalties. He sought to obtain one per cent of receipts from any subsequent production as a just reward for taking the original risk on a new work and granting it access to a lucrative subscription season.

---

68 Evans, B. 'Low-Risk Policy Pays For STC', *The Sydney Theatre Company*, 22 July 1994, p. 20.

Wayne Harrison also picked up new Australian plays from companies like the Griffin in the Stable Theatre at King's Cross and the Playbox at the Malthouse in Melbourne, and organisations dedicated to the creation of new Australian work, such as the Australian National Playwrights' Centre. He sought to limit the liability of the Sydney Theatre Company by letting other companies share the risk for producing premieres of Australian plays. If they proved popular, the Sydney Theatre Company would then take them up, negotiate the changes, and make the necessary refinements. This was the case for brilliant works like *Kafka Dances* and *Sixteen Words For Water*. The Sydney Theatre Company would pay the originating producers a royalty of one per cent for the privilege, or let them be co-producers. A consensus is forming about the originating producers' royalty within state theatre companies, and agents acting for writers and performers.

Wayne Harrison was inspired to fight for recognition of the originating producer after *Strictly Ballroom* was turned from a stage-play into a film.[69] In correspondence, he recalls that the Sydney Theatre Company received nothing, even though it had premiered the first professional stage production of the work:

> My spur was the fact that Sydney Theatre Company as the originating producer of the stage version of *Strictly Ballroom* should have shared in the proceeds from the film version of the piece. It is only by deriving funds from these subsidiary uses that companies such as Sydney Theatre Company can afford to produce the next *Strictly Ballroom*. But Sydney Theatre Company received nothing from Baz Luhrmann's film success.[70]

---

69 Luhrmann, B. and Pearce, C. *Strictly Ballroom*. Sydney: Currency Press, 1992.

70 Rimmer, M. 'Correspondence from Wayne Harrison', London, 24 February 1999.

The show *Strictly Ballroom* was developed at the National Institute of the Dramatic Arts by a group of theatre students lead by the actor and director Baz Luhrmann.[71] The class signed over the rights to produce the dramatic work on stage to Baz Luhrmann in return for a percentage of the box office profits. The creators of the dramatic work were at first unhappy that they were not included in discussions about adapting *Strictly Ballroom* into a film. They finally agreed to assign away the film rights for $24,000 and a small percentage of the producer's net profit. The producers of the dramatic work were also excluded from the discussion about the adaptation of *Strictly Ballroom* into a film.[72] The Sydney Theatre Company was not as fortunate as the cast from the National Institute of the Dramatic Arts. They did not receive any royalties because they did not have any claim to ownership under copyright law and contract.

In response to the sobering experience of the film adaptation of *Strictly Ballroom,* Wayne Harrison protected the interest of the Sydney Theatre Company in the show *Tap Dogs.* He ensured that the original producer received proper recognition in a complex financial arrangement. In a newspaper interview, Wayne Harrison observes that the Sydney Theatre Company now earns $300,000 a year from the international exploitation of the dramatic work. He emphasises that such profits were re-invested to allow for cross-subsidisation of new productions.[73]

Wayne Harrison also sought to protect the investment of the Sydney Theatre Company in the play *Blackrock.* He drafted the production contract to cover any film or television adaptation. Originally the playwright Nick Enright wrote *A Property of the Clan* for Newcastle's

---

71 Squires, T. 'Strictly Baz', *The Sydney Morning Herald,* 27 June 1992, p. 33.

72 Rimmer, M. 'Correspondence from Wayne Harrison', London, 24 February 1999.

73 Cochrane, P. 'Wayne's Expanding World', *The Sydney Morning Herald,* 8 May 1996, p. 18.

Freewheels theatre-in-education company.[74] It was a dramatic response to the rape and murder of the teenager Leigh Leigh at a beach party in Newcastle. Nick Enright then reworked the material into a new play called *Blackrock* for the Australian Peoples' Theatre and for a production at the Wharf Theatre. He developed the piece through six drafts and four workshops at the Sydney Theatre Company. He received assistance in this process of revision and editing from the dramaturg Wayne Harrison and the director David Berthold. The contract for the creation of *Blackrock* specified rewards to the Sydney Theatre Company for any on-sale to film or television.[75] However, the producer of the film version of *Blackrock* refused to pay the royalty to the Sydney Theatre Company. Fortunately, the playwright Nick Enright paid the fee out of his writer's royalty. There was no litigation because the ethics of the playwright circumvented the law. This episode suggests that there are limits to private contracting to protect the original producer.

Wayne Harrison concludes that, if *Heretic* has a future life, the original collaborators should share in future proceeds because they worked so hard in imposing some order on the script.[76] He believes that this is fair and morally correct. Wayne Harrison was upset that, while David Williamson was prepared to criticise elements of the production in public, he was busy including those same elements in the published version of the text. He was concerned that David Williamson profited from the subsidiary rights he enjoyed in the play *Heretic*, both from book sales and the royalties earned when a New Zealand production based on this published text had a short season in Wellington. However, the

---

74 Enright, N. *Blackrock*. Sydney: Currency Press, 1996.

75 Rimmer, M. 'Correspondence from Wayne Harrison', London, 24 February 1999.

76 Ibid.

original producer did not share in the profits from the exploitation of the play *Heretic*.

Wayne Harrison believed that his model for originating producers' rights has overseas precedents.[77] He cited the practice of the National Theatre of Great Britain. If a play is originally produced at that particular institution, the playwright is compelled to give one third of all royalties to the company for all subsequent productions of dramatic work. This agreement is intended to recompense the producer for showcasing, branding, advertising, and promoting the work to the outside world. In return, the playwright gains the imprimatur of the National Theatre of Great Britain.

The question of producers' rights raises larger questions about the funding of the performing arts. In light of a financial crisis in the performing arts community, the Federal Government set up an inquiry into Australia's major performing arts organisations. The Committee headed by Dr Helen Nugent released a Discussion Paper entitled *Securing the Future*.[78] It recognised that many of the major performing arts companies face a bleak future because of increased labour and venue costs and greater competition from festivals, venues importing international acts and commercial touring companies. The problems were particularly acute outside of Sydney and Melbourne. The Committee denied that greater Government funding would solve the problems in the performing arts community. It proposed that performing arts companies should merge or share productions to cope with increasing competition

---

77 Rimmer, M. 'Supplementary Correspondence (II) From Wayne Harrison', London, 22 January 2001.

78 Department of Communications, Arts and the Information Economy. Securing The Future: The Major Performing Arts Discussion Paper. Canberra: Australian Government Publishers, 1999.

and rising costs. There were, though, no particular recommendations regarding the performing arts and intellectual property.

PART 4
THE PROPERTY OF THE CLAN:
THE PERFORMERS

It is striking that the performers had few opportunities to provide their own interpretation of the debate over *Heretic*. In a rare interview, Liz Alexander said that the public row between the playwright and the director unsettled the cast.[79] She was grateful for the support of Wayne Harrison: 'He's a stimulating director, he gives you space to work in and he has a pretty good sense of humour - I think you've got to have that when you're working'.[80] Liz Alexander admitted that she hated the controversy around her role as Margaret Mead:

> With the different assertions made in the press by different people who have been involved in it, it's been difficult to continue working in a positive and happy manner ... It just puts a little spanner in the works. A company that was very happy about the production has now, in a way, each night, to deal with the controversy that's surrounded it.[81]

It is worthwhile considering whether the actors deserve performers' rights given their contribution to the production of the dramatic work.

---

79 Browne, S. 'Liz Seeks Peace From The Storms Of The Stage', *The Sydney Morning Herald, Northern Herald*, 23 May 1996, p. 31.

80 Ibid.

81 Ibid.

The critics of the playwright claim that the pre-eminence of the writer and the text is subverted by the act of performance. The director, Wayne Harrison, debunked the view that performers do not make a creative contribution, which is comparable to the work of the playwright. He argued that actors play a significant role both in the creation of a written script and in the production of the play:

> The perception is that the playwright brings the script along on the first day of rehearsal and all we do is faithfully put life into what's written on the page. Nothing could be further from the truth - it is a continuing, evolving process where the actors become the major dramaturgs questioning, every line: 'My character wouldn't say that - do you realise the consequences of this?' They have a major role to play in the evolution of the work ... but when it does dissolve into a bunfight, the people involved in the process ask 'why are we doing all this work when we're being abused at the other end of it. Why are we doing this when the good ideas we had in rehearsal becomes part of the published text, which earns the author more money'.[82]

The performance is not something ancillary, accidental, or superfluous that can be distinguished from the play proper.[83] The dramatic work is incomplete and unfinished in its script version. The individual performance of the script is required to bring the play into existence. The creativity of the writer is dependent upon the improvisation and group authorship of the cast. The meaning of the text is open to interpretation by the voice, the gestures, and the bodies of the actors. The performers are thus creative partners and collaborators who deserve respect.

---

82 Cochrane, P. 'Wayne's Expanding World', *The Sydney Morning Herald*, 8 May 1996, p. 18.

83 Connor, S. 'Postmodern Performance' in *Postmodernist Culture: An Introduction to Theories of the Contemporary*. Oxford: Basil Blackwell, 1989, p. 134.

The dispute over the interpretation of *Heretic* also raised issues of performers' rights. The artistic director, Wayne Harrison, reflects upon the controversy:

> The other legacy of the *Heretic* experience has to do with intellectual rights. Actors and directors and dramaturgs are starting to question the nature of the work they do. The convention is that all the work done in the rehearsal room becomes the copyright property of the playwright. But ownership of copyright doesn't necessarily mean that everything was written by the playwright - it becomes a very dicey legal area, especially if it blows into a media circus when people are being accused of hijacking the play, of doing unauthorised work on it.[84]

It is worth considering whether the contribution of the performers to the creation and development of a dramatic work is deserving of copyright protection.

Wayne Harrison recognises that limited copyright protection has been granted in respect of performances such as circus and variety acts.[85] He accepts that such performers enjoy the right to prohibit the recording of their live performance, and the right to control an unauthorised recording and transmission of their live performances under Part XIA of the *Copyright Act* 1968 (Cth). Wayne Harrison recognises that performers make a great creative and economic contribution in the collaborative process of theatre:

---

84 Cochrane, P. 'Wayne's Expanding World', *The Sydney Morning Herald*, 8 May 1996, p. 18.

85 S 248A (1) of the *Copyright Act* 1968 (Cth) defines 'performance' as broadly meaning a performance or an improvisation of a work, and includes the use of puppets, dances, circus acts, variety acts, and similar presentations and shows. However, s 248A (2) excludes sport, news-reading and crowd participation in performances from the definition of a performance.

> There are precedents in the copyrighting of circus and variety/magic acts which are often on-sold for large amounts of money, which implies a copyright and moral right. But acting performances are such ephemeral things, that change on a nightly basis, just as 'the play' does. What exactly would you be copyrighting? Many actors actually resist the notion of archivally recording their stage work - they like to think that what they create is fluid, evolving and ultimately 'of the moment', something re-created on a nightly basis with the most important collaborators, the audience.[86]

However, Wayne Harrison doubts that actors and performers would want to reduce their work to material form. He believes that they would prefer a performance to be fluid and ephemeral, rather than fixed in an archive of a sound recording or video.

The courts have been reluctant to grant full copyright protection to performers. In the United Kingdom, there has been debate over the meaning of a 'dramatic work' in relation to a short film called *Joy*, which inspired a commercial advertising the Irish beer Guinness.[87] There was doubt as to whether a performance recorded on film amounted to a 'dramatic work'.

The Federal Government has released a Discussion Paper on whether it should implement full copyright protection for performers, at least in relation to sound recordings.[88] Wayne Harrison only champions the cause of actors and performers so far. He refuses to take his argument in relation to the authorship of plays to its logical conclusion, and to

---

86 Rimmer, M. 'Correspondence from Wayne Harrison', London, 24 February 1999.

87 Sowden, T. 'Limits to Film Copyright', *Media and Arts Law Review*, 1998, Vol. 3, p. 223; James, M. 'Some Joy at Last for Cinematographers', *European Intellectual Property Review*, 2000, Vol. 22 (3), p. 131; and Rivers, T. 'Norowzian Revisited', *European Intellectual Property Review*, 2000, Vol. 22 (9), p. 389.

88 Attorney General's Department. *Performers' Intellectual Property Rights: Scope of Extended Rights for Performers under the Copyright Act 1968.* Canberra: Australian Government Printing Services, 1997.

acknowledge that actors deserve a full share of copyright protection.[89] His artistic commitment to collaborative theatre is overridden by administrative concerns about the practicality and viability of such reforms. Wayne Harrison foresees that playwrights in this country would be resistant to sharing the royalties of a play with performers:

> It's a minefield. The minute you start to determine who was responsible for this line, or who edited or restructured that section, the people involved feel they deserve a share of the royalty payments ... and as playwrights have shown in this country they are loath to allow anyone to cut into their royalty packages, which are quite substantial - more so than overseas.[90]

Similarly, the actor and festival director Robyn Archer doubts whether performers will ever receive comprehensive copyright protection in relation to their performances. She observes that 'certainly no actor – for instance in an interpretation of a David Williamson – will ever be paid copyright in that'.[91] There does not seem to be a strong consciousness of copyright law reform within the performing arts community.

---

89 Leiboff, M. 'Actors, Directors and Others and Writers: Copyright Protection for Non-Writer Contributors in Group-Devised Theatre', *Arts And Entertainment Law Review*, October 1993, p. 13.

90 Cochrane, P. 'Wayne's Expanding World', *The Sydney Morning Herald*, 8 May 1996, p. 18.

91 Rimmer, M. 'Correspondence with Robyn Archer', Adelaide, 11 October 1998.

PART 5
INTELLECTUAL CABARET:
THE DESIGNER

The designer Jon Senczuk was a long-time collaborator of the director Wayne Harrison. They had worked on over 20 productions together. The production of the play *Heretic* was a difficult task because of its peculiarities in content and form. The theatrical concept of the production was a response to textual elements of the play that emphasised that Margaret Mead was the 'intellectual godmother' of the 'permissive society' of the 1960s. It took its cue from stage directions such as:

> *Psychedelic lighting and the throbbing music of the Sixties start to fill the theatre and a back projection montage gives us still shots and movie footage of some of the familiar icons and images of the Sixties - Woodstock, Haight Ashbury, peace symbols, flower power, love-ins, the Grateful Dead and the outrageous colours, sights, sounds and clothing of the era bring us the sense that a new world is being born.*[92]

In the theatrical production of *Heretic*, Wayne Harrison sought to explore the iconic status of Margaret Mead. The character assumes the personae of public icons of the 1960s, such as Marilyn Monroe, Barbara Streisand and Jackie Kennedy. Lines were inserted to accommodate these personae, such as 'Happy Birthday, Mr President'. In the visual design, John Senczuk was inspired by M.C. Esher's woodcut *Metamorphose*. The set and the costume design were psychedelic, hallucinogenic in feel and 1960s in style, but heightened and distorted because of its dream-like state.

---

92 Williamson, D. *Heretic*. Melbourne: Penguin Books, 1996, p. 20, italics in original.

However, David Williamson was unhappy with this production of *Heretic*, because he thought that it was unfaithful to the intentions of his script. He endorsed the criticisms of the production as being 'intellectual cabaret' and a 'new genre'.[93]

The set designer John Senczuk defended the design against the attacks of the playwright. He believed that the work was a good marriage between the script of David Williamson, the dramaturgy of Wayne Harrison, and his own theatrical and visual philosophy:

> My concerns over the last week have more to do with what one should expect of a collaborator, especially in the development of new work. It is a nonsense to believe, as is often the case, that the director/designer team spend their time deliberately trying to sabotage a production.
>
> I have to remain confident with the decisions made in the design development period. These decisions are not made flippantly and risks are taken. Other times, other places, the process may be different. I, like any other theatre worker in this country, live and work in a theatrical system shackled by economic rationalism. Yet there is still a determined and conscious decision to entertain and stimulate audiences with high quality work. At the same time there is a need to provoke and educate audiences theatrically, to take them into dangerous territory.[94]

The task of John Senczuk was complicated by the evolution of the script for *Heretic*. He based his decisions about the design upon an early draft of the play. The set was already being built by the time that later drafts of the script sought to alter the tone and look of the play.

---

93 Williamson, D. 'Some Like It Hot... But I Don't', *The Sydney Morning Herald*, 9 April 1996.

94 Senczuk, J. 'Heretic Row: Designer Chips In', *The Sydney Morning Herald*, 4 April 1996, p. 15.

It is also worth reflecting that John Senczuk enjoys copyright in the artistic work of the design. It is arguable that his economic rights and moral rights might be violated if the playwright David Williamson sought to break down the integrity of the design without his consent or permission.

Wayne Harrison observes that there have been several interesting copyright disputes in respect of artistic design in the performing arts.[95] The Tony award-winning designer Brian Thomson had a much reported run-in with the opera director Elijah Moshinsky.[96] He claimed that the design for Moshinsky's 1996 Met production of the Makropoulos Affair – which featured a large black sphinx – was similar to his own design for the same opera in a 1982 Adelaide Festival production, which was also directed by Moshinsky. An exchange of letters followed between Brian Thomson and the Met. Elijah Moshinsky informed the Met that no part of Brian Thomson's design had been used, utilised, or copied. However, Brian Thomson vows that he will never work with the director again: 'He does crowd-pleasing operas... I have no desire to work with him again'.[97]

There has been a French case dealing with the moral rights of artistic designers in a dramatic production.[98] In *Leger* v *Reunion des Theatres Lyriques Nationaux*, the artistic designer brought an action against a theatre, arguing that the excision of a scene from part of an opera impaired his moral rights.[99] He asked for damages and an order that the defendant re-establish the opera's stage setting in its entirety. The court agreed that the stage design constituted an artistic work in which there

---

95 Rimmer, M. 'Correspondence with Wayne Harrison', London, 24 February 1999.

96 Morgan, J. 'What the Critics Say', *The Sydney Morning Herald*, 13 June 1998, p. 8.

97 Ibid.

98 Merryman, J.H. 'The Refrigerator of Bernard Buffet', *The Hastings Law Journal*, 1976, Vol. 27, p. 1023.

99 [1955] 6 RIDA 146.

were moral rights but said that the composer of the opera and its producer had rights to control the production. However, it still found that the producer had no right to make a cut without the permission of the artist and without informing the public.

CONCLUSION

The dispute over *Heretic* presented a number of competing visions of authorship and collaboration in dramatic works. First, David Williamson maintained that the role of the playwright was paramount. Although he was willing to acknowledge the contributions of other collaborators, the writer did not believe that these interpreters deserved copyright protection. Second, Wayne Harrison advocated a more collaborative vision of the performing arts. He believed that the role of the director and the position of the producer deserved greater legal recognition. Furthermore he was also willing to countenance limited rights for the performer. A third, more radical view is that recognition should be accorded to all of the collaborators in the performing arts. The Performing Arts Media Library pilot project supported this position.[100] It concluded that the authorship of dramatic works should not be limited to just the playwright, but extended to all of the collaborators and the performers. However, it remains to be seen whether this model will be accepted in the performing arts, and prove viable in the marketplace.

---

100 Rimmer, M. 'Telephone Interview with Helen Simondson', Melbourne, 2 September 1998; and Simondson, H. *Performing Arts Media Library: From Live Performance To The Digital Stage*. Melbourne: Cinemedia, 1999.

CHAPTER FIVE

SHINE: COPYRIGHT LAW AND FILM

If the blockbuster *Crocodile Dundee* was a symbol of entertainment law in Australia in the 1980s,[1] then the film *Shine* can be seen in some ways as representative of copyright law and film in the 1990s. The motion picture raises critical issues about the division of labour in the film industry. Should the authorship of the film be limited to the producer? Should authorship be shared between the key collaborative team of the writer, the director, and the producer? Or should authorship be shared among a larger range of collaborators, including the composer, the performers and the cinematographer?

The film *Shine* provides a useful case study into authorship and collaboration in Australian cinema because of an unusual configuration of circumstances. It engaged the film community, the legal system, and the media. The motion picture received popular acclaim and critical success. The actor Geoffrey Rush won an Academy Award for his portrayal of the protagonist, David Helfgott. The film-makers sought to capitalise on the success of the film in policy debates about copyright law reform. The screenwriter Jan Sardi sought to defend the position of screenwriters in a dispute over the *Copyright Amendment (Moral Rights) Act* 2000 (Cth). The director Scott Hicks lobbied for directors to be included as beneficiaries in the re-transmission of films on pay television in the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth). Furthermore, the film *Shine* was embroiled in litigation. The producer Jane Scott faced law suits from the distributor Pandora Films, the composer David Hirschfelder, and the

---

1 Morris, M. 'Tooth and Claw: Tales of Survival and Crocodile Dundee', *Art & Text*, 1987, Vol. 25, p. 36.

grandson of the composer Sergei Rachmaninov. She sought to resolve such disputes through negotiation, litigation and publicity.

This paper considers the debate over the film *Shine* in the tradition of theoretical investigations into authorship and collaboration in cinema. In the classic text, *The Ownership of the Image*, Bernard Edelman considers the treatment of film under French law.[2] He discusses how authorship was initially assumed by the producer in 1939 and shifted to a team of authors, including the scriptwriter, the director, and the composer in 1957. Bernard Edelman points out that, in spite of this development, the producer maintained control over the exploitation of the film through contracts. The authors could only exercise moral rights in respect of the film. In a chapter from *Of Authors and Origins*, Marjut Salokannel discusses how copyright law became accommodated within film.[3] She discusses the artistic, economic, and technological discourses about cinema. Marjut Salokannel charts the rise of the director as the auteur. She claims that this discourse about the director enabled cinema to be granted copyright protection. In *Contested Culture*, Jane Gaines considers the treatment of cinema in the United States.[4] She is especially interested in the position of performers under contract law, copyright law and publicity rights. Her work is also interested in the protection of character merchandising in the field of film. Similarly, in *Cultural Rights*, Celia Lury looks at branding, trade marks, and cinema.[5]

---

2 Edelman, B. *Ownership of the Image: Elements for a Marxist Theory of Law.* London: Routledge, 1979, pp. 52-63.

3 Salokannel, M. 'Film Authorship in the Changing Audio-visual Environment', in Sherman, B. and Strowel, A. (eds) *Of Authors and Origins: Essays on Copyright Law.* Oxford: Clarendon Press, 1994, p. 57.

4 Gaines, J. *Contested Culture: The Image, the Voice and he Law.* London: British Film Industry Publishing, 1992.

5 Lury, C. *Cultural Rights: Technology, Legality and Personality.* Routledge: London and New York, 1993.

This paper looks at the various experiences of the film-makers involved in *Shine* in relation to copyright policy and litigation in Australia. It examines how authorship and collaboration in cinema is understood in terms of artistic, legal, and media discourses. Part 1 considers the involvement of Jan Sardi in the campaign to get screenwriters included in the moral rights regime in the film industry. Part 2 recounts the efforts of Scott Hicks to push for directors to acquire royalties under the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth). Part 3 discusses the contractual dispute between independent producer Jane Scott and the distributor over the gross receipts to the film *Shine*. Part 4 explores the disputes over the use of Sergei Rachmaninov's music in the film *Shine*. Part 5 investigates whether performers like Geoffrey Rush deserve economic and moral rights. Part 6 considers whether cinematographers, such as Geoffrey Simpson, should be able to claim authorship under copyright law. The Conclusion examines the symbolic struggle between the different communities in the film industry to determine the content of copyright law in respect of film.

PART 1
FILM VANDALS:
THE SCREENWRITER

Jan Sardi was the principal screenwriter for the film *Shine*. He tried to avoid the traditional biography, with its linear, chronological narrative.[6] He instead created a strong emotional line in the film, centering the story

---

6 Sardi, J. and Hicks, S. *Shine: The Screenplay*. London: Bloomsbury Publishing, 1997, vi-vii.

around the relationship between David Helfgott and his father.[7] Jan Sardi relied upon visuals to tell the story rather than dialogue. He believed that this structure allowed the story to move rapidly, for developments to take place 'in between' scenes, allowing the audience to participate by having to fill it in for themselves. Jan Sardi thought that the emotional hook allowed the film to meld together the past and the present. It also helped weave together a number of stories – a portrait of an artist as a young man, a tale of madness and redemption, and a romantic love story.

Copyright Amendment Bill 1997 (Cth)

The screenwriter of *Shine*, Jan Sardi, is a leading member of the Australian Writers' Guild ('the Guild') for screenwriters in film and television. He became a copyright activist after a script that he wrote for a film called *Breakaway* in the 1980s was distorted because the director allowed the actors to improvise too much and failed to provide adequate coverage of the scenes. Jan Sardi was concerned that his reputation as a screenwriter could be damaged by being associated with the film. He sought legal advice whether he could take his name off the scriptwriting credits for the film.[8] Jan Sardi was advised that he could be sued by the film's investors for 'causing injury' should the sales agent fail to pay for the film on the grounds that the film was not representative of the screenplay. In the end, Jan Sardi left his name off the scriptwriting credits and hoped that no one would see the film. Ironically, he won an Australian Writers' Guild award for the screenplay.

---

7 This emphasis upon the paternal relationship proved to be controversial. Margaret and Leslie Helfgott claimed that their father had been misrepresented in the film *Shine*. However, the film-makers maintained that the portrait was faithful to the memories of David Helfgott. Fishkoff, S. 'Pain or "Shine"', *The Jerusalem Post*, 23 February 1997.

8 Rimmer, M. 'Supplementary Correspondence from Jan Sardi', Melbourne, 28 November 2000.

Jan Sardi appeared before the Senate Legal and Constitutional Legislation Committee to give evidence about the introduction of the *Copyright Amendment Bill* 1997 (Cth).[9] He was angry that directors and producers were defined as the authors of film in the legislation, but screenwriters were excluded from this status. Jan Sardi asked a rhetorical question of Chris Creswell, the assistant secretary of the Intellectual Property Branch:

> I am sure the Attorney-General's Department did a lot of homework and looked at all the different legislation around the world, but they got it badly wrong. Did you at all look at a script to see what was on the script, Mr Creswell?[10]

His point is that the drafters of the Bill did not pay enough attention to matters external to legal knowledge – like the aesthetics of film scripts, and the division of labour in the film industry.

In its submission, the Guild acknowledged that under the provisions of the Bill, writers were accorded moral rights in the film script. The Guild maintained that moral rights in the script were not enough. In an interview, Jan Sardi reflected:

> Screenplays are not written to be read. They are written to be seen ... The screenplay is not the film. I would not get any satisfaction out of telling people, 'Why don't you come round to my place for a reading of my screenplay, *Shine*?'[11]

---

9 Senate Legal and Constitutional Legislation Committee. *Copyright Amendment Bill No.1*. Canberra: Parliament House, 1997.

10 Senate Legal and Constitutional Legislation Committee. 'Public Hearings: *Copyright Amendment Bill No.1*', Monday, 18 August 1997, p. 22.

11 Rimmer, M. 'Interview with Jan Sardi', Melbourne, 30 April 1999.

Even so, there is a growing market for film scripts. For instance, Bloomsbury Paperbacks published the screenplay for *Shine* by Jan Sardi in the wake of the film's success. However, it is difficult to appreciate screenplays in and of themselves because they need to be performed and directed. As the film critic Adrian Martin comments: 'Scripts rarely hold up as literary objects, because they are mere skeletons without flesh, tales without poetry or metaphor, figures without life'.[12]

In his evidence to the Committee, Jan Sardi argued that there was a personal and inherent connection between the writer and the film. He illustrated his point with a page from the screenplay of the Oscar-winning film *Shine*:

> The screenplay is the film on the page ... People often just think maybe writers write the story or they just write some dialogue. There is some dialogue there, there are also visual effects, there are sound effects, there is some lighting, there are special effects, there is make-up, there is music, there is editing, and there is also the narrative device obviously to move the story along. That is the scene in the film where David Helfgott collapses on the stage. I sat down and that came from here, okay. I had to type that, and I was thinking when a writer writes they write in a sense with the film happening up in the head, and what you are doing is, you are putting it down in order for people to be able to interpret that and to realise that, and the entire production process is that, basically. It is trying to realise the intentions of the screenplay.[13]

Jan Sardi claims that screenwriters deserve moral rights on the grounds that they are creators and originators. He notes: 'In 90% of cases, the writer is the only genuine creator in the Oxford Dictionary definition of

---

12 Martin, A. 'Making a Bad Script Worse: The Curse of the Scriptwriting Manual', *Australian Book Review*, April 1999, p. 23 at 25.

13 Senate Legal and Constitutional Legislation Committee. *Copyright Amendment Bill* 1997. October 1997.

the word, which is to create something out of nothing'.[14] However, in the case of the film *Shine*, it was the director Scott Hicks who first came up with the idea of the story for the film.

Jan Sardi maintains that screenwriters are indispensable in the process of film-making. He glosses over the corporate and collaborative nature of writing that is characteristic of Hollywood film studios.[15] It is rare for a screenwriter to exercise control over a work. It is common for them to be subject to editors and script doctors. Furthermore, screenwriters are liable to be replaced if the director, the producer, or the financiers are unhappy with the script. Witness, for instance, what happened in the case of the film adaptation of the novel, *The Year of Living Dangerously*. The author of the novel, and the screenwriter of the film script, Christopher Koch, was at loggerheads with the director Peter Weir over the presence accorded to one of the characters, Mel Gibson. As a result, a new scriptwriter David Williamson was brought in to rewrite the film script. Another good example is the film about the concert pianist Percy Grainger called *Passion*. Peter Goldsworthy, Peter Duncan, and Don Watson successively worked on the film script. It seems to be the case that screenwriters are treated just like any other employee or independent contractor who are hired and fired depending on their performance.

Jan Sardi was also critical about the waiver provision in the legislation. The clause provided that the creator could waive all or any of his or her moral rights for the benefit of everyone, a particular person or

---

14 Rimmer, M. 'Interview with Jan Sardi', Melbourne, 30 April 1999.

15 Hamilton, I. *Writers in Hollywood 1915-1951*. New York: Harper and Row Publishers, New York, 1990.

persons or a particular class of persons.[16] Jan Sardi said in an interview with Rebecca Goreman:

> Well, it just seems absurd that here we are with this legislation being introduced in order to protect artistic integrity, and then we have a waiver provision to take it away. If they're allowing people to waive their rights to artistic integrity, why have the legislation? It's a Clayton's law otherwise, it's nonsense. It's the law you have when you don't want to have a law.[17]

Jan Sardi was concerned that financiers spread misinformation that screenwriters were 'film vandals' who would disrupt and interfere with the production, and distribution of Australian film and television. He longed for screenwriters to be included in the inner circle of policy-makers in the film industry.

In addition to such parliamentary submissions, the Guild also used the media as a platform to persuade the public of the rightness and correctness of its views. It relied upon stars and celebrities to broadcast its views in a range of different media. As a leading representative of the Guild, Jan Sardi was heavily involved in the public debate over moral rights. He spoke with Rebecca Goreman on the radio station PM, appeared on the television arts program 'Express', and wrote letters to the *Sydney Morning Herald*. His arguments were also displayed upon a web site maintained by the Guild. The Guild made public letters it sent to the Prime Minister, John Howard, and the Minister for the Arts, Senator Alston.[18] It charged that 'writers have been denied their moral rights

---

16 Senate Legal and Constitutional Legislation Committee. *Copyright Amendment Bill No.1*. Canberra: Parliament House, 1997.

17 Goreman, R. 'Interview with Jan Sardi', PM Program, Australian Broadcasting Corporation, 20 June 1997.

18 Martin, L. 'Writers Plan to Picket', *The Sydney Morning Herald*, 3 June 1998, p. 19.

because of pressure from United States interests'.[19] The Guild also picketed the opening of the Sydney Film Festival opening in 1998 to step up political pressure over moral rights.[20] It staged this media event to attract coverage of the issue. The Guild hoped that such attention would force the Federal Government to reconsider its policy about moral rights.

The Copyright Amendment (Moral Rights) Act 2000 (Cth)

Under pressure from the Guild, the Federal Government withdrew the section on moral rights until there was further industry debate and discussion.

The vice-president of the Guild, Ian David, put forward a compromise.[21] He submitted that authorship should be shared between the screenwriter, the director, and the producer where there was genuine collaboration in a film. He also said that the waiver provisions should be removed in return for an industry agreement stipulating what industry practices will be consented to. There has been industry discussion about this proposal. Other professional associations have also been involved.

The Federal Government essentially accepted the proposal put forward by the film and television industry. It has passed the *Copyright Amendment (Moral Rights) Act* 2000 (Cth). The Guild has provided affirmative public support to the Federal Government for accepting the proposals. The president of the Guild, Mac Gudgeon, said it was a great day for writers:

> The legislation reflects the collaborative nature of film-making. Australia has a vibrant television and film industry which relies heavily on the creative talents of

---

19 Ibid.

20 Ibid.

21 Coslovich, G. 'Writing the Wrongs', *The Age*, 29 September 1998.

> its writers, producers, and directors. These talents should be nurtured, recognised and celebrated – moral rights provide a framework in which this can be achieved. It provides a reasonable and workable solution that creates certainty for all parties.[22]

Ian David called it 'World-beating legislation for a common law country' that represented a new era for Australia's writers and creators.[23] He envisaged: 'We will now see in a new century feeling better, stronger and more confident as creators and Australians'.[24] Such public endorsements reflect the involvement of the Guild in the drafting of the legislation. However, it is not clear whether the screenwriters have necessarily won the struggle.

First, the Federal Government accepted the recommendation of the Senate Committee that the writers of scripts for film and television should be considered authors of the film or television program alongside the authors designated by the original legislation – namely, the producer and the director.[25] In practice, this proposal will have a different operation between television and film. A producer would be able to claim co-authorship in the case of a television series if they created the characters and storyline, or assumed responsibility for the visual style and casting. However, a producer would be able to claim co-authorship in the case of documentaries, mini-series and feature films if they were initially involved in the making of the film.

Second, the Federal Government has given legal recognition to co-authorship agreements.[26] It seems that a screenwriter can only take moral

---

22 Staff Reporter. 'Artists to Win Rights', *The Sydney Morning Herald*, 10 December 1999, p. 15.

23 Ibid.

24 Ibid.

25 S 191 of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth).

26 S 195AN (4) of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth).

rights action with the consent of the other authors – namely, the director and the producer. This means that they would be unable to take action against their collaborators in situations of conflict and disagreement. Take for, instance, the experience that so politicised Jan Sardi about the need for the reform of moral rights. It was a situation in which the screenwriter was pitted against the director and the producer of a film. There would have been no recourse to legal action if the moral rights compromise proposal was in existence during this conflict. The proposal also raises the prospect that the producer would be able to stymie any moral rights actions against parties – such as the financiers, and the distributor.

Third, the Federal Government dropped the waiver provisions completely from the legislation. It accepted the argument of creators that the waiver provisions were a means by which economically powerful users of their works could force them to give up these new rights altogether. The Federal Government has clarified the effect of the consent provisions.[27] It establishes that it is not an infringement of a moral right of an author if the act or omission is within the scope of a written consent given by an author. The Federal Government addressed concerns that powerful parties could abuse the consent provisions. It provided that duress or false and misleading statements would invalidate consent.[28]

Fourth, the Federal Government has added to the original legislation by including any relevant voluntary code of practice as a factor to be taken into account in the test of reasonableness. This is the case for both the right of attribution and the right of integrity.[29] The Federal

---

27 S 195AWA of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth).

28 S 195 AWB of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth).

29 S 195AR (3)(g) and s 195AS (3)(g) of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth).

Government gives effect to the film and television agreement, which stipulates what behaviour is reasonable. For instance, activities such as putting commercials on television, and cutting films to fit time-slot requirements were considered to be acceptable. The circumstances in which a moral rights action could be brought seem to be extremely limited. It would appear that it would only be possible to bring a legal action in relation to serious breaches of moral rights.

Fifth, the Federal Government added to the original legislation by including a requirement that, before granting an injunction, a court must consider whether to give the parties an opportunity to reach a settlement by negotiation or mediation.[30] It seems that legal action may only be taken as a last resort after the processes of mediation and alternative dispute resolution are exhausted. There is a danger that the co-authors will succumb to pressure from parties with superior bargaining power in this process. It is arguable that the moral rights legislation will serve a symbolic, rather than a practical purpose. What will happen in reality is that bargaining will take place under the shadow of the legislation. Only a few intractable disputes in the area of film will reach the courts.

Sixth, the Federal Government has taken heed of consultations about the duration of the new moral rights. The author's right of integrity in relation to film expires with the death of the author.[31] By contrast, the author's right of integrity in relation to other copyright works continues in force until copyright ceases to subsist in a work.[32] Furthermore the right of attribution and the right against false attribution also continue in force until copyright ceases to subsist in a work.[33] This double standard

---

30 S 195AZA (3) of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth).

31 S 195AM (1) of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth).

32 S 195AM (2) of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth).

33 S 195AM (3) of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth).

can be explained by the special pleading of the film industry. Perhaps the idea is that anyone can judge whether there is proper attribution, but only the author can judge matters of personal integrity.

The efforts of the film industry to regulate the effects of moral rights will no doubt encourage other copyright industries to engage in special pleading. In particular, the music industry will no doubt rely upon contract law to protect themselves from moral rights actions from disgruntled composers and musicians. It will also have the internal discipline to negotiate and impose an industry-wide agreement about consent and reasonable conduct.[34] It remains to be seen whether the publishing industry, galleries, performing arts companies, and the internet community will have the cohesion and the organisation to impose industry agreements on their respective communities.

PART 2
CELLULOID HEROES:
THE DIRECTOR

The director Scott Hicks was inspired to make the film *Shine* after reading an article by Samela Harris about David Helfgott for *The Adelaide Advertiser* in South Australia. He was so intrigued that he cancelled a birthday dinner with his wife to hear one of the concerts of the performer on the 30th May 1986. Scott Hicks met David Helfgott and his wife Gillian after the performance. It took him a year to engender a relationship of trust with them and their friends. Scott Hicks then spent a year

---

34 S 195AR (2)(f) and S 195AS (2)(f) of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth).

researching the story. He went back and forwards to Perth, sourcing information, and talking to members of the family. Scott Hicks attempted to write a screenplay, which was called 'The Flight of the Bumble Bee'. However, he decided to bring in Jan Sardi in 1990 to get a fresh interpretation of David Helfgott's life story and write a new screenplay. Scott Hicks approached the producer Jane Scott to raise finance for the film. It took the producer a long time to obtain money from funding bodies and commercial organisations to finance the film.

The film-makers attempted to protect the director's vision for *Shine* against outside interference. Jane Scott reflected that it was a matter of incredible negotiation to preserve the creative control of Scott Hicks. She sought to ensure that the studio who bought the film did not get any rights to cut the movie or re-edit it. Jane Scott was in a strong bargaining position because the film was successful at the Sundance Film Festival. She was able to secure the director's cut because of intense competition for the distribution rights in the United States. Scott Hicks reflected in his diaries:

> We extract pledges from Fine Line: no cuts, strong P & A (prints and advertising budget), platform release (in three stages). They offer resources for Oscar push, consultation with us all down the line and US $2 million advance for Northern American rights... At last, we opt for Fine Line, excited and in trepidation. A handshake all round and Bollinger seal the deal. We have sold the North American rights for close to half the film's budget ($6 million).[35]

The film-makers remained wary of the vision for the film being compromised by outsiders. The director was aghast at the suggestion

---

35 Hicks, S. 'From Sundance to Golden Globes: How Shine Seduced Hollywood' in Caputo, R. and Burton, G. *Second Take: Australian Film-makers Talk*. Sydney: Allen and Unwin, 1999, p. 305.

from a representative at the Film Finance Corporation that the film should be market-tested by an American audience. He was concerned that the content of the film would be changed in light of the results of the preview.

Since the international success of the film *Shine,* the director Scott Hicks has become a leading spokesperson for the Australian Screen Directors Association (ASDA) because of his high media profile and status. He fought for directors to be included in the scheme for statutory royalties for the retransmission of free-to-air broadcasts on pay television in the introduction of the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth). This was part of a larger campaign by directors to gain recognition as copyright authors in respect of economic rights as well as moral rights.

ASDA argued that the director was not recognised as the author of a film because the Australian film industry was in its infancy when the *Copyright Act* 1968 (Cth) was passed through Parliament. There was no understanding of the film director's craft and there was no professional guild or lobby group for directors. ASDA submitted that the director deserved the title of authorship because of the nature of the film industry and professional organisation:

> Since that time Australian film directors have become Australia's most significant cultural export in terms of human resources. Think of Peter Weir, Bruce Beresford, Baz Luhrmann, Scott Hicks, Jane Campion, George Miller, PJ Hogan, Jocelyn Moorhouse, Fred Schepsi, John Duigan, Gillian Armstrong, and Phil Noyce.[36]

---

36 Australian Screen Directors Association. *Submission to he House of Representatives Standing Committee on Legal and Constitutional Affairs.* Canberra: Parliament House, 1 October 1999.

ASDA glories in a golden age of national cinema. It evokes such great films as *Picnic at Hanging Rock, The Chant of Jimmy Blacksmith, Mad Max, Proof, The Year My Voice Broke, Muriel's Wedding, Strictly Ballroom,* and *The Piano.* The underlying message is that Australian directors deserve the status of authorship, because they are responsible for the success of the film industry.

In a powerful account of auteur theory, ASDA argues that the director is the author of a cinematographic film. It submits that the director is the principal creative contributor to a cinematographic film because they control what appears in the frame: sets, lighting, costume, acting, music, the behaviour of the figures, and the staging of the scenes.[37] ASDA denies that the film director is merely a technician who interprets the work of others:

> Despite Australia's prodigious directing talent our *Copyright Act* operates under the legal fiction that there is no author of a film. Film directors are perceived as being analogous to theatre directors or conductors of an orchestra in that they merely interpret or realise screenplays rather than create new and original works.[38]

ASDA asserts that the director deserves the status of authorship, because they stamp a distinctive visual appearance on a film. There is a personal connection between the director and the images of the film. In contrast to the claims of script writers, ASDA emphasises that narrative is subordinate to the spectacle of a film. It insists that cinema is primarily a medium of images. According to this perspective, the writing of the

---

37 Wallace, S. *Auteur or Author? Moral Rights and the Film Industry.* Arts Law Centre of Australia, 1994.

38 Australian Screen Directors Association. *Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs.* Canberra: Parliament House, 1 October 1999.

screenwriter is merely secondary to the work of the director in creating the spectacle of the film.

However, ASDA is wrong to assert that the idea that the director is the author of the film commands universal acceptance in the film community. There is some doubt whether the auteur theory should provide the basis for a legal model for authorship.[39] In the making of the film *Shine*, the director Scott Hicks eschewed the role of the auteur. He generously stressed the efforts of his collaborators – the screenwriter, the producer, the cinematographer, and the individual members of the cast. Scott Hicks was modest about his own contributions to the film. His vision of film-making was essentially a co-operative, collaborative model. So a much more realistic model would recognise that authorship is shared between the director and other key creative contributors, such as the screenwriter and the producer.

ASDA claimed that the trend in simplifying copyright law was towards acknowledging that film was a creative work.[40] It noted that the Copyright Law Review Committee said that films should be protected at the higher level of 'creations', and television programs as mere 'productions'. ASDA also sought to exploit the fact that the *Copyright Amendment (Moral Rights) Act* 2000 (Cth) recognised that the director was an author of a film. It submitted that it is inconsistent and ambiguous to amend legislation to provide authorship status for a director for moral rights but not for economic rights.

The Screen Producers Association ('The Association') claimed that there was a clear understanding that the establishment of moral rights did

---

39 Cooper, M. 'Moral Rights and the Australian Film and Television Industries', *Copyright Reporter*, 1997, Vol. 15 (4), p. 166.

40 Copyright Law Review Committee. *Simplification of The Copyright Act 1968: Part 2. Rights and Subject Matter.* Canberra: Attorney-General's Department, 1999.

not amount to a precedent for the extension of economic rights. It argued that giving directors an economic right in the film would have an adverse impact on financing of productions, industrial relations, and the management of intellectual property. The Association argued that remuneration for directors is adequately dealt with through industrial awards and commercial negotiations. They further argued that the Bill was an inappropriate place to make the significant changes to Australia's copyright and intellectual property rules that director's copyright entails. However, it is questionable whether the economic and moral rights of directors are adequately dealt with under contract law.

Witness what happened in the case of the film *Brazil*, written and directed by Terry Gilliam, the Monty Python animator.[41] He shot the approved script, and brought the film within schedule and within budget. Universal invested $9 million in exchange for the North American distribution rights. It was unhappy with the ending of the film because of a belief that the dark conclusion was uncommercial. Using the contractual provision governing the film's length as a ploy, Universal compelled Terry Gilliam to make further cuts and to re-edit the film. Terry Gilliam agreed to trim the film further, but he refused to alter the ending. In response, Universal declined to release Gilliam's version of the film and threatened to release a studio cut of *Brazil*. However, Terry Gilliam enlisted the aid of sympathetic columnists and film critics who aroused public sympathy and finally obtained the acquiescence of Universal. The case suggests that the power of the director was based in the media, rather in the legal system.

---

41 Carmenaty, R. 'Terry Gilliam's Brazil: A Film Director's Quest for Artistic Integrity in a Moral Rights Vacuum' *Columbia VLA Journal of Law and The Arts*, 1989, Vol. 4, p. 91.

Given the vagaries of bargaining with powerful parties under contract law, ASDA lobbied the Federal Government over including directors as beneficiaries of the retransmission scheme. Scott Hicks played a key role in this campaign. He presented the keynote speech to the annual conference of the professional organisation in Wollongong, 1999. Scott Hicks used the opportunity to express his worries about the continued erosion of the director's position in Australia, with battles on such issues as moral rights, residuals, and credits. Scott Hicks commented: 'We haven't really devised the same sort of mechanisms to nurture and nourish the director that we have for writers'.[42] He emphasised to the Minister for the Arts, Peter McGauran, that the position of the director must be respected in Australia.

In the Advisory Report on the *Copyright Amendment (Digital Agenda) Bill* 1999 (Cth), the House of Representatives Committee was persuaded by the arguments put forward by ASDA.[43] It recommended that the proposed Part VC of the Bill be amended to include film directors amongst the class of underlying rights holders who are to receive remuneration under the statutory scheme. However, ASDA failed to take into account divisions within the Federal Government. The executive and the bureaucracy did not agree with the views of the Parliamentary committee.

The Federal Government rejected the recommendation from the bi-partisan House of Representatives Committee looking at the scheme.[44] It excluded directors from the proposed legislation on cable re-transmission

---

42 Maddox, G. 'Taking Shine to Hollywood', *The Sydney Morning Herald*, Monday, 11th October 1999, p. 15.

43 House of Representatives Standing Committee on Legal and Constitutional Affairs. *Advisory Report on The Copyright Amendment (Digital Agenda) Bill* 1999. Canberra: The Parliament of The Commonwealth of Australia, 1999, p. 92-93.

44 Harty, J. 'Directors Dropped from Rights Scheme', *Encore*, Wednesday, 28 June, 2000.

of free-to air television. After the Federal Government rejected their proposal, the directors could only obtain the support of the Labor Opposition. The Democrats refused to support the proposals of ASDA because the amendments were badly drafted. Scott Hicks was dismayed at the exclusion: 'There is a fundamental principle at stake here – that directing is a creative act and produces intellectual property, for which directors should be rewarded in the same way as any other creator'.[45] He believed that Australia was in danger of becoming an international laughing stock as a result of the legislation's failure to recognise the creative contributions of directors. However, the Federal Government has publicly called for submissions on the issue of whether copyright law should recognise the creative contribution of film directors.[46] It will provide another chance for ASDA to press its case.

PART 3
PANDORA'S BOX:
THE PRODUCER

The producer Jane Scott has a long association with the Australian film industry. Since working with Bruce Beresford on *The Adventures of Barry McKenzie*, she has worked as the producer of *Crocodile Dundee II*, *The Boys in the Island*, *Top Kid*, *On Loan*, *Echoes of Paradise* and *Goodbye Paradise*. She also line-produced *My Brilliant Career*, *Stormboy*, *The Survivor*, *Strictly Ballroom*, and *Crocodile Dundee I*. Her television producer credits include *The Boys from the Bush* and Stephen King's *The Tommy Knockers*. Jane Scott

---

45 Ibid.

46 Copyrites. 'Film Directors – Consultation on Copyright', Canberra: Department of Communications, Information Technology and the Arts, 2000, Issue 32, p. 15.

observes that her job is a jack-of-all-trades. She is involved in the creation, production, and marketing of films. Jane Scott reflects that ultimately her role is to deliver a product to the financier:

> In a way, producing is anything to anyone. You can concoct a producing role to suit whatever production it is ... The producer role is everything. It is initiating the project more often than not. It is ultimately delivering a product to the financier, having raised the money from the financier. It can be the Film Finance Corporation. It can be sales agents. It can be distributors. Here, there, everywhere.
>
> Being responsible for delivering that finished article to those financiers means having an overall creative role as well. There are all these issues about director's cuts. It is a matter of incredible negotiation to work out how to preserve that creative control. In the end, I do need to work it out with the distributor that I am delivering what I said I would deliver without it getting in the way of the director's cut.[47]

The producer has a responsibility to protect the creative vision of the writer and the director when selling the film to sales agents, financiers, and distributors.

Jane Scott was involved in the early negotiations about forming the Screen Producers Association of Australia. However she has since disassociated herself from the professional organisation because she found that it was not an adequate representative of her interests. For instance, Jane Scott did not agree with the Screen Producers Association of Australia that producers should be the only ones to be recognised as authors of a film. She was instead sympathetic to the claims that screenwriters and directors should also be recognised as authors of a film. Jane Scott still feels an affinity with independent film and television

---

47 Rimmer, M. 'Interview with Jane Scott', Sydney, 29 July 1999.

producers. Jane Scott was instrumental in setting up an informal association of independent film and television producers. She drafted a petition to the Federal Government and canvassed the support of nineteen other independent producers – including Tristram Miall of *Strictly Ballroom*, Helen Bowden of *Soft Fruit*, Martha Coleman of *Praise*, and Patricia Lovell of *Picnic at Hanging Rock*. In addition to such informal associations, Jane Scott has also joined ASDA. She feels that this association is more representative of film-makers. This also reflects her collaborative method of working with film directors.

Jane Scott is conscious that collaborations with writers and directors are often volatile and unpredictable. She enters into a partnership deal with writers and directors to diminish the potential for conflict and disagreement. She believes that this is a good way in which to begin collaboration. Jane Scott incorporated a new company called Momentum Films in order to make the film *Shine*. She thought that this model provided protection in the form of limited liability. Jane Scott made Scott Hicks a corporate director of Momentum Films. She believed that this partnership allowed for a sharing of copyright ownership and royalties. Jane Scott talks about the nature of this relationship:

> Economically, these things have to be set out very clearly on paper both with the writer and the director. I negotiate the deal with the writer's agent or the director's agent. It is a clear negotiation about fee and equity. They usually have some equity in the production and some share in the profits. From the creative point of view, you can only set out the working relationship on paper in an ideal form. In practice, it is a matter of personalities working together. I most prefer entering into a partnership with the key people – whether it be the writer or the director. I make them a director of the company, so they are very much a part of the whole thing. It is then really not a question of who has what. That seems to

> work very well. So Scott Hicks was a director of Momentum Films, and Ana Kokkinos was a director of Head On Films.[48]

Jane Scott has been using this method of partnership in the last seven years. She believes that the model of the corporation was a good way to define the responsibilities and obligations of the key creative team.

Jane Scott had great difficulties raising the finance for the film *Shine*. Scott Hicks reflected that funding for the project fell through on a number of occasions:

> The project did come seriously close to having the lid nailed down two or three times. But every time it was almost financed, and then fell over again, I'd reassess. And I'd pick up the script and reread it again, and it said and did the same things to me, and somehow I'd find the resolve and the drive to stay with it.[49]

However, Jane Scott remained determined in her efforts to find financial partners who were willing to fund the production of the film *Shine*.

Ronin Films expressed interest in becoming the Australasian distributor and the Film Finance Corporation began to talk of getting behind the project too. 'In the early stages this encouragement was crucial', said Jane Scott. 'It kept the project alive'.[50] However, there was a need to raise finance from overseas. Jane Scott observed that the size of the budget – about $6 million dollars – made it necessary to get pre-sales finance from overseas sales agents and distributors:

---

48 Ibid.

49 Sardi, J. and Hicks, S. *Shine: The Screenplay*. London: Bloomsbury Publishing, 1997, p. 145.

50 Ibid.

> A low budget would have been easier to finance but the film would have been harder to make properly. A higher budget meant going overseas for a bigger proportion of the finance, which was immediately more challenging.[51]

Scott Hicks resented the fact that the Australian Film Finance Corporation compelled Momentum Films to bring in another financing company from outside Australia. He made some pointed comments on the need for film-makers to share in the profits of their success. Had the Film Finance Corporation not brought in an extra financing partner, he and producer Jane Scott would have earned enough from Shine's international success to establish a company to develop projects – another Kennedy Miller.

The film-makers entered into a deal with Pandora Cinemas, a film distribution company incorporated in Luxembourg and based in France. They reserved for themselves distribution rights throughout Australasia and the United Kingdom; and granted Pandora distribution rights throughout the world. The film-makers were ambivalent about the involvement of Pandora Cinema. The producer Jane Scott was appreciative that the involvement of the distributor made it possible to make the film *Shine*:

> Once Pandora came in it triggered the rest. The Film Finance Corporation, the British Broadcasting Commission and South Australian Film Commission, and Film Victoria. It was quite a mixed bag. At one point I was dealing with eighteen different lawyers.[52]

However, she had some reservations about whether the distributor would be reliable in passing on the money to Momentum Films.

---

51 Ibid.

52 Id, p. 145.

Jane Scott discovered that the royalty returns from Pandora Cinemas were wrong. She filed suit in 1998 in Sydney's Supreme Court, saying that on her reading of the pact with Pandora, the French group owed her money:

> I believe there's a discrepancy in the way in which Pandora is reporting and so I'm taking them to court. It sits sadly and in this case I'm forced into this position.[53]

Momentum Films were able to bring this action because of the success of the film and the support of Australian film finance bodies. Pandora Films filed a suit over jurisdiction in the United Kingdom and counter-sued Jane Scott, saying that on its reading of the contract, she owed them money. In response, Jane Scott dropped her Australian action and defended the mirror claim of Pandora. She thought that a judgment would be easier to enforce in a United Kingdom court, than from an Australian court. A tactical decision was taken that it was better to sue Pandora Films in Europe where the company was located.

In *Pandora Investment S.A.* v *Momentum Films*, Justice David Steel of the High Court of Justice, Chancery Division, considered the proper construction of a written acquisition agreement made between the producer and the distributor.[54] The key provision was clause 5 of the agreement, which concerned the allocation of receipts between the parties. The parties agreed that clause 5 (a) of the agreement dealt with the application of Pandora Investment's gross receipts. They also concurred that clause 5 (b) dealt with the receipts of the owners as a result

---

53 Woods, M. 'Success Breeds 'Shine' Lawsuits', *Variety*, 16 March 1998, Vol. 370, p. 18.

54 *Pandora Investment S.A.* v *Momentum Films Pty Ltd* (unreported, High Court of Justice, 30 June 1998), p. 9.

of distribution in Australasia and the United Kingdom. However, there was a division of opinion over the proper interpretation of clause 5 (c) of the agreement.

In the Chancery Division of the High Court, Justice Steel rejected the interpretation of the contract put forward by Pandora Cinemas:

> For my part, I am wholly unpersuaded that the owners' construction and the outcome just described can be categorised as commercial nonsense. It is true that if the owners' construction be right Pandora could have sought to negotiate a better deal where they were held harmless from contributing to the net production cost regardless of the time at which receipts reached the owners. But a bad deal, let alone a deal less advantageous than it might have been, is not an absurd deal. It may well be that Pandora sought to negotiate a better arrangement; maybe they did not; maybe they assumed that the film was likely to sell, if it all, in the United Kingdom and Australia and thus the risk of paying off the net cost was minimal.[55]

His Honour ruled in favour of Momentum Films, Scott's production company for Shine, validating its interpretation of the contract.

Pandora Films appealed against the decision of Justice Steel in respect of the *Shine* case on the grounds that his reading of the contract was incorrect or perverse. The chairman Charles Bourguignon denied that the distributor owed any outstanding monies to Momentum Films.[56] In response, Jane Scott retorted: 'I am surprised they pursued this but I'm not surprised he might be re-writing history. Nobody likes to be proven wrong'.[57]

---

55 Id, p. 9.

56 Woods, M. and Tartaglione, N. "Kolya' Suit Joins 'Shine' In Pandora Legal Tangles', *Variety*, 13 July 1998, Vol. 371 (9), p. 23.

57 Ibid.

In the end, three judges of the English Court of Appeal were unanimous in dismissing the appeal brought by Pandora Films.[58] Jane Scott confirmed that the film's Australian investors would now be able to recoup about $2 million dollars, up to half of which has been awarded as legal costs. She discussed the implications of the decision for film-makers:

> I've been fighting this for a long time and I've been vindicated. The film has taken over $100 million, but very little of that has sifted through. *Shine* has well repaid the film's budget and has allowed a lot of people to make a lot of money on the way through, but certainly for myself at the bottom of the pile, it is difficult. Film-makers also need to be kept financially liquid so they can go on and make more films.[59]

The result is significant because it is believed to be the first time that an Australian producer has launched a successful action against an international distributor or sales agent.

The legal dispute between Pandora Films and Momentum Films received a considerable amount of publicity. It received notable coverage in the film industry journals, *Variety* and *Encore*, and mainstream Australian newspapers, like *The Sydney Morning Herald*. Jane Scott believes that publicity is a good alternative to litigation. She observed that the controversy made it difficult for the owners of Pandora films to sell the company. The chief executive of the Film Finance Corporation, Catriona Hughes, commented to the media:

---

58 *Pandora Investment S.A.* v *Momentum Films Pty Ltd* (unreported, Court of Appeal Civil Division, 17 December 1999).

59 Martin, L. 'Shine Investors Win $2m in British Court Battle', *The Sydney Morning Herald*, 7 July 1998, p. 11.

> I believe the English Court of Appeal's decision confirms the legal position of the parties and I congratulate Jane Scott on her win. I regret that Jane had to go through this unnecessary court process for this vindication. The Film Finance Corporation will always support producers enforcing their rights, and our motivation in doing so goes beyond simply protecting our investment.[60]

The effect of the publicity was to send a warning to international distributors and sales agents to respect Australian film-makers.

The publicity also gave heart to other producers who were experiencing contractual and financial disagreements with Pandora Films. After the decision of the High Court of Justice in relation to Momentum Films, the producer of *Kolya*, Eric Abrahams, launched another writ on behalf of Portobello Pictures and Biograf Jan Sverak against Pandora Films.[61] The plaintiffs wanted their pact with Pandora Films terminated and damages paid for various alleged breaches of contract by Pandora. Areas of dispute included marketing expenditure and strategies, Pandora's inking of a first and last look deal on remakes, sequel and prequel rights with Miramax, and cross-collateral and recoupment matters. The film distributors Pandora Cinemas have decided to reach a settlement with Eric Abrahams. They do not want to take his case further to court.

---

60 Zion, L. 'Short Cuts', *The Age*, 23 December 1999, p. 4.

61 Woods, M. and Tartaglione, N. '"Kolya" Suit Joins "Shine" in Pandora Legal Tangles', *Variety*, 13 July 1998, Vol. 371 (9), p. 23.

PART 4
THE GHOST OF RACHMANINOV: THE COMPOSER

David Hirschfelder was the musical director and composer for the film *Shine*. After training as a classical musician and playing modern jazz, he worked with the popular singer John Farnham as a musician, songwriter, programmer and arranger. David Hirschfelder went on to compose theme music for television and films such as *Strictly Ballroom*, *Elizabeth*, and *Sliding Doors*. He is a member of the Australian Guild of Screen Composers, and the Australasian Performers' Rights Association, the copyright collecting society for composers.

David Hirschfelder observes that composing musical soundtracks for movie pictures is all a question of 'tuning into the psyche of the film'.[62] He does not mind whether he is called in before or after filming is completed, 'each process has its pros and cons', but he insists on immersing himself in the script and following the director's vision.[63] David Hirschfelder observes that the composer is a key part of the collaborative team in film-making:

> It's a team thing. Sometimes – only sometimes – I can write a piece of music and a director will say, 'You have given me an idea. I need to re-shoot that'. But usually I'm an interpreter, a reflector.[64]

---

62 Moss, D. 'Score: An Interview with David Hirschfelder', *Cinema Papers*, December 1997, no. 122, pp. 18-21, 70.

63 Ibid.

64 Ibid.

David Hirschfelder claims that the composer will occasionally play an instrumental creative role in providing a new development in the film. He admits, though, that the music is usually just an interpretative activity.

In the case of *Shine*, David Hirschfelder spent a lot of time with David Helfgott, getting to know his personality and idiosyncrasies. He recalls that the life and music of David Helfgott provided the inspiration for the work:

> On one occasion, we asked David to play a few bars of Rachmaninov and Liszt and he wouldn't do it. He kept on muttering to himself, 'Tragic fragments. Tragic fragments.'
>
> I realised this music was bringing back bad memories for him and I said, 'No, David, these are not tragic fragments, but magic fragments'. His eyes lit up, he laughed and said, 'That's right, that's right. Accentuate the positive, accentuate the positive. Magic fragments: that's good, that's good', and he played the pieces straight away. The idea of 'tragic fragments' stuck in my head though, and, when I was writing the score, here and there up popped these jarring, tangled, tragic chords, which I feel reflect David's state of mind.[65]

The musical composition for the film is a mixture of interpretations of the work of Liszt, Rachmaninov and others, and original compositions.

David Hirschfelder

In 1997, the composer David Hirschfelder lodged a writ at the County Court of Victoria over the soundtrack royalties for *Shine*.[66] He alleged that the agreed 2 per cent royalty on each soundtrack unit sold had not

---

65 Ibid.

66 Staff Report. 'Disharmony over Soundtrack', *The Sydney Morning Herald*, 19 Feburary 1997, p. 3; and Magowan, F. 'Shine: Musical Narratives and Narrative Scores', in Coyle, R. (ed.) *Screen Scores: Studies in Contemporary Australian Film Music*. Sydney: Australian Film and Television School, p. 106 at 118, and 120.

been paid by Momentum Films, and sought $200,000 damages in compensation. His solicitor Phil Dwyer said: 'We say that he is entitled to a royalty calculated on a retail basis; they say he isn't'.[67]

Jane Scott has settled this court action with the composer. The terms of the agreement are confidential. After the settlement with David Hirschfelder, Jane Scott said in a *Variety* interview:

> It all comes down to the interpretation of contracts. People pick up pieces of paper two years later with something else in their minds and the success of the film behind them.[68]

Jane Scott believes that there was a contract in respect of royalties for the soundtrack for the film *Shine*. However, the parties had different interpretations of that agreement in light of the success of the film *Shine*. Jane Scott believes that contracts are not fixed and immutable documents. They become negotiable documents, especially when a producer is dealing with a composer. It is difficult to draft a contract that will cover all of the contingencies and eventualities.

Jane Scott is exasperated by such legal disputes over copyright to musical works and sound recordings in relation to the film *Shine*. She points out that the main problem is that composers have licensed or assigned away their rights to the music to recording companies and musical companies. It is difficult to establish who has ownership of work. Jane Scott observes:

---

67 Staff Report. 'Disharmony over Soundtrack', *The Sydney Morning Herald*, 19 Feburary 1997, p. 3.

68 Woods, M. 'Success Breeds 'Shine' Lawsuits', *Variety*, 16 March 1998, Vol. 370 (5), p. 18.

> This is a nightmare. Music is just awful. It is partly awful because most composers seem to have entered into a publishing deal with a music publishing company. I have had so much trouble with that. They are putting themselves outside any possibility of future negotiation. I never want to deal with a composer via a music publishing company. This was the case with *Shine* with David Hirschfelder and Polygram. It was also the case with *Head On,* and another composer who also has Polygram as his music publishing company. It drags on with both films. It is a big mess really.[69]

Jane Scott makes the general observation that composers and managers often unwisely assign away their economic rights in musical works and sound recordings to recording companies and musical publishers. The litigation taken by composers and musicians such as George Michael, Elton John, and Holly Johnson from the band Frankie Goes To Hollywood demonstrates that it would be difficult for film composers to get out of agreements negotiated with recording companies and musical publishers.[70] The individual fights she has had with composers and musical publishers takes place against the background of an industry-wide struggle over the royalties paid in respect of soundtracks.[71]

Rachmaninov's Estate

Jane Scott and David Hirschfelder faced claims that the use of the work of Sergei Rachmaninov in the film *Shine* was a breach of economic rights and the moral rights of the estate.

---

69 Rimmer, M. 'Interview with Jane Scott', Sydney, 29 July 1999.

70 *Schroeder Music Publishing Co Ltd* v *Macaulay* [1974] 1 WLR 1308; *O'Sullivan* v *Management Agency And Music Ltd* [1984] 3 WLR 448, *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] EMLR 229.

71 *Phonographic Performance Company Of Australia Limited* v *Federation Of Australian Commercial Television Stations* (1998) 40 IPR 225.

Economic rights

Jane Scott believed that the musical work of Sergei Rachmaninov would have fallen outside the period of copyright duration, which in Australia was for the life of the author plus 50 years. She noted that the film was made in 1996, more than 50 years after the death of the composer Sergei Rachmaninov in 1943.

However, Jane Scott discovered at the end of the production that the musical work was still in copyright protection in certain countries such as France and Japan, where duration was for the life of the author plus 75 years.

Furthermore, Jane Scott also found that the United Kingdom had just extended the duration of copyright protection from 50 years to 70 years in line with the European Union.[72] She had made the film and recorded the music in the no-man's land period between the 50-year end of copyright and the United Kingdom coming back into 70 years of copyright.

Her lawyers believed that she had grounds for argument under 'The Duration of Copyright and Rights in Performances Regulations 1995'. Regulation 23 protected Jane Scott against claims of copyright infringement on the grounds that she was pursuing arrangements – written agreements with financiers – to produce the film *Shine* which were made before the necessary date. Regulation 24 provided that a

---

72 Dworkin, G. 'Authorship of Films and the European Commission Proposals for Harmonising the Term of Copyright', *European Intellectual Property Review*, 1993, Vol. 15 (5), p. 16; Kurlantick, L. 'Harmonization of Copyright Protection' *European Intellectual Property Review*, 1994, Vol. 16 (11), p. 463; and Antill, J. and Coles, P. 'Copyright Duration: The European Community Adopts 'Three Score Years and Ten'' *European Intellectual Property Review*, 1996, Vol. 18 (7), p. 379.

compulsory licence could be obtained in respect of revived copyrights subject to reasonable remuneration.

After obtaining this legal advice, Jane Scott refused to surrender to the incredible demands of the music publishers for exorbitant royalties. She was able to negotiate a smaller payment of royalties, and sign off on a copyright licence with the musical publishers of Rachmaninov's work.

Moral rights

Alexandre Rachmaninov, the grandson of composer Sergei Rachmaninov, brought a moral rights action in France against the makers of *Shine*. He sought damages from Jane Scott, David Hirschfelder, the distributor Gaumont/BVI and the music publisher Polygram.[73] Alexandre Rachmaninov argued that the makers of the film *Shine* have infringed the moral right of attribution because his grandfather's music had received insufficient credit in the film and supporting materials, and claimed damages of more than five million francs ($1.25 million). He also argued that the makers of the film *Shine* had violated the moral right of integrity because the film's musical director, David Hirschfelder, had improperly fragmented and denigrated the grandfather's musical works in his adaptations.

Jane Scott was unable to dismiss the case on the procedural grounds that Alexandre Rachmaninov did not have standing to represent the relatives of the dead composer. So she had to contest the substantive claims that the film-makers had violated the moral rights of Sergei Rachmaninov.

First, Jane Scott claims that the use of Rachmaninov's work in the film actually enhanced the honour and the reputation of the composer.

---

73 The music publisher Polygram passed in ownership from Philips to Universal.

The film gives the work of Rachmaninov the imprimatur of romantic greatness and genius. Take, for instance, the reverence with which the performers John Gielguld and Noah Taylor speak about his work in the course of the film.

Second, Jane Scott put forward evidence that the grandson benefited enormously from the use of Rachmaninov's music in the film *Shine* through royalties from the soundtrack, the sound recordings of Rachmaninov's music by other performers, and the increase in sales of sheet music.

Third, Jane Scott argued that Alexandre Rachmaninov himself did not believe that the film *Shine* was in any way detrimental to the honour or reputation of his grandfather. He had taken out a large advertisement in trade paper *Variety* congratulating Geoffrey Rush for his Academy Award and others associated with the film. He had invited David Helfgott to the family home on Lake Geneva to play his grandfather's piano. He also spoke highly of the film while having tea at the Dorchester with David Helfgott's manager.

In the end, a Paris court threw out Alexandre Rachmaninov's moral rights case over the use of Serge Rachmaninov's music in the 1996 Australian film.[74] It dismissed the case and ordered the plaintiff to pay 10,000 francs in costs to the defendants, including production company Momentum Films. Jane Scott said that she was 'totally relieved' by the decision, which ironically came after she had decided to settle the case out-of-court to stop it dragging on. However, the Rachmaninov family has appealed against the decision of the Paris Court.[75] It is doubtful, though, that such an action will be successful.

---

74 Barber, L. 'D Minor for Shine Lawsuit', *The Australian*, 14 June 2000, p. 5.

75 Rimmer, M. 'Supplementary Interview with Jane Scott', Sydney, 15 December 2000.

The question arises: how would have this case fared if it had been brought under the proposed moral rights legislation in Australia? It is important to recognise that there are important differences between moral rights in civil law and common law countries.[76] The regime in Continental countries is quite robust. Alexandre Rachmaninov was able to bring an action for violation of moral rights in France, even though the outcome went against him. By contrast, the regime of moral rights proposed for Australia is but a pale imitation of the European system. It would have been difficult to bring an action for the violation of the moral right of attribution because of the operation of industry agreements. It would have been impossible for Alexandre Rachmaninov to bring an action for infringement of the moral right of integrity in Australia because the cause of action would have expired with the death of his grandfather. So the outcome of the litigation would have been the same whether it was brought in France or Australia. However, it is arguable that the process would have been quite different. Jane Scott could have been saved the legal uncertainty and financial hardship of defending such a case in the jurisdiction of Australia.

---

76 Ginsburg, J. 'Moral Rights in a Common Law System', in Anderson, P. and Saunders, D. (eds) *Moral Rights Protection in a Copyright System.* Brisbane: Griffith University, 1992, p. 13; Ginsburg, J. 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America', in Sherman, B. and Strowel, A. (eds) *Of Authors and Origins: Essays on Copyright law.* Oxford: Clarendon Press, 1994; and Adeney, E. 'The Moral Right of Integrity of Authorship: A Comparative View of Australia's Proposals to Date', *Australian Intellectual Property Journal,* 1998, Vol. 9, p. 179.

PART 5

THE BIG STEAL:

THE PERFORMERS

The film-makers of *Shine* were adamant that Geoffrey Rush was the perfect choice to play the role of the adult David Helfgott. Scott Hicks was impressed by his performances in *King Lear, The Diary of a Madman,* and *Uncle Vanya.*[77] However, the distributors and sales agents were reluctant to finance the cinematic film *Shine* because the lead actor Geoffrey Rush did not have an established reputation in the film community. They argued that the role should instead be awarded to a recognisable star. Jan Sardi recalls that the film company sought to dislodge Geoffrey Rush from the position:

> The distributors said, 'Yes, look, it's kind of interesting, we kind of like it, but who is Geoffrey Rush?' At one stage Miramax were sort of swimming around the project basically saying, 'We like it, but we'd need to put someone in it' or agents from overseas, there were some agents who had read it because you give it to agents to try to cast. We were doing that to try to cast some of the other roles. And they'd say, 'Well if you put this actor in it, I'll guarantee you that Miramax will instantly pick this film up because we know that they like it very much, but they'd never be able to sell it'.[78]

The distributors and sales agents discounted the experience and employment of Geoffrey Rush in the community of Australian theatre. They assumed that success on stage did not necessarily translate to stardom on the screen. The distributors and sales agents dismissed the

---

77 Sardi, J. and Hicks, S. *Shine: The Screenplay.* London: Bloomsbury Publishing, 1997, p. 146-147.

78 Tooth, G. 'Home Movies in the Global Marketplace', Background Briefing, Radio National, Australian Broadcasting Corporation, 8 August 1998.

limited experience of Geoffrey Rush in the area of film. They believed that a star performer could guarantee the success of a risky film. Such faith is often misplaced – a film can still be a failure with a stellar cast of celebrities.

The film-makers of the film *Shine* refused to buckle under such pressure from sales agents and distributors. They declined to compromise on the casting of Geoffrey Rush as the elder David Helfgott. The film-makers were forced to cast Noah Taylor in the role of the younger David Helfgott because Geoffrey Rush would be too old to cover his childhood years. They cast international names and stars – such as Lynn Redgrave, Sir John Gielgud and Bob Hoskins – in the supporting roles to compensate for the relative anonymity of the Australian actors Geoffrey Rush and Noah Taylor. The BBC withdrew from financing the film after Bob Hoskins could no longer play the part of David Helfgott's father.[79] However, the broadcaster returned to the fold after Armin Mueller-Stahl was cast in that role. The outstanding reputation of the supporting cast helped persuade sceptical sales agents that they would be able to sell the film overseas. It also helped advertise that the film *Shine* was a serious piece of work deserving consideration for film awards.

After the film *Shine* was released, Geoffrey Rush won an Academy Award for the Best Male Actor at the Oscars. He dedicated his award to all those sales agents and distributors who doubted that he should be cast in the role of the adult David Helfgott. The actor has gone onto have a successful film career, appearing in such films as *Children of the Revolution*, *A Little Bit of Soul*, *Shakespeare in Love*, and *Elizabeth*.

---

79 Rimmer, M. 'Supplementary Interview with Jane Scott', Sydney, 15 December 2000.

The episode highlights the vulnerable position of performers in relation to film. It raises the question of what, if any protection, performers have in relation to their performance in a cinematographic film.

The industry union, Media Arts and Entertainment Alliance, have lobbied, so far in vain, for the introduction of comprehensive economic and moral rights for performers in both the audio and audio-visual fields.

The industrial officer, Michelle Hryce, claimed that performers are creators of their work, and should be entitled to moral rights in respect of their performances. She put forward a number of legal arguments in favour of performers' rights to the Senate Legal and Constitutional Committee on the *Copyright Amendment Bill* 1997 (Cth). Michelle Hryce observed that performers were not adequately protected under industrial contracts, agreements, and awards. She pointed out that it would be hard to win a case under defamation law, Trade Practices law, and copyright law at present. Michelle Hryce insisted that performer's rights are supported by international trends. She referred to the WIPO Phonograms And Phonographs Treaty of 1996. It was left to a member of the Media, Arts and Entertainment Alliance to illustrate such concerns with practical examples.

In personal testimony to the Senate Legal and Constitutional Committee, Steve Bisley emphasised that performers deserved the status of authorship because of their work in the development and creation of characters. He sought to impress the Senators with his experience as an actor in television programs such as *The Seven Deadly Sins*, *Frontline*, and *Water Rats*, and cinematic features as *Mad Max* and *The Big Steal*. Steve Bisley sought to provide a practical understanding of the copyright issues affecting actors and performers in the audio-visual arena. He referred to two defining experiences in his career – the first, in which his character in

the film *Mad Max* had his voice dubbed over; and the second, in which his character in the *Big Steal* was billboarded in a television advertisement without his consent or permission.

First, Steve Bisley recalled his appearance in the Australian road movie, *Mad Max*, directed by George Miller and produced by Byron Kennedy in the 1970s. He played the supporting character of Goose, a policeman friend of Max played by Mel Gibson. Steve Bisley was distressed to discover that the American distributor of the film had revoiced the characters because of a belief that an overseas audience would not be able to understand Australian accents. He recalled that his voice had been dubbed as a Montana cowboy:

> A friend of mine called me from London to say that they had just seen the film and the Montana accent that I had was a bit surprising. So I got a copy of it and there I was 'yuckin' it up and slidin' along' the Australian roads with a cowboy accent. So it was revoiced. We were not even asked to do the voices. The thing was that if we had been approached and asked, 'Can you voice them in an American accent?' I am sure the performers were of the calibre that they would have given it a very good shot.[80]

Steve Bisley allows that the film industry at the time was still rather naive. It was the first film by the director George Miller and the producer Byron Kennedy. The production team could have lacked the necessary legal experience to protect themselves against American distributors.

Second, Steve Bisley spoke about his role as a used-car salesman called Gordon Farkus in the film *The Big Steal* directed by Nadia Tass. He emphasised the time, effort, and creative work he had put into

---

80 Senate Legal and Constitutional Legislation Committee. *'Public Hearings: Copyright Amendment Bill* 1997 (Cth)', Tuesday, 19 August 1997, p. 125.

researching and developing the character. Steve Bisley was appalled to find that his character was billboarded in a television advertisement when it was screened in Australia:

> About six months after the *Big Steal* had done the cinema release, it was given the Sunday night film slot on one of the major networks. One of my children, my eldest son, called me into the lounge room and there was an ad break and in the ad break there was a still of my character, the Gordon Farkus character, in another sticky situation and there underneath it was a name of one of the major telecommunication players saying that if this character had had the mobile phone that was being promoted by this company, 'He may not have been in this sticky situation that he found himself in'.[81]

Steve Bisley observed that he had avoided appearing in television commercials because he wanted to preserve his artistic integrity in the acting profession. So he felt that the advertisement screened on commercial television had diminished his honour and reputation. Steve Bisley acknowledged that the contract provided money for his appearance in film and residual payments for re-runs of the show. However, he was upset that the agreement did not give him any rights in respect of the commercial use of his performance on the cinematographic film.

Steve Bisley complained to the telecommunications network concerned. He accepted a settlement in respect of the billboarding. The Media, Arts and Entertainment Alliance obtained legal advice for Steve Bisley telling him that he had no grounds to bring a legal action. This is accurate to the extent that there would be no remedy in respect of economic rights and moral rights under copyright. But there could have

---

81 Id, p. 123.

been an action under s 52 of the *Trade Practices Act* for misleading and deceptive conduct, and under the common law for the action of passing off.[82]

The majority of the Legal and Constitutional Committee refused to contemplate the introduction of performer's rights. They found it difficult to follow the submissions of the Media Arts and Entertainment Alliance and the actor Steve Bisley. What is apparent from the transcripts is that the Legal and Constitutional Committee do not really understand the significance of performers' rights. They were guided instead by the opinion of the senior public servant, Chris Creswell:

> I do not want to confuse the situation, but Mr Bisley was arguing in support of performers having moral rights. I am happy to address that question if the committee would like. If it is not in this bill, it is a separate issue – performers rights, including performers moral rights ... We are not seeking to constrain the discussion. All I was seeking was to inform the committee that performers moral rights are not provided for here. The bill is intended to implement the moral rights obligations under the Berne Convention. The Berne convention does not include any protection for performers. Performers rights derive at the moment from conventions in operation such as the Rome Convention and the TRIPS convention. They make no provision for moral rights.[83]

It is unlikely that the Australian Government will be moved to provide copyright protection for audio-visual performances until international conventions have been developed on the matter. The WIPO Phonograms

---

82 Protection against the appropriation of personality and charactering merchandising has been established in the Crocodile Dundee litigation and the Duff Beer case: *Hogan* v *Pacific Dunlop* (1988) 12 IPR 225; *Pacific Dunlop Ltd* v *Hogan* (1989) 14 IPR 398; *Hogan* v *Koala Dundee Pty Ltd* (1988) 12 IPR 508; and *Twentieth Century Fox Film Corporation* v *South Australian Brewing Corporation* (1996) 34 IPR 225.

83 Senate Legal and Constitutional Legislation Committee. 'Senate Legal and Constitutional Legislation Committee. *'Public Hearings: Copyright Amendment Bill* 1997 (Cth)', 2 September 1997, p. 224.

and Performances Treaty (WPPT) concluded in December 1996 updates the regulatory environment for the protection of performers only in sound performances and not audiovisual performances. The WIPO International Bureau has published a draft of the proposed draft treaty on the protection of audiovisual performances. It will be considered at a WIPO Diplomatic Conference in Geneva.

There is also resistance within the film industry to the introduction of performers' rights. Jan Sardi speaks with respect about the performers in the film *Shine* – such as Geoffrey Rush, Noah Taylor, and John Gielguld. However, he argues that performers do not deserve copyright protection, because they are merely interpreters of the script:

> It is a question of where do you draw a line in the end. I think that the key word that you used was 'interpretation'. Performers interpret. They are not coming up with a character, but they are coming up with an interpretation of a character. Performers can be vulnerable because they can be made to look good or bad in a film through editing. I do not believe that they should get moral rights as such because they are not the authors of the work. You have to limit the protection to the authors of the work.[84]

Jan Sardi concedes that the role of performers may go beyond mere interpretation in certain cases and amount to invention and creation. I asked the screenwriter what he thought of Mike Leigh's method of working with actors, developing a script through the rehearsal and improvisation of the actors.[85] Jan Sardi replied: 'Mike Leigh is a special case. But even he gets the credit for the screenplay'.[86] It is true that Mike

---

84 Rimmer, M. 'Interview with Jan Sardi', Melbourne, 30 April 1999.

85 Clements, P. *The Improvised Play: The Work of Mike Leigh*. London: Methuen, 1983.

86 Rimmer, M. 'Interview with Jan Sardi', Melbourne, 30 April 1999.

Leigh claims copyright in respect of the screenplays for his films, such as *Naked*, *True Lies*, and *Career Girls*. But he does give credit to his actors for developing the characters and the dialogue in the films. However, Jan Sardi distinguishes away alternative forms of scripting that deviate from a fixed script format. His defence is that even such creativity occurs within a framework set up and established by the writer and the director of the film. The actors are allowed to improvise within a tightly worked-out script structure.

Jan Sardi argues that the key creative team – the screenwriter, the director, and the producer – are best placed to act as the guardians of the interests of performers. He makes the passionate case:

> You are in a sense carrying the can for everyone. If it is a good film, then everyone gets accolades. If it is not a good film, then no one does. The defence of the integrity of the work resides with the key creative team. It does not necessarily mean that they will not change the work. It just means that the people who created the work will make the changes, rather than someone else coming in and doing it. The rights of the actors and other parties to recognition and preservation of the quality of their work is vested in the writer and the director if they have proper, unassailable moral rights.[87]

The strength of this proposal is that it offers some protection for performers in respect of their economic and moral interests in their performance. The weakness of this proposal is that it reinforces the existing hierarchies in the film industry. The actors and performers remain in a weak and vulnerable position in relation to screenwriters, directors, and producers.

---

87 Ibid.

PART 6

THE ACTION OF LIGHT:

THE CINEMATOGRAPHER

Scott Hicks decided to use Geoffrey Simpson as Director of Photography. He said: 'We'd worked together on a couple of projects, and we even went to school together. He's had a very fine career in Hollywood and Australia, and he's an absolute perfectionist'.[88] Scott Hicks recalls that what he particularly needed from his 'was all in the lighting', he says. 'We had to take the film into some very dark places, and chart the character's journey through that darkness, and out into the light again. And we agreed – let's not be frightened by shadows, dark corners and corridors. Lighting was the key to that'.[89] The other technique Scott Hicks really wanted to exploit was a lot of wide angle close-ups. 'A camera that close is very intrusive. It's inches from the actor's face. But it gives you a tremendously powerful image. We used it particularly with the younger David'.[90]

The question arises whether the art of the cinematographer deserves economic and moral rights in the film or the underlying work.

On behalf of The Australian Cinematographers Society, a national organisation of 1,000 members, Chris Moon argued before the Senate and Legal Constitutional Committee that the cinematographer should receive economic and moral rights in a film[91]. He went on to claim that moral

---

88 Sardi, J. and Hicks, S. *Shine: The Screenplay*. London: Bloomsbury Publishing, 1997.

89 Ibid.

90 Ibid.

91 Moon, C. 'Moral Rights for Cinematographers', Senate Legal and Constitutional Legislation Committee, 4 August 1997.

rights should be inalienable. He claims that they should not be subject to a waiver, because moral rights are personal rights of attribution and integrity. His conclusion is that one of the authors of the film must be the person who actually shot the film, and that person should not asked to waive their rights of attribution and integrity.

Chris Moon argued that the cinematographer should be defined as the author of the visual images of a cinematograph film. He refers to a number of well-known directors of photography – such as Dean Semler, John Seale, Jim Frazier and Neil Davis – to support his case that cinematographers are creators. The problem is that such examples are exceptional. The majority of cinematographers remain anonymous and unknown. They enjoy no celebrity status. It is therefore difficult for the profession to seek recognition as authors of the film in the public arena because they have few high-profile advocates.

Chris Moon contends that the art of the cinematographer forms both an underlying artistic work (the shots and the frame), and a work integral with the edited film itself. This argument hinges upon a comparison between cinematography, and photography:

> The making of a film involves photography. Photography is the process of recording images by the action of light. This process is undertaken by a cinematographer. On a film set the cinematographer is often referred to as the director of photography.[92]

Chris Moon adds that digital photography blurs the line between still and motion picture photography. He notes that digital cameras are available that capture images that can be viewed as either a moving image or photographs.

---

92 Ibid.

The analogy between cinematography and photography is a shrewd and crafty one. Historically, photographers were denied copyright protection.[93] They were considered to be technicians who used cameras to faithfully and accurately reproduce the world as it was. They were not treated as artists who applied creativity and originality in framing and taking shots. However, photographers have since been granted copyright protection. Their work has been accorded the status of artistic works. It has been the subject of aesthetic practice and theory. The cinematographers hope that their work can gain similar artistic and legal acceptance if they hitch their star to that of photographers. Hence they would like to depict themselves as a profession who have been subject to unfair discrimination.

The Senate Legal and Constitutional Committee ignored this belated submission by The Australian Cinematographers Society. It merely dismissed the case of Chris Moon without considering the comparison between cinematography and photography. It assumed that it was axiomatic that the Director of Photography should not enjoy economic or moral rights in a cinematographic film, or its underlying rights.

There are, however, points where this analogy between cinematography and photography breaks down. The cinematographer is engaged in a collective enterprise. Their work must realise the demands of the script written by the screenwriter. It is subject to filtering and editing by the director. It is tied to the economic financing provided by the producer. By contrast, the photographer exercises a great deal more

---

93 Edelman, B. *Ownership of The Image: Elements for a Marxist Theory of Law.* London: Routledge, 1979; Anderson, N. and Greenberg, D. 'From Substance to Form: Legal Theories of Pashukanis and Edelman', *Social Text*, 1983, Vol. 7, p. 69; and Bowrey, K. 'Copyright, Photography and Computer Works – The Fiction of an Original Expression', *The University of New South Wales Law Journal* 1995, Vol. 18 (2), p. 278.

creative control over their artistic work because there is not the same level of investment as in cinema. They are still occasionally subject to the will of others. For instance, they are dependent upon the developer of the print. Furthermore, in the case of commissioned work, they lose rights over the artistic work.

The film industry was also hostile to the claims of The Australian Cinematographers Society. It sought to exclude the professional organisation from the discussions and consultations over copyright law reform. It tried to preserve the existing hierarchies within the film industry which draw a distinction between the creators and the interpreters of a cinematographic film.

Jan Sardi argued that cinematographers do not deserve moral rights, because they only provide technical and interpretative labour. He believes that such roles are replaceable in the film. Jan Sardi defends his point of view in an exchange with Rebecca Goreman on the ABC:

> Rebecca Goreman: But if you took away the Director of Photography, the animators in Babe, for example, you wouldn't have much of a product either.
>
> Jan Sardi: No I disagree with that. Everyone who works on a film brings their interpretative skills to get what is on the page up on to the screen. If one cinematographer is not available to do the job, you get someone else and they'll apply their interpretative skills. The process is such that everyone works from the script, and it's what is on the page that everyone attempts to realise. It's to get the intentions of the screenplay up there on the screen in order to be able to share it with the audience.[94]

---

94 Goreman, R. 'Interview with Jan Sardi', PM Program, Australian Broadcasting Corporation, Friday, 20 June 1997.

His claim that the model content of all films is script-based is not entirely convincing. It gives short shrift to the creativity involved in the visual appearance of a film. It could be argued, for instance, that animators are the creators of films driven by special effects – such as George Miller's *Babe*, Pixar's *Toy Story* and *A Bug's Life*, and George Lucas' *Star Wars* series. Film producers spend more money on visual pyrotechnics than script development. The reason for this capital investment is that audiences are eager to watch the spectacular visual appearance of the film – rather than listen to the dialogue.

Jan Sardi claims that authorship under moral rights should be limited to the triumvirate of the screenwriter, the director, and the producer. He claims that such collaborators are an integral part of the film-making. Jan Sardi rebuts the arguments that, if the screenwriter is provided with authorship, then all of the other collaborators should also deserve authorship as well:

> Rebecca Goreman: For the sake of not being too complex though, wouldn't you have to stop somewhere in terms of who has the final say on creativity? You say that the cinematographer can be replaced, but presumably the screenwriter and the director and the producer can all be ultimately replaced, so where does it stop?
>
> Jan Sardi: Well it's a question of saying, who creates the work? What is everyone there for? Generally what brings everyone together is a screenplay. It's the first thing that involves the director. It's the first thing that a producer will pick up. Generally it will come from a writer. Sometimes a producer will initiate a work, and sometimes a director will initiate a work, but I'd say eight times out of ten the writer is the initiator and the original creator of a work,

> which this legislation is saying the writer has no claim to authorship of, in the form in which it was originally intended, which is as a film.[95]

Jan Sardi concedes that the work of cinematographers can be distorted and harmed by activities such as colourisation. However, he is sensitive to the argument of producers that, if screenwriters were given moral rights, then everyone else involved in the film would be entitled to them. He cannot afford to show solidarity with the cinematographers. Instead Jan Sardi reaffirms that the key creative team are the best guardians of the integrity of the film. His solution is to let the writer and director protect the work of the cinematographer.

Jane Scott does not believe that the cinematographer should get copyright protection. She concurs with the screenwriter Jan Sardi that the role of the Director of Photography is essentially a technical one. Jane Scott comments:

> The cinematographer is really the person conducting the lighting of the film. They are not manhandling the filming. It is such a difficult role to include... It is debatable whether the Director of Photography is more important than the camera operator. I think that it is an interesting and appropriate share between the key creative team – being the director, the writer, and the producer. But I think that it has to be limited to that – otherwise it unravels.[96]

Jane Scott points out that the cinematographer does not necessarily take the movie pictures themselves. They merely co-ordinate the efforts of the camera operators under their control. Her argument seems to be that the Director of Photography does not deserve copyright protection because they do not physically reduce the work to a material form. It is a similar

---

95 Ibid.

96 Rimmer, M. 'Interview with Jane Scott', Sydney, 29 July 1999.

contention that was used to deny photographers the benefit of legal rights a century ago.

Scott Hicks is a little more generous in granting that cinematographers are engaged in a creative interpretation. He recalls that the camera was hand-held throughout the scene, in which David Helfgott is driven to leave his family by a fight with his father. Scott Hicks observes:

> It was very difficult for Geoffrey [Simpson]. You can see the wobble in the frame because he was running out of energy to hold the camera. Then David breaks from the scene and Armin steps back into the light – a good actor will always know where the light is – and then he takes off his glasses. The phrasing is perfect. Totally unrehearsed. And we got the whole thing.[97]

His evocation of the cinematography in the film *Shine* is striking. First, Scott Hicks grants that the cinematographer played a highly creative role in the film *Shine*. This claim challenges the argument of Jan Sardi that the work of the Director of Photography is essentially a technical one. Second, Scott Hicks notes that the cinematographer had a hands-on role in relation to the camera-work in at least some of the scenes in the film *Shine*. This suggests that the Director of Photography may have a personal and individual connection to a work.

---

97 Sardi, J. and Hicks, S. *Shine: The Screenplay*. London: Bloomsbury Publishing, 1997.

CONCLUSION

The film *Shine* was the subject of practical negotiations and litigation over the operation of copyright law. The artistic practitioners engaged in innovative, pragmatic strategies for dealing with the management of economic and moral rights under copyright law, and litigation over authorship and ownership.

The film *Shine* was also part of wider symbolic struggles over the reform of copyright law. The artistic practitioners sought to represent their guilds and unions in a competition over the monopoly of the right to determine the content of copyright law in respect of films.

For all of its internal struggle, the film industry has been united in its efforts to maintain its autonomy from other fields of cultural production. It has engaged in special pleading in relation to the reform of copyright law. It has demanded that film requires particular rules because of the collaborative nature of film-making, and the high levels of capital investment in the project. The independence of film runs against the simplification project of the Copyright Law Reform Committee which argues that creations should be treated alike.

CHAPTER SIX
NAPSTER: INFINITE DIGITAL JUKEBOX OR PIRATE BAZAAR? COPYRIGHT LAW AND DIGITAL WORKS

The controversy over the file-sharing program Napster has been a focal point for debate among copyright users, distributors and creators. The discussion has concerned the relationship between technology, copyright law, and culture. Should consumers be able to download music for free? Or is it theft and piracy of intellectual property? Does the advent of such MP3 technology spell the death knell of record companies? Or can they re-invent themselves as on-line distributors? Are artists liberated from their dependence upon record companies? Or are they being cruelly deprived of royalties?

The debate over Napster and file-sharing programs has been dominated by American copyright owners, users, and distributors. The Recording Industry Association of America (RIAA) sued Napster for copyright infringement on the grounds that it helped its users exchange illegal MP3 files. The heavy metal band Metallica and the rap star Dr Dre also took legal action against the file-sharing program. In response, Napster Inc. has argued that its users are copying files for personal, non-commercial use. Their cause has been supported by musicians like Chuck D, Courtney Love and Prince who have become disaffected with the major record companies.

This paper considers the debate over Napster within the theoretical framework of Lawrence Lessig's book *Code and other Laws of Cyberspace.*[1] The professor of law at Stanford Law School brings together an eclectic

---

1 Lessig, L. *Code and other Laws of Cyberspace.* New York: Basic Books, 1999.

range of intellectual interests: economics, constitutional law, and cyberspace. Lawrence Lessig observes:

> Cyberspace presents something new for those who think about regulation and freedom. It demands a new understanding of how regulation works and of what regulates life there. It compels us to look beyond the traditional lawyer's scope – beyond laws, regulations, and norms. It requires an account of a newly salient regulator. That regulator is the obscurity in the book's title – Code. In real space we recognize how laws regulate – through constitutions, statutes, and other legal codes. In cyberspace we must understand how code regulates – how the software and hardware that make cyberspace what it is regulate cyberspace as it. As William Mitchell puts it, this code is cyberspace's 'law.' *Code is law*.[2]

Lawrence Lessig contends that behaviour in cyberspace, as in real space, is regulated by more than law. Beyond law, Lawrence Lessig notes that social norms and the market regulate behaviour in cyberspace. He observes that the architecture or the design of the Internet further regulates behaviour in cyberspace. In other words, 'code is law'.

This paper considers the debate over Napster in the context of technoculture. It examines the interaction between culture, law, technology, and the market. Part 1 examines the technology of file sharing. It examines Napster and its rivals, such as Freenet, Gnutella, MP3.board, and streaming media. Part 2 evaluates the litigation by the RIAA against Napster in the United States. It considers questions of infringement, audio home recording, fair use, the liability of Internet service providers, and competition law. Part 3 considers a number of market models in relation to file sharing. Part 4 looks at social norms. It considers how the local media in Australia has given extensive coverage

---

2 Id, p. 6, italics in original.

to the dispute over Napster. The newspapers have followed the story; the radio broadcasters have sought talkback radio feedback; and the Internet news services have been full of debate.

PART 1
THE INFINITE DIGITAL JUKEBOX:
THE MP3 COMMUNITY

Hunters and Collectors

If code is law, as Lawrence Lessig would have us believe, it stands to reason that the great legal innovators are computer programmers – like Shawn Fanning, Ian Clarke, and Gene Khan.

After music lawyers succeeded in shutting down dozen of web-sites that stored copies of music in the MP3 format,[3] the program Napster was introduced. It is an integrated browser and communications system, which enables musicians and music fans to locate bands and music available in MP3 format. Napster is a small Internet start-up company based in San Mateo, California.[4] It makes its proprietary Music Share software freely available for Internet users to download. Users who obtain Napster's software can share MP3 music files with others logged on to the Napster system. Napster allows users to exchange MP3 files stored on their own computer hard-drives directly, without payment. It also provides media fans a forum to communicate their interests and

---

[3] MP3 software is free technology, which can be used to compress CD-quality songs by a factor of 10 into a file that can be transmitted over the Internet and downloaded rapidly.

[4] http://www.napster.com

tastes with one another via instant messaging, chat rooms, and Hot List user bookmarks.

Teenager Shawn Fanning developed the original Napster application and service in January 1999 when he was a freshman at Northeastern University. He explained the impetus for the project:

> Napster was built on a frustration with unreliable, Web-based search engines like Scour.net and mp3.lycos.com and just the desire to share music. There was no good way to share musical content with people.[5]

Shawn Fanning combined the practicality of sharing personal music and finding MP3s online with the community features of the Internet Relay Chat. After the program was named 'Download of the Week' and received over 300,000 hits at download.com, he realised the commercial potential of the program and decided to pursue its development full-time. He remains active in the development and growth of the Napster technology and business.

Shawn Fanning received the support of Eileen Richardson, a Boston venture capitalist with ten years of experience in the technology industry. She helped form the company Napster Inc., became the Chief Executive Officer and moved the firm to San Mateo, on the edge of Silicon Valley. Napster recently closed a $15 million series C venture capital funding round. The round was led by Hummer Winblad Venture partners, with additional investments from Angel Investors LP and other existing investors. As part of the investment in Napster, Hummer Winblad partners Hank Barry and John Hummer joined the Board of

---

5 Brown, J. 'MP3 Free-For-All', *Salon*, 3 February 2000.

Directors, and Hank Barry has assumed the role of interim Chief Executive Officer of Napster.[6]

Napster directed its early efforts towards generating an active user base of digital music enthusiasts. It has since been seeking to invent business models, marketing strategies, and revenue streams for its product. Napster has considered many business models, including sponsorships, advertising, selling artist and Napster merchandise, and compact disc sales. It has also considered selling or marketing digital music products related to its core service such as compact disc burners. Napster has entered into a written agreement with online Amazon.com pursuant to which Napster will receive a portion of the revenues Amazon receives from users Napster refers. It has also prepared for the possibility that the company will be the subject of an acquisition or merger in order to cash in on the size of the user base.

In his article, 'Immaterial World', Julian Dibbell thoughtfully discusses the culture of copying in the musical community.[7]

Julian Dibbell sets the discussion in the context of Walter Benjamin's reflections upon the passions of the private book collector in 'Unpacking My Library'.[8] The German writer argues that the collector has a mysterious relationship to ownership – they do not emphasise the functional and utilitarian value of objects, but study and love them as the scene of their fate. He ends on an elegiac note, with the recognition that a democratic age was no place for the hoarding of beautiful objects. He predicted the extinction of the collector and the collector's passion, and concluded that public collections were rightfully the way of the future.

---

6 http://www.napster.com/company

7 Dibble, J. 'Idee Fixe: Immaterial World', *Feed Magazine*, 17 April, 2000.

8 Benjamin, W. 'Unpacking My Library', in *Illuminations*. New York: Schocken Books, 1995, p. 60.

Julian Dibbell reflects that his passion for collecting music was reawakened by his introduction to MP3 and Napster. His guide to this new technology was a college boy who showed him his pirate's treasure: a thick loose leaf album, with three dozen CD-ROMs, each one burnt with about a hundred MP3 files. He was a warez trafficker, a member of various groups dedicated to moving pirated digital goods – software, games, movies, music – as fast as high-bandwidth Net lines allowed.[9] The college boy described the competition for collecting in this community:

> The zero-day scene. It's a competition. A race to see who can get the latest stuff up first. Way it works is, say some CDs are being released tomorrow. These groups have people that go out, buy these CDs, or get them however they can, rip them, and then put them up on our site.[10]

Julian Dibbell observes that the college boy was not interested in the musical works themselves, or the amount that he had copied. He was interested in the speed with which he could transfer the musical works from their corporate origins to his computer. In other words, he was interested in their fluidity, not their history. The whole obsessive idea was to compress a record's history to nothingness, to a sliver of time: zero days.

Julian Dibble wonders what Walter Benjamin would have made of collecting on the digital age. He suggests that the Internet has transformed and intensified the nature of collecting cultural works. Julian Dibble observes that the new technology has created a virtual community of consumers and collectors. He speculates that users have an almost

---

9 For a discussion of the Warez culture, see McCandless, D. 'Warez Wars', *Wired*, April 1997, Vol. 5 (4).

10 Dibble, J. 'Idee Fixe: Immaterial World', *Feed Magazine*, 17 April, 2000.

sexual frisson at their sudden connectedness and vulnerability to the wired population of the world: 'The traditional eros of collecting has been perverted, connecting the collector not just to objects but, of all things, to other people'.[11] Julian Dibbell magnifies the feeling of solidarity, and connectedness at work in the Internet community. He underestimates the utilitarian motive behind the exchange of information of the Internet – it is much cheaper to share and exchange musical works for free than buying CDs at exorbitant prices. The Internet has democratised the culture of collecting. It is no longer the preserve of the upper-class connoisseur. It is open to all who have access to a computer. However, Julian Dibble also fears that the perfect organisation of digital collections may result in a loss of intimacy with the musical works. He notes that the disembodiment of the musical works entails a loss of the intimate, possessive touch and a certain intimately personal disorder. Julian Dibbell concludes: 'For these are the times that try intellectual-property holders' souls, when music flies from hard drive to hard drive on wings of desire and in the face of every known law of copyright'.[12]

Virtual Utopias

Just as Napster becomes immanent in the public sphere, it is in danger of becoming obsolete and redundant because of the speed of change in digital technologies. The company has sought to prevent others from reverse engineering and adapting its software program in vain.

The second generation of file-sharing programs have sought to protect themselves against the threat of litigation from copyright owners. Chris Gilbey suggests that sites will start to flourish in countries where

---

11 Ibid.

12 Ibid.

copyright laws are weaker than in the United States, the United Kingdom and Western Europe, and Australia and New Zealand:

> We will start to see the migration of the heavy-duty file-sharing applications out of the United States. At the moment, the epicentre of file-sharing application development is in the United States. Americans are so parochial by nature, because they think that they are at the centre of the universe. They say, 'We will put the server up at San Jose, because there is a lot of bandwidth in San Jose'. There is a preoccupation with the bandwidth, rather than with a strategy to ensure survival and business continuity.[13]

Applications such as Freenet and Gnutella use decentralised systems, so that they are not vulnerable to being sued like Napster. They have developed technological measures to protect the anonymity and the privacy of their users, and resist attempts by third parties to deny access to information. This would make it difficult for copyright owners to launch actions for copyright infringement against them.

The second generation of file-sharing programs have expanded upon the capabilities of Napster, so that they allow for the trade in not just MP3 files, but a variety of media files. This demonstrates that the debate over the effects of Napster and other file-sharing programs is not limited to just the musical community. The new digital technologies have the potential to affect a wide range of cultural industries in the future. The chairman of the Copyright Assembly, Jack Valenti, comments: 'If Napster can encourage and facilitate the distribution of pirated sound recordings, then what's to stop it from doing the same to movies, software, books, magazines, newspapers, television, photographs, or

---

13 Rimmer, M. 'Interview with Chris Gilbey', Sydney, 28 June 2000.

video games'.[14] This scare campaign has a partial element of truth. However, it may be some time before this potential is fully realised. The publishing industry fears that their works will be next.[15] It is still too slow to download products like movies and software products on the Internet at present. The film industry and the software industry will face difficulties if high-speed Internet connections are developed.

A second generation of file-sharing programs, such as Freenet, Gnutella, Filetopia, I-Mesh, and Uprizer are threatening the dominance of Napster. It remains to be seen whether these operations will be able to handle the increase in traffic if Napster is shut down. Roger Parloff observes that it may be some time before Napster is dethroned:

> The overriding problem with both Gnutella and Freenet, hampering either from ever developing a mainstream user base, may be that they lack the sense of community that makes Napster so enticing. Napster creates an experience that is much like that of the age-old marketplaces or bazaars that form the heart of so many real-world communities ... In contrast, Gnutella offers a 'Vietcong-style' file-swapping experience. 'Someone pops out of the grass and says, "I'm here," and then goes back into the grass. That's not very community-friendly.' Thus, the very thing that makes Napster a vulnerable target for litigation – its centralized Web site – is also what makes it so far superior to Gnutella and Freenet as a shopping experience.[16]

File-sharing programs such as Freenet and Gnutella will facilitate a virtual community, which is different in character to Napster. They appeal to an

---

14 Valenti, J. 'Deposition for Napster case', Recording Industry Association of America, 6 September 2000, http://www.riaa.org/Legal.cfm.

15 Roush, W. 'Napster, Gnutella, and Freenet: Publishing in a Post-Copyright University', EbookNet, Friday, 2 June 2000.

16 Parloff, R. 'Newbies vs. Netwits', *American Lawyer*, 2000, Vol. 22 (9), p. 17.

elite clique of computer programmers who have a certain level of technical skill and competence rather than a democratic community.

Hell's Angels

In the future, Chris Gilbey predicts that the next generation of developments will be a fetch-it program. It will be a search engine, which will enter into the gateways of Napster, Gnutella and I-Mesh, and take whatever files are available. It will be, in other words, quite parasitic technology. Such a fetch-program will be similar to MP3.Board. However, it will sit on a personal computer as a search engine, rather than as a hypertext interface, in which you have to go onto the Internet. The special quality about such an application is that it does not need to be based anywhere because it is not a hypertext application. It does not need to be specifically server-based. Such a fetch-it program would protect the anonymity and privacy of their users, and resist attempts by third parties to deny access to information. It would also be protected from actions in copyright infringement because it is not based in any particular country.

The fetch-it program will offer the service of downloading material from other people's servers. However, it will not allow others to download material from one's own personal computer. Chris Gilbey observes that what has happened so far is the formation of a community of people who feel impassioned about sharing music. He imagines that the utopia of the community will be threatened by freeloaders who use software to download material without sharing anything in return:

> The file-sharing community will be threatened by the real freeloaders. They will not want to share files, but will just want to download files. Just like in the real

> world, the hell's angels will ride into town, and scream, 'Give us all the beer and all the women'. [17]

So the threat to the file-sharing community may come from within from individuals who do not respect the etiquette of sharing and reciprocity. There is a danger that the society will become divided and fragmented under such pressure. It will hamper the efforts of the file-sharing community to present a united front of resistance against copyright creators and owners.

Streaming Media

The debate over downloading MP3 files may be made redundant by streaming technologies that use compression in the delivery of media files over the Internet. Tom Kennedy, the managing director from Beyond Online, discusses the advantages of streaming technology:

> With streaming, a web user does not have to wait to download a large file before seeing the video or hearing the sound. Instead the media is sent in a continuous stream and is played as it arrives at your local computer after a buffering period. Streaming has the added bonus for the content holders that the content cannot be saved in the viewer's machine, therefore protecting the copyright holder, unlike the case with MP3. Streaming video is usually sent from pre-recorded video files, but can be distributed as part of a live broadcast.[18]

The economic model behind streaming media and ubiquitous access will obviate the problems surrounding copyright law and piracy. There is

---

17 Rimmer, M. 'Interview with Chris Gilbey', Sydney, 28 June 2000.

18 Kennedy, T. 'The Real Net Effect', *The Australian*, 20 July 2000.

much evidence that consumers are happy to gain access to streaming media without wanting to download the material.[19]

In spite of being able to deliver music and audiovisual material in a secure format, streaming audio and video was nearly frustrated in Australia by the Federal Government. The Minister for Communications, Senator Richard Alston, wanted to conduct a review of whether, in the context of converging media technologies, Internet audio and video streaming was a form of broadcasting.[20] This amendment reflected an attempt to protect the existing free-to-air broadcasters, such as Kerry Packer's Nine Network, from any competition online. In response, the Internet industry rebelled against this possible restriction on streaming technology. Tom Kennedy emphasised that the Internet was not a broadcast medium, but a point-to-point communications network.[21] Although it had aspects of traditional media as part of its make-up, it was a new medium in its own right because of its interactivity. Against this backlash, Senator Richard Alston decided in the end that streaming technology would not be impeded by the broadcasting act. It seems that the promotion of streaming media will further the policy goals of the Federal Government to reduce the amount of copyright infringement. However, it might be too much to expect downloading to become extinct just because of the emergence of streaming media. The file-sharing

---

19 The research of recording companies showed that there was a twelve to one preference for streaming to downloading: Reece, D. 'Beyond MP3', MP3.com, 16 February 1999. Similarly, the results of the European Commission Music Trial also found that, when given the choice, consumers will stream, instead of download music: Imprimatur. *The Imprimatur Music Trial Report.* http://www.musictrial.com/contents.html. Such studies reflect a growing trend amongst users that possession is less important than accessibility.

20 Westfield, M. 'Alston Fiddles as Net Set Burns', *The Australian,* Wednesday, July 19, 2000, p. 21.

21 Kennedy, T. 'The Real Net Effect', *The Australian,* 20 July 2000.

programs will survive, just as the book survived the advent of television and film.

PART 2
THE PIRATE BAZAAR:
LEGAL RELATIONS

RIAA filed suit against Napster Inc., operators of the web site Napster.com, accusing them of violating federal and state laws through 'contributory and vicarious copyright infringement.' The complaint describes the case as follows: 'Napster is similar to a giant online pirate bazaar: users log onto Napster servers and make their previously personal MP3 collections available for download by other Napster users who are logged on at the same time'. Metallica amplified the legal questions surrounding Napster. Not only did they bring legal action against Napster, but they also brought legal action against Yale University, the University of Southern California, and Indiana University, alleging that they are complicit in music piracy. They have also named a number of anonymous Jane Does – individual consumers who have been using Napster. Furthermore, the rap artist Dr Dre has also brought lawsuits against Napster and individual users at universities. He requested that the company blocks users from accessing his songs through the means of the software program.

In response to the legal action, Napster hired David Boies, the legal counsel who was successful in the Microsoft anti-trust case.[22] The

---

22 Heilemann, J. 'David Boies: The Wired Interview', *Wired*, October 2000, Vol. 8 (10).

employment of this marquee lawyer signalled that the company was serious about defending the charges of copyright infringement. David Boies sought to creatively re-interpret copyright law in order to save the file-sharing program. He maintained that the company was protected under the *Audio Home Recording Act* 1992 (US). He claimed that Napster users were copying files for personal, non-commercial use and that the law was designed to accommodate digital technologies of reproduction. David Boies argued that Napster did not infringe the plaintiff's copyrights because of the defence of fair use. He claimed that Napster users were engaged in a number of fair uses – including listening to authorised works, sampling, and space-shifting, copying songs onto portable media. David Boies reiterated the point that Napster was an Internet service provider, which should enjoy immunity from claims of copyright infringement. Finally, David Boies raised competition issues.

Justice Patel of the United States District Court in the Northern District of California found that Napster was guilty of contributory and vicarious infringement.[23] Her Honour rejected the creative arguments of David Boies. The 9th United States Circuit Court of Appeals agreed with the District Court that the record companies presented a prima facie case of direct copyright infringement by Napster users.[24] It also dismissed the various defences of the company. The panel, though, modified and narrowed the injunction granted by the District Court. Napster plan to appeal the decision before the full court of the 9th United States Circuit Court of Appeals, or the Supreme Court of the United States.

---

23 *A & M Records Inc.* v *Napster Inc.* (2000) 114 F. Supp. 2d 896.

24 *A & M Records Inc. and others* v *Napster Inc.* (unreported, United States Court Of Appeals Ninth Circuit, 12 February 2001).

Technological Measures

Metallica hired an Internet detective agency, NetPD, to hunt down the web addresses of fans illegally swapping their songs. This points towards a new development in the enforcement of intellectual property rights. Intellectual property-rights holders are increasingly relying upon cyber-surveillance and Internet monitoring companies to police the infringement of intellectual property in the area of cyberspace.

NetPD is a consulting firm based in Cambridge, the United Kingdom.[25] It uses artificial intelligence to track file-sharing activity across the Internet. NetPD plans to use the proceeds from the Metallica case to launch the company into the business of being an Internet detective agency. It intends to offer copyright protection services to not just the music industry, but the video game industry and movie industry. It has registered the address: www.mp3police.com. NetPD will join the lucrative new market of monitoring infringement of intellectual property rights on the Internet. A couple of organisations were spruiking their wares at the WIPO Conference on Electronic Commerce and Intellectual Property. The Internet private detective agency, Cyveillance, provides the service of NetSapien™.[26] Similarly, Virtual Internet New Searchers offer the service of an Internet Audit.[27] Furthermore, a Utah computer programmer called Travis has released the application called Media Enforcer in May 2000, which provides information about Napster user

---

25 Dean, A. 'NetPD Wants to be Web's Police Department', Forbes.com, 5 May 2000.

26 Thomas, B. 'E Business Intelligence: A New View of the New Economy', *International Conference on Electronic Commerce and Intellectual Property*, September 14-16, 1999.

27 Wood, N. 'Cybersurveillance: Techniques for Monitoring Abuse of Rights', *International Conference on Electronic Commerce and Intellectual Property*, September 14-16, 1999.

names and IP addresses of Gnutella users.[28] Such services seek to monitor the use and misuse of intellectual property on the Internet so that companies can systematically and effectively manage and control their intellectual property on the Internet.

In response to the claims of copyright infringement, Napster declared its intention to comply with the *Digital Millennium Copyright Act* 1998 (US). They expeditiously took action to disable the users who Metallica alleged were infringing the copyrights of the company. However, Napster noted that users who are banned from the service deserve the opportunity for reinstatement in the event that there has been a genuine mistake or misidentification of the materials made available by that user. Users who feel they have been banned as a result of a mistake may submit a counter notification form.

There are concerns that such cyber-surveillance and Internet-monitoring organisations may breach the privacy of Internet users in their search for the culprits of infringement of intellectual property.[29] In the Metallica case, Napster was keen to assure its consumers that it had not been responsible for giving up the e-mail addresses of its clients. It stressed that the company respected the privacy rights of their users. It emphasised that it kept users' personal information, including personal names, e-mail addresses, street address, or other data separate and distinct from users' Internet activities.

---

28 Kumar, J. 'Media Enforcer Launches Attack on Music Piracy', Webnoize, 13 June 2000.

29 In Australia, Microsoft argued that the new privacy legislation for the private sector should make allowances for investigations into piracy of software. It does not want to inform people of its use of personal information in such investigations.

Infringement

The action by the RIAA against Napster for contributory and vicarious infringement was heard by the District Court and the Court of Appeals.

Justice Patel found that Napster was liable for contributory infringement. She accepted evidence that the defendant had actual or constructive knowledge that third parties were engaging in direct copyright infringement by downloading MP3 files using the Napster service. She also found that Napster was liable for vicarious infringement because it has the right and ability to supervise its customers, and the economical benefits from the use of its services. Justice Patel was particularly disapproving of evidence that senior executives at Napster had downloaded illegal MP3 files of popular music. She took into account the submissions of the RIAA: 'Ironically, although Napster's former CEO, Richardson, proclaimed Napster is 'not about Madonna', her computer revealed downloads of five Madonna MP3 files'.[30]

The Court of Appeals upheld the conclusion of the District Court that Napster was guilty of contributory infringement. The panel found that Napster knowingly encouraged and assisted its users to infringe the record companies' copyrights. The Court of Appeals also supported the finding of vicarious infringement. The panel found that Napster had a direct financial interest in its users' infringing activity, and retained the ability to police its system for infringing activity. However, the Court of Appeals found that the ability of Napster to police the program was cabined by the system's current architecture. Although the company could not read the content of indexed files, it still had the ability to locate

---

30 Recording Industry Association of America. 'Motion for Preliminary Injunction', 12 June 2000, p. 13.

infringing material on its search indices, and to terminate users' access to the system.

Audio Home Recording Act

Napster argued that the company was protected under the *Audio Home Recording Act* 1992 (US). It claimed that Napster users were copying files for personal, non-commercial use and that the law was designed to accommodate digital technologies of reproduction.

In the District Court, Justice Patel rejected this argument. Her Honour held that the legislation applied to hardware like cassette decks, not software such as Napster. In the Court of Appeals, the panel agreed that the *Audio Home Recording Act* 1992 (US) did not cover the downloading of musical files to computer hard drives.

Fair Dealing

Napster argued that under the decision of *Sony Corporation Of America* v *University City Studios Inc.* the software program did not infringe the Plaintiff's copyrights because of the defence of fair use.[31]

In *Sony Corporation Of America* v *University City Studios Inc.*, the Supreme Court of the United States considered the sale of a VCR, which was capable of authorised and unauthorised recording of copyright material. It argued that the offering of Betamax did not constitute infringement because the product is widely used for legitimate, unobjectionable purpose. It ruled that when consumers used the Sony Betamax VCR to make their own personal copies of copyrighted television programs (for single-use 'time-shifting' purposes) they were

---

31 (1984) 78 L Ed 2d 574.

making a 'fair use' of the copyrighted work, and that there was no infringement.

In *Recording Industry Association of America* v *Diamond Multimedia System Inc.*, the Federal Court followed the decision of the Supreme Court of the United States.[32] It found that a portable MP3 player called Rio attracted the defence of fair use, because the machine merely made copies in order to 'space-shift' those files that resided on a user's hard drive.

In *A & M Records Inc.* v *Napster Inc.*, Justice Patel found that the defendants had not established or met their burden of proving that they were entitled to the affirmative defence of fair use.[33] First, her Honour noted that although downloading and uploading MP3 music is not a paradigmatic commercial activity, it was not also typical of personal use, because it involved sharing among anonymous users. With respect to the second and third factors, Justice Patel considered that copyrighted musical compositions and recordings are the paradigmatic kinds of things for which copyrights are obtained. They are creative in nature. They constitute entertainment. They are downloaded in their entirety. Fourth, Justice Patel considered the competing evidence as to whether Napster use harms the market for copyrighted use. She was persuaded by evidence that the file-sharing program harmed the sale of sound recordings to college students. Her Honour dismissed findings that Napster stimulated sales of musical works.

Justice Patel went onto consider whether Napster use had caused harm by reason of raising barriers to plaintiff's entry into the market for the digital downloading of music. First, Justice Patel held that sampling did not constitute a non-commercial personal use in the traditional sense

---

32 (1999) 180 F. 3d 1072.

33 (2000) 114 F. Supp. 2d 896.

because it involves the distribution of music among millions of users. She found that such sampling would reduce – rather than stimulate – the market for copyrighted works. Second, Justice Patel found that the defendants failed to show that users engaged in space shifting of previously owned works constituted a commercially significant use of Napster. She found that the most credible explanation for the growth of traffic on Napster was the vast array of files offered by other users, not the ability of each user to space shift music they already owned. Third, Justice Patel found that the potential non-infringing uses of Napster were minimal. She noted that many of them seemed to be thought of after the litigation started – such as the program to promote new artists who authorised the distribution of their work.

The Court of Appeals also rejected the defence of Napster that its users were engaged in the fair use of copyright material. It found that the analysis developed in *Sony Corporation of America* v *University City Studios Inc.* and the *Recording Industry Association of America* v *Diamond Multimedia System Inc.* could not be applied to the situation of Napster:

> We conclude that the district court did not err when it refused to apply the 'shifting' analyses of *Sony* and *Diamond*. Both *Diamond* and *Sony* are inapposite because the methods of shifting in these cases did not also simultaneously involve distribution of copyrighted material to the general public; the time or space-shifting of copyrighted material exposed the material only to the original user. In *Diamond*, for example, the copyrighted music was transferred from the user's computer hard drive to the user's portable MP3 player. So too *Sony*, where 'the majority of VCR purchasers ... did not distribute taped television broadcasts, but merely enjoyed them at home.' Conversely, it is obvious that once a user lists a copy of music he already owns on the Napster system in order

to access the music from another location, the song becomes 'available to millions of other individuals,' not just the original CD owner.[34]

The reliance of Napster upon the decision in *Sony Corporation of America* v *University City Studios Inc.* was misplaced. In his perceptive article, 'Timeshift', John Frow argues that the decision of the Supreme Court of the United States failed to challenge the philosophical contradictions in copyright law, which have allowed the encroachment of private rights onto the public domain.[35] The focus on fair use as a limited exemption from copyright law left it vulnerable to erosion.

Safe Harbours

Napster argued that its business activities fell within the protection of the safe harbour provisions of s 512 of the *Digital Millennium Copyright Act* 1998 (US), which limited the liability of Internet service providers.

Justice Patel declined to grant summary adjudication in its favour on two grounds. First, she doubted whether Napster was a 'service provider' under the safe harbour provisions for the purposes of s 512 (a) of the *Digital Millennium Copyright Act* 1998 (US). The court determined that Napster did not provide connections through its system. Although the Napster server conveyed information to establish a connection between the requesting and host users, the connection itself occurs through the Internet. Second, Justice Patel found that Napster had failed to implement a copyright compliance policy for users, as is required under s 512 (i) of the *Digital Millennium Copyright Act* 1998 (US). She

---

34 *A & M Records Inc. and others* v *Napster Inc.* (unreported, United States Court Of Appeals Ninth Circuit, 12 February 2001).

35 Frow, J. 'Timeshift: Technologies of Reproduction and Intellectual Property', *Economy and Society*, Vol. 23 (3), 1994, p. 290.

found that Napster only adopted its copyright compliance policy after the onset of the litigation and did not discipline infringers in any meaningful way.

The Court of Appeals recognised that the issue of whether Napster could obtain shelter under the safe harbour provisions of the *Digital Millennium Copyright Act* 1998 (US) would be more fully developed in trial. It acknowledged that the plaintiffs had raised serious questions whether Napster was an Internet service provider with a detailed copyright compliance policy.

Competition Issues

Napster argued that the recording companies were improperly attempting to combine their limited monopoly rights in copyrighted sound recordings to dominate and control the market for online music distribution affecting the music rights of others.

Justice Patel rejected this defence on the grounds that most of the cases that the defendant cited dealt with improper attempts to enlarge a copyright monopoly through restricted or exclusive licenses, and in this case that the plaintiff had granted no licences to the defendant.

The Court of Appeals affirmed the decision of the District Court in this respect. It found that there was no evidence that the plaintiffs sought to control areas outside their grant of monopoly.

Remedies

Justice Patel enjoined the company Napster from 'engaging in, or facilitating others in copying, downloading, uploading, transmitting, or distributing plaintiffs' copyrighted musical compositions and sound recordings, protected by either federal or state law, without express permission of the rights owner'.

The Court of Appeals narrowed the scope of the injunction. It determined that Napster could be held liable for contributory infringement only to the extent that the company knew of specific infringing files that were available on the system, and failed to act to prevent the distribution of copyrighted material. It also noted that Napster may be held liable for vicarious infringement when it failed to patrol its system and preclude access to infringing files listed in its search engine. This ruling stops short of shutting Napster down. It does mean, though, that the company will be unable to continue its present format.

David Boies announced that the company would appeal the ruling, including possibly seeking a review by the entire panel of the 9th United States Circuit Court of Appeals, or an appeal to the Supreme Court of the United States. Such appellate courts would be tempted to seize the opportunity to review the decision of *Sony Corporation of America* v *University City Studios Inc.* and consider the operation of *Digital Millennium Copyright Act* 1998 (US).

Summary

The political question arises: how should legislators respond to these competing views about copyright law and the digital age?

The debate about Napster within the digital community, the recording industry, and the media fed back into parliamentary deliberations on the introduction of the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth). At one extreme, Kevin Andrews, the Liberal member for Menzies, supported the introduction of a 'right of first digitisation' to protect copyright owners.[36] His colleague, Christopher

---

36 Andrews, K. 'Second Reading of the *Copyright Amendment (Digital Agenda) Bill* 2000', House of Representatives, Hansard, 27 June 2000, p. 18354.

Pyne, the Liberal member for Sturt, justified the legislation of the Federal Government as striking a balance between the views of Emmanuel Candi and Chris Gilbey, the former advocating stronger copyright laws and the latter encouraging tolerance towards new forms of technology.[37] Senator Kate Lundy reflected at length upon the legal challenges against Napster by recording companies and Metallica, and the emergence of new technologies, such as Gnutella:

> What we are experiencing here is very much about a cultural change. It is about, in some ways, a clash of generations as young technologists push the boundaries of what is conceivably possible through the Internet and the digital environment. It is the captains of industry who are finding it difficult to adapt to the Internet and all of the ramifications and who use the law in the courts and use parliaments to attempt to block that change and put a lid on it.[38]

Bob Sercombe, the Labour member for Maribyrong, expressed caution about some of the hype about piracy promoted by commercial interests.[39] He advocated a lighter-handed approach to the regulation of new technology. The diverse responses of the members of Parliament reflect very different opinions as to where the balance should be struck between competing interests in copyright law.

However, all of them endorsed the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth), even though it may face community disobedience and disrespect. First, the legislation introduces a general right of communication to the public. It replaces the right of broadcasting and the

---

37 Pyne, C. 'Second Reading of the *Copyright Amendment (Digital Agenda) Bill* 2000', House of Representatives, Hansard, 27 June 2000, p. 18347.

38 Lundy, K. 'Second Reading of the *Copyright Amendment (Digital Agenda) Bill* 2000', Senate, Hansard, 17 August 2000, p. 15329.

39 Sercombe, B. 'Second Reading of the *Copyright Amendment (Digital Agenda) Bill* 2000', House of Representatives, Hansard, 27 June 2000, p. 18370.

right of diffusion. Second, the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth) acknowledges that the 'right of first digitisation' is a part of the right of reproduction, and a factor in relation to damages. This means that the unauthorised digitisation of printed materials and other subject matter will incur particularly heavy sanctions. Third, the legislation extends the notion of fair dealing to the digital era. However, the defence of fair dealing is limited to particular purposes in Australia. It is not yet a general defence, which is supported by constitutional principles, such as in the United States. Fourth, the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth) provides limited liability for telecommunications carriers and Internet service providers in respect of copyright infringement. It provides a broad statement of authorisation provisions combined with the express limitation of liability in certain circumstances as provided for by the Act. It does not expect, as in the United States, that Internet service providers take measures to stop providing their service to repeat copyright infringers and take other steps to prevent infringements on their networks. Finally, the legislation provides protection for technological measures and rights management information systems.

In Australia, there would be little room for such an argument about competition as agreements relating to the work or other subject matter in which the copyright subsists are exempt from the operation of restrictive trade practices law.[40] It could be still possible to run an action dealing with monopolisation[41] or retail price maintenance.[42] Arguments

---

40 S 51 (3) (v) of the *Trade Practices Act* 1974 (Cth).

41 S 46 of the *Trade Practices Act* 1974 (Cth).

42 S 48 of the *Trade Practices Act* 1974 (Cth).

about competition might gain sway if the proposals of the Ergas Committee are implemented.[43]

It would appear that Napster and other file-sharing programs would be vulnerable to law suits for copyright infringement under such a regime.

PART 3
CHAOS MUSIC:
MARKET

In the book, *The Infinite Digital Jukebox*, Chris Gilbey reflects that the major recording companies have been forced to rethink their business model in light of the development of digital technologies.[44] There seem to be three possible alternatives open to them. First, the record companies could emulate publishing companies and become licensors of rights, as new and superior entities become the dominant forces in distribution. The underlying catalogues could even be acquired by these new Internet-centric enterprises, so that they can achieve vertical integration. Second, the record companies could seek to re-invent themselves as cyber-distributors. The challenge that they each face is to reconcile working in two realms at the same time – that of traditional manufacturer and distributor of product in physical form (atoms) with that of the cyber-distributor delivering the product in digital form (zeroes and ones). However, this may turn out to be an impossible feat; it may end up with

---

43 Intellectual Property and Competition Review Committee. *Review of Intellectual Property Legislation under the Competition Principles Agreement*. Canberra: Australian Government, 2000.

44 Gilbey, C. *The Infinite Digital Juxebox*. Melbourne: Hardie Grant Books, 2000.

them cannibalising their own businesses in the attempt. Finally, the record companies could opt out of licensing, manufacturing and distributing CDs.[45] They could instead invest in producing hardware, which facilitates the reproduction and distribution of musical works. It seems at the moment that most record companies have taken the second route.

Subscription Model

It was inevitable that Napster would lose the case against the recording companies, Metallica, and Dr Dre for copyright infringement because its defences of fair use and safe harbours are not strong contentions. The question has been whether the company can change its business model. The start-up company has sought to reach a settlement with the musical industry to their mutual advantage and benefit. The chief executive, Harry Banks, has positioned the software company Napster to become the subscription service for the major recording companies. His legal strategy is to make concessions to the musical industry in return for this business model.

Bertelsmann AG and Napster Inc. announced the formation of a strategic alliance to further develop the Napster person-to-person file-sharing service. Bertelsmann AG's newly formed eCommerce Group, BeCG, and Napster have developed a new business model for a secure membership-based service that will provide Napster community members with high-quality file sharing that preserves the Napster

---

45 Chris Gilbey observes: 'Philips make a twin CD replicator, and the slogan they use to advertise it is, 'Clone your CDs'. Philips used to own Polygram Records, and Chapel Music. They sold the record labels to Universal and the publishing company to Warners. Why did they get out of those businesses? Perhaps they saw that the future was not in owning copyrights, but in owning patents. Perhaps they thought that patents was of greater strategic value than copyright. I do not know.'

experience while at the same time providing payments to rights holders, including recording artists, songwriters, recording companies and music publishers. Napster and Bertelsmann will seek support from others in the music industry to establish Napster as a widely accepted membership-based service and invite them to participate actively in this process. Under the terms of the agreement, once Napster successfully implements its new membership-based service, Bertelsmann's music division, BMG, will withdraw its lawsuit against Napster and make its music catalogue available. Bertelsmann eCommerce Group will provide a loan to Napster to enable development of the new service and will hold a warrant to acquire a portion of Napster's equity.

Furthermore, the German independent record company Edel has signed on with Napster and Bertelsmann to allow its music to be traded through Napster's fee-based service.[46]

Julian Dibbell considers the implications of the subscription service for Napster. He found it hard to see how music makers would necessarily benefit from a subscription scheme. Julian Dibble observed that artists would still be dependent on intermediaries, whether they are advertisers or the owners of subscription-based music portals. His point underlines the need for equitable remuneration for creators in respect of the digital transmission of their work. Julian Dibble feared that, under a subscription scheme, musical culture would suffer from 'the broader effects of an economics borrowed from the television business, with its aggravated tendencies to stifle diversity and reward lowest-common-denominator crapola'.[47]

---

46 Gengler, B. 'Giant Edel Joins Rebel Napster', *The Australian*, IT Section, 9 January 2001, p. 34.

47 Dibble, J. 'You Say You Want a Revolution?', *Intellectual Capital*, http://www.intellectualcapital.com, 20 May 1999.

Chris Gilbey is also an advocate of a subscription scheme. However, he takes issue with the argument of Julian Dibble that a subscription scheme would necessarily result in the aesthetics of mass culture. Chris Gilbey argues that, on the contrary, it could produce great musical diversity:

> What I would like is to be able to listen to music based on the profile that you or I have as people so that we can be exposed to new music. That is the real opportunity being missed by the record business. More than nine tenths of the music released by music companies does not earn money. They pay the bills with less than ten percent of the releases. The opportunity is there for music companies to monetize the ninety per cent of music that loses money... It will make it extraordinarily profitable. Imagine: one or two hundred million dollars that you would instantly generate from that music. How many pieces of new music could you re-invest in. If each of the major record companies – such as Sony, Warners and Universal, to name three – were doing it individually or in a joint project, then bingo.[48]

Chris Gilbey argues that a subscription service could target the personal profiles of individual consumers based on far-ranging templates. He believes that such a service has the potential to make a profit out of the loss-making areas of non-mainstream music – world music, classical music, and so on.

Record Companies

The record industry might not want to have anything to do with this model of using Napster as a subscription service. Emmanuel Candi was disapproving of the business model of the company. He said: 'Well, I think the Napster model is the classic, you know, free-riding Internet

---

48 Rimmer, M. 'Interview with Chris Gilbey', Sydney, 28 June 2000.

model – steal someone's product, give it away for free, establish a huge mailing list and then see how you can leverage that for advertising or to sell other goods further down the track'.[49] He was heartened by the plans to shut down Napster: 'These people tried to a build a business from helping people to steal'.[50]

Emmanuel Candi argued that the music industry would introduce legitimate digital downloads once the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth) comes into effect in March 2001. He preferred to believe that the recording companies could re-invent themselves as cyber-distributors. Emmanuel Candi said that the industry hoped to have technology that would make illegally copied recordings self-destruct. He is alluding to the Secure Digital Music Imitative, which aims to develop an open, interoperable framework for the secure distribution, playing and storage of music via the Internet.[51] Emmanuel Candi hopes that this standard may answer consumer demand for quality digital music, enable copyright protection for artists' works and assist music companies to build successful online businesses. However, he conceded that it was already too late for millions of songs – including the lucrative back catalogues of bands – which were already in circulation and were multiplying with every download.

However, the copyright owners are reluctant to introduce such technological measures just at the moment. A Melbourne information technology lawyer, Peter Moon, explains the reasons for these

---

49 Australian Broadcasting Corporation. 'Industry Win over Napster May Not Stop Music Downloads', 7:30 Report, Australian Broadcasting Corporation, 28 July 2000.

50 Needham, K. 'Music Magpies Mob Napster's Site on the Last Day of Free Hits', *Sydney Morning Herald*, 29 July 2000.

51 http://www.sdmi.org

reservations.[52] First, the copyright owners would have to commit to a frighteningly expensive exercise. It would be costly, for instance, for recording companies to convert their CDs to a technologically protected format. Second, the copyright owners would have to be sure that the technological measures were secure against hackers. The recording companies would only get one opportunity to introduce CDs in a technologically protected format. They might not be able to afford the constant upgrading and revisions of their technology. Third, the copyright owners are still researching the level of connectivity of users. They could be able to charge for the use of copyright works if most people in Australia are connected by the Internet through some permanent means by cable or new technology like ADSL. However, they might find it difficult to extract fees if individuals only had temporary access to computers. As a result of these factors, copyright owners would prefer to take legal action until such time that their technological plans are ready.

On-Line Distributors

In response to this reaction, the online music distributors in Australia sought to distance themselves from file-sharing companies, which engaged in the trade of unauthorised musical works. They sought to forge an industry agreement with artists, record companies, and collecting agencies. Chaos Music proposed a levy on the distribution of digital music over the Internet. Robert Appel, the Chief Executive Officer of Chaos Music, said:

---

52 Australian Broadcasting Corporation. 'Online Music – Download or Freeload?', Australia Talks Back, Radio National, Australian Broadcasting Corporation, 1 August 2000.

> We feel that this is a proactive and practical starting point for the Australian music industry. In light of the legal battles in the United States, we felt that it was time that the industry organisations in Australia start co-operating with each other, in order to establish an acceptable standard for recognising the copyright component of online music. The proposed levy is by no means an endorsement for the unauthorised use of music files.[53]

Chaos Music proposed that 15 per cent of all advertising revenues generated through the FreeTracks service would be directed to the appropriate collecting society and in turn distributed to the relevant Australian copyright owners. It promised to provide the industry with the necessary quantitative information for the royalty to be distributed appropriately. Chaos Music sent a letter outlining its scheme to the Australian Record Industry Association, record labels such as Sony and Mushroom Records, the Australasian Performing Rights Association, and artist managements. It also suggested that its plan would benefit other sites that benefit from the transmission of music files, such as MP3.com.au. This proposal received positive feedback from the management of established acts such as INXS and John Farnham. The singer and songwriter of Custard and The Titanics, Dave McCormack, welcomed the plan put forward by Chaos Music. The model for the digital distribution of music is being considered by collecting agencies and the major recording labels. It remains to be seen whether the public would accept this or similar models.

---

53 Chaos Music. '15% Levy for the Distribution of Online Music Proposal', 10 August 2000, Media Centre, http://www.chaosmusic.com; and Marriner, C. 'Chaos Promises to Pay 15% As Royalties', *The Sydney Morning Herald*, Friday, 11 August, 2000.

Telecommunications Carriers and Internet Service Providers

Chris Gilbey contends that telecommunications carriers, Internet service providers, and major cable television stations have the ability to measure the bandwidth because they own the installed system of wires. He observes that such gatekeepers have the ability to monitor the movement of MP3s and the transfer of data. Chris Gilbey predicts that the owners of the wires and the satellites – the transponders – will move into the position of owning the content. In the event that they own the copyrights, they would be able to levy a charge.

Chris Gilbey proposed that a peak industry group of Internet service providers, copyright owners, and other interested parties needed to develop as a starting point a methodology of measuring what is taking place. He believed that there need to be statistics about the MP3 community. Chris Gilbey argues that there needs to be more done to quantify the use of MP3 files on the Internet: 'There is very little measurement taking place of the amount of file downloads and music downloads in Australia in the workplace. The failure to quantify this use is because copyright owners do not really want to know the reality of what is happening'.[54] He believes that it is necessary to understand the problems before developing solutions. Yet the various parties have refused to engage in such round table discussions because they see one another as competitors for content and access.

Open Source/ Voluntary Contribution Model

However, it seems that there will remain resistance in the online community to being charged a subscription fee or a service fee for downloading MP3 files. The gift culture of free exchange of information

---

54 Rimmer, M. 'Interview with Chris Gilbey', Sydney, 28 June 2000.

and ideas will make it difficult for companies to make a profit on the Internet. Ian Clarke, the founder of Freenet, is setting up a new company called Uprizer in the United States, with Rob Kramer, Fred Goldring and Ken Hertz.[55] He explained that the new venture would bypass copyright protection laws by citing the example of Stephen King, the author who is asking for voluntary payment for each online instalment of his latest novel. Ian Clarke notes that Uprizer will not insist on everybody paying, just enough people to ensure profitability. He said: 'The public pays, but collectively rather than individually'.[56] Ian Clarke is keen to enlist established and unknown musicians to the project. He said: 'We are keen to help the small guy. We want to democratise the process so you won't need to sell your soul to the devil to get a recording contract'.[57] It remains to be seen whether such electronic business will be viable.

PART 4
SYMPHONY AND METALLICA:
THE MEDIA

The first Australian journalist to provide significant coverage about the dispute over Napster was David Higgins, the *Sydney Morning Herald's* technology editor. He provided front-page coverage of the controversy over the legal action against Napster on the 5th May 2000, with an article

---

55 Martinson, J. 'Freenet Takes Music Copyright Battle to US', *The Guardian*, 1 August 2000.

56 Ibid.

57 Ibid.

entitled 'Metallica Gets Heavy with Net Fans'.[58] He explained why the story grabbed his attention:

> I think it was mainly the unprecedented spectacle of a pop band attacking 300,000 fans. I don't think it was necessarily the copyright issue. It had a lot of attractive aspects: teens in revolt; a challenge to the Law; even the fact that it involved a thrash metal band! Also, the news pages are generally keen for interesting, new Internet stories.[59]

There were a number of reasons why the Metallica case was deemed worthy of receiving front-page coverage on the leading newspaper in Australia. First, the medium of the Internet is an international one. Australian consumers would be able to use Napster just as easily as their American counterparts. Second, the dispute raises legal issues at the heart of the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth). It helps to put the technical debate about the legislation in a social context, which is readily understood. Third, the band Metallica has a large following of consumers in Australia. They are able to gain coverage in Australia because of the international scope of their celebrity star status.

The initial coverage by the *Sydney Morning Herald* was followed by a number of features on the subject – 'Download or Be Damned', 'The War for Words', and 'Slipping through the Net'.[60] David Higgins explained his interest in the subject:

---

58 Higgins, D. 'Metallica Gets Heavy with Its Fans', *The Sydney Morning Herald*, 5 May 2000, p. 1.

59 Rimmer, M. 'Correspondence with David Higgins', Sydney, 25 July 2000.

60 Higgins, D. 'Download and Be Damned', *The Sydney Morning Herald*, 19 May 2000, p. 15; Higgins, D. 'The War for Words', *The Sydney Morning Herald* , 30 June 2000, p. 15; Higgins, D. 'Slipping through the Net', *The Sydney Morning Herald*, 22 June 2000, p. 38; and Riley, M., Zuel, B., and Donovan, P. 'Caught in the Net: Free Music in its Death Throes after Court Pulls Plug', *The Sydney Morning Herald*, 14 February 2001, p. 2.

> I don't have legal or IT training. Not many journalists have formal training in the area they report on. Some develop skills as they go along, but most rely on their contacts to supply expert information. Many journalists like to swap rounds just as politicians change their portfolios. I'm not interested in copyright as such. I'm interested in examining areas where the Internet brings the greatest change. The greater the change, or controversy, the better the news story. The Internet receives tremendous coverage in the press because it is simply the source of great change and therefore the source of great news stories. Copyright is one of my favourite areas, because it carries such controversy and because so many people feel so passionate about it. Some academics feel the Internet has made copyright redundant; kids take delight in ignoring it; lawyers and politicians throw their support behind it; intellectual property owners are looking for ways of doing without it ...[61]

The other newspapers followed the lead of the broadsheet. There were editorials, reports, and opinion pieces in *The Australian*,[62] *The Age*, [63] *The Canberra Times*,[64] *The Courier-Mail*,[65] *The West Australian*,[66] and *The*

---

61 Rimmer, M. 'Correspondence with David Higgins', Sydney, 25 July 2000.

62 Harris, R. 'Metallica Sues over Copyright', *The Australian*, 9 May 2000; Fist, S. 'Wolf Playing at Muso's Door', *The Australian*, 16 May 2000; Romei, S. 'Music-Swapping Monster in Record Demand', *The Australian*, 31 July 2000, p. 36; Grayson, I. 'Napster Must Face the Music', *The Australian*, 8 August 2000, p. 34; Megalogenis, G. 'Turn on, Log in, Download', *The Australian*, 14 August 2000, p. 11; Shedden, I. 'Whole World's Dancing to the Rhythm of MP3', *The Australian*, 14 August 2000, p. 11; and Lusetich, R. 'US Judgment Silences Bootleg Music Net Site', *The Australian*, 14 February 2001, p. 3.

63 Rushkoff, D. 'Warning: Digital Ahead', *The Age*, 13 June 2000; Donovan, P. 'Napster: The Great Refrain Robbery', *The Age*, Saturday, 15 July 2000, News Extra, p. 2; Dubecki, L. 'Net Music Bonanza Plays On', *The Age*, 31 July 2000; Harris, R. 'Napster Ordered to Stop Downloads', *The Age*, 13 February 2001; and Riley, M. 'Napster Users Must Pay, Orders Court', *The Age*, 14 February 2001.

64 Hull, C. 'Net Effect: Criminal Records and Free Music Online Pose a Social and Economic Threat', *The Canberra Times*, 6 May 2000; and Sutherland, J. 'Musical Chairs on The Net', *The Canberra Times*, 8 June 2000.

65 Cassrels, D. 'Grand Theft Audio', *The Courier-Mail*, 22 April 2000; and Mathewson, C. 'Band Hails Bid to Shut Down Pirate Website', *The Courier-Mail*, 29 July 2000.

66 Editorial. 'It's Time to Tame Wild World Web', *The West Australian*, 9 May 2000.

Australian Financial Review.[67] There was also extensive coverage of the dispute on radio,[68] television,[69] and on the Internet.

It is important to consider the effects of this publicity on the dispute over Napster. In the book, *The Infinite Digital Jukebox*, Chris Gilbey argues that the litigation and the propaganda released by the musical industry actually has the counter-productive effect of promoting the downloading MP3 files:

> There is a great probability that the measures that the music industry takes to combat piracy will actually *promote* downloads. Notwithstanding the fact that there are already millions upon millions of music tracks being downloaded via the Internet every day, the vast majority of music consumers has still not heard of downloads, MP3s or any of the other on-line jargon. But as the record industry's attempts to control downloads continues, the likelihood is that the publicity surrounding MP3 will continue to build, resulting in free downloads growing at a geometric pace, while paid-for, legitimate downloads will continue

---

67 Kohler, A. 'Record Companies Losing to the Net', *The Australian Financial Review*, 3 August 2000; Kohler, A. 'Anarchic Heart Ticks in New Economy', *The Australian Financial Review*, 16 May 2000; Davidson, J. 'How Big Business Can Fight Piracy', *The Australian Financial Review*, 3-4 June 2000, p. 22; Davidson, J. 'Napster Beats Free Sex, Notes Business', *The Australian Financial Review*, 3 August 2000; Davidson, J. 'US Court Downloads On Napster', *The Australian Financial Review*, 14 February 2001, p. 1; Davidson, J. 'Music Labels' Grip on Artists Won't Last', *The Australian Financial Review*, 14 February 2001, p. 26; and Editorial. 'Freedom on Line in Digital Curbs', *The Australian Financial Review*, 14 February 2001, p. 34.

68 Background Briefing. 'The Future of Music', Radio National, Australian Broadcasting Corporation, 11 July 2000; and Australia Talks Back. 'Online Music – Download or Freeload?', Radio National, Australian Broadcasting Corporation, 1 August 2000.

69 Australian Broadcasting Corporation. 'MP3 – The Internet's Threat to the Music Moguls', 7:30 Report, Australian Broadcasting Corporation, 15 July 1999; Australian Broadcasting Corporation. 'Click to the Beat', Lateline, Australian Broadcasting Corporation, 28 October 1999; Australian Broadcasting Corporation. 'Government Caught in Net Copyright Wrangle', 7:30 Report, Australian Broadcasting Corporation, 10 March 2000; Australian Broadcasting Corporation. 'Industry Win over Napster May not Stop Music Downloads', 7:30 Report, Australian Broadcasting Corporation, 28 July 2000; Collinge, A. 'Facing the Music', Insight, SBS, 16 November 2000; and Australian Broadcasting Corporation. 'Napster Court Ruling Eagerly Awaited', 7:30 Report, Australian Broadcasting Corporation, 4 January 2001.

only to have arithmetic growth. This will almost certainly contribute to the perception by traditional retail music businesses that the future is limited.[70]

This argument can be tested in relation to the public relations battle waged between the recording companies, Metallica, and Napster.

Metallica

Metallica is a heavy metal band based in the United States. It consists of a partnership of Lars Ulrich, James Hetfield, Kirk Hammett and Jason Newsted. Metallica started out as a band that promoted individualism, anarchism, and anti-authoritarianism. Since releasing its first album *Kill 'Em All* in 1983, it has produced another eight albums – including *Master of Puppets, And Justice for All,* and *Ride the Lightning.* Metallica has sold more than 50 million albums through normal retail channels in the United States. Its self-titled album *Metallica* has sold more than 12 million copies alone. It has been nominated nine times for Grammy Awards by the National Academy of Recording Arts and Sciences, and has won five times. However, Metallica has endured a backlash since 1996 when the band released the commercial album *Load.* The group has increasingly tried to sell albums by repackaging old songs. Its latest effort, *S & M,* is a collaboration with the San Francisco Symphony Orchestra, which puts the heavy metal band's works to orchestral music.

Metallica was among the industry doomsayers who declared that Napster would bring about massive piracy on the Internet. The group staged and orchestrated a media event in order to publicise the litigation against Napster. The drummer of the band, Lars Ulrich, showed up at the Fourth Street headquarters of Napster Inc. to deliver the names of 334,435

---

70 Gilbey, C. *The Infinite Digital Juxebox.* Melbourne: Hardie Grant Books, 2000, p. 136.

Napster users who made 1.45 million Metallica songs available for free downloads. He told a news conference: 'If they want to steal Metallica's music, instead of hiding behind their computers in their bedrooms and dorm rooms then just go down to Tower Records and grab them off the shelves'.[71] In a press conference, Lars Ulrich comments:

> We take our craft – whether it be the music, the lyrics, or the photos and artwork – very seriously, as do most artists. It is therefore sickening to know that our art is being traded, sometimes with an audio quality that has been severely compromised, like a commodity rather than the art that it is. From a business standpoint, this is about piracy – taking something that does not belong to you; and that is morally and legally wrong. The trading of such information – whether it's music, videos, photos, or whatever – is, in effect, trafficking in stolen goods.[72]

Lars Ulrich relies upon the age-old distinction between art and commerce. He draws a strong link between aesthetics and ethics. Lars Ulrich insists that the question of reproducing musical works is a matter of morality. This argument sounds like a claim that the moral rights of the musicians have been violated. It raises the possibility that moral rights claims could be brought in respect of MP3 files on the grounds that they violate the integrity of the musical work.

The media event did not turn out how Metallica had planned. It resulted in a consumer backlash. In protest, Metallica fans mutinied, accusing the band of valuing its royalties over them. A number of anti-Metallica web sites were launched. The response was immediate as thousands of furious fans flooded the Internet with messages attacking

---

71 Higgins, D. 'Metallica Gets Heavy with its Fans', *The Sydney Morning Herald*, 5 May 2000, p. 1.

72 http://www.riaa.org/napster.cfm

Metallica. Some consumers accused Metallica of betraying their artistic credos of individualism and anti-authoritarianism. One fan said: 'It sickens me to think that this is the same band that released albums like *Kill 'Em All* and *Ride the Lightning*.'[73] Another set his grievance to music, posting on the Net a parody of the lyrics to one of Metallica's biggest hits, the song 'Enter Sandman': 'Say your prayers Internet, don't you dare connect, we'll just sue everyone.'[74] Some supporters called for a consumer boycott. 'It's the fans who got Metallica all their millions of dollars and now they want to take away Napster so they can make more money? Let's put a stop to it,' said one fan.[75] 'I suggest that you should not purchase any Metallica product, including concert tickets, until they pull their heads out of their collective asses', said another. 'We need to make sure other bands think twice before attacking the fans that have made them millions of dollars and treating them as criminals.'[76]

In an effort to subdue this hostile reaction, the Metallica drummer Lars Ulrich participated in a question and answer session with fans under the auspices of Slashdot. He was aggrieved at the threat of a consumer boycott:

> If there is a full-on consumer boycott of a product, whether it's toothpaste or Suburbans or CDs, sooner or later the people whose livelihood depends – not the artists, but the companies who are selling these toothpaste or CDs or whatever, will take note. But the way to combat a $16 CD as being unfair is not to go out and steal it, that just becomes sort of the anarchy, the mob rules.[77]

---

73 Higgins, D. 'Metallica Gets Heavy with its Fans', *The Sydney Morning Herald*, 5 May 2000, p. 1.

74 Ibid.

75 Ibid.

76 Ibid.

77 Slashdot. 'Lars Speaks', Slashdot, 26 May 2000.

Sensitive to the threat of a consumer boycott, Lars Ulrich spoke in more conciliatory terms than at the initial press conference. He sought to qualify his rash statements, and put them into a more reasonable context.

In the exchange, one writer argued that the panic over Napster was no different from the debate over home taping in the 1980s. In response, Lars Ulrich pointed out that Metallica has always supported bootlegging. They have always let fans tape their shows, and record live materials for special appearances:

> Metallica have always been in favour of giving the fans as much access as possible to our music. This includes taping sessions at our concerts, and streaming our music via our website. And while we certainly revere our fans for their continued support and desire for our music, we must stress that the open trading of any copyright material is, in effect, the looting of art.[78]

He even admitted that the band had copied tapes, records, and CDs themselves. However, Lars Ulrich sought to distinguish between home taping and digital copying. He believes that there was an important difference in terms of the scale and size of the copyright infringement. His comments can be put in the context of the debate over whether performers should enjoy rights in respect of audio recordings, so that they can control the electronic distribution of live performances.

The media controversy generated by the actions of the heavy metal band was not entirely in vain. Upon reflection, Chris Gilbey cited the adage of Lou Levy who said that any publicity is good publicity:

> The Metallica move backfired on them in one sense. But it gave them an enormous profile on another. It may have harmed them in one domain. But in

---

78 Ibid.

> another domain it may have helped put them in the spotlight. You could argue that the Metallica move was an attempt by an extremely cynical band, who were past their prime and going downhill, to put themselves back in the public spotlight and enabled them to get more attention on mainstream radio, which will help them sell more records.[79]

Metallica attracted support from the major recording companies, artist management like Gold Mountain Management, and established musicians and bands such as Dr Dre, Elton John, Blondie, and Madonna.

Napster

In response, Napster engaged in a public relations campaign. Chris Gilbey noted that the company drew inspiration from the rebel ethos used by recording companies to promote and market rock n' roll music:

> The record companies developed the whole idea of marketing based upon rebellion and revolution. Napster is just continuing that general vector.[80]

Napster launched an upgraded New Artist program in March 2000. It has generated more than 14,000 participating artists. The program allowed emerging artists to share their music with other artists and fans. It also makes available literature, software, and other services that might be useful for independent musicians. Napster sponsored the band Limp Bizkit to tour the United States and provide free concerts.[81] It sought galvanise support for the file-sharing program from consumers. Napster also urged its users to support the artists who backed the company by going out and buying their CDs in a 'buy-cott'. They also recommended

---

79 Rimmer, M. 'Interview with Chris Gilbey', Sydney, 28 June 2000.

80 Ibid.

81 http://www.limpbizkit.com

that they write to the heads of the major record companies and tell them to stop trying to close down Napster.

In support, the evangelists of MP3 spoke of a future in which recording artists can use the Internet to deliver their songs directly to the fans, without having to be dependent upon the distribution networks of major record companies. The rap musician from Public Enemy, Chuck D, supports Napster.[82] After disagreements with his record company, he ended their longstanding contract, and took Public Enemy onto the Internet. Until Polygram's lawyers put a stop to it, he posted previously unreleased tracks on the Net, where anyone with the technology could download them for free. In a posting on the Public enemy web site, Chuck D supported Napster.[83] He was upset that artists did not own the masters of their past musical works and sound recordings. He hoped that the revolution of Napster would liberate artists from oppressive contracts with recording companies. In testimony to the House Committee on small business, Chuck D made the following provocative endorsement for Napster:

> Napster or downloadable distribution, like we would call it, file sharing, is leading a one million MP3 march. It trades music like baseball cards, and digital distribution and file sharing is like those asteroids that wiped out all the dinosaurs. And in this case the dinosaurs are the big four, Sony, BMG, Time Warner and Universal.
>
> Now these companies, which will soon probably be three any week now, have always prided themselves in the excitement of the music industry and the fans. Well, Napster and downloadable distribution is the biggest excitement since disco rap and the Beatles. It is like new radio. And it is not just free music,

---

82 Australian Broadcasting Corporation. 'Click to the Beat', Lateline, Australian Broadcasting Corporation, 28 October 1999.

83 http://www.public-enemy.com

but it is a watchdog method for one site industrial rip-off. The chickens have finally come home to roost.[84]

Courtney Love agreed that any alternative to record company contracts could only benefit artists. She said that 'stealing our provisions in the dead of night when no one is looking is piracy. It's not piracy when kids swap music over the Internet using Napster'.[85] Similarly, Prince, another artist disaffected with recording companies, noted that 'online distribution is turning into a new medium which might enable artists to put an end to this exploitation'.[86] The alternative rock band, the Smashing Pumpkins, released a new album on the Internet because they were unhappy with their record label, Virgin Records.[87]

However, Napster has also attracted negative publicity for seeking to protect its intellectual property against others. It had demanded that the band, Offspring, stop selling bootlegged goods bearing the company's logo on their web site. However, the company later withdrew the order and apologised for taking action against Offspring. Napster and Offspring decided to work together to provide merchandise, with all proceeds going to charity. The episode, though, highlighted that Napster does not really take a radical anarchist stance that copyright is dead. Instead it was shown up to be a corporate player willing to use copyright law when it suits.

The Australian artists and musicians have been ambivalent about the introduction of Napster and file-sharing programs. Chris Gilbey

---

84 Chuck D. 'Online Music: Will Small Music Labels and Entrepreneurs Prosper in the Internet Age', House Committee On Small Business, United States Congress, 24 May 2000.

85 Love, C. 'Digital Hollywood Speech', http://www.holemusic.com

86 Prince. '4 Love of Music', http://npgonlineltd.com

87 Higgins, D. 'Trouble in the Pumpkin Patch as Band Puts Album on Web', *The Sydney Morning Herald*, 14 September 2000, p. 3.

observes that there is a division between musicians who are devoted to art and musicians who are interested in commerce:

> For those people who are in it for the art, who are creative with music and want to share it, MP3 offers an opportunity. For those people who are in it for the money, it still offers the ability to communicate and generate revenue.[88]

The problem is that major recording companies can only sign up a small proportion of musicians and bands. The rest of the people may have talent but do not have a commercial viability for a major corporation to invest in them. They may be interested in sharing their music for free or for a fee on the Internet.

Chris Dubrow, the singer with Australian techno-rock band iNsuRge, is happy that technology will outgrow copyright. He has posted MP3 files of the band's previous album *Power to the People* and several of their EPs on the Internet. Dave Morris from Melbourne rock band Pre Shrunk believed that artists would find it difficult to recoup the costs of making a CD because musical works were distributed for free on the net.[89] He believed, though, that musicians could minimise the damage caused by such file-sharing activity. His band released their song, 'Gamer', free of charge on their own web site before a pirate site could do so. Similarly, Andy Van from the dance music duo Madison Avenue was concerned about the introduction of Napster.[90] He could see the value, though, in using sites such as MP3.com to source new material and found out what was happening to the rest of the dance world. Kate Crawford

---

88 Rimmer, M. 'Interview with Chris Gilbey', Sydney, 28 June 2000.

89 Donovan, P. 'Napster: The Great Refrain Robbery', *The Age*, Saturday, 15 July 2000, News Extra, p. 2.

90 Shedden, I. 'Whole World's Dancing to the Rhythm of MP3', *The Australian*, Monday, 14 August, 2000.

from Biftek Corporation believed that the litigation of Metallica against Napster was a public relations disaster.[91] However, she could relate to the concern of the group that artists would not get paid if their musical work were given away for free. In the end, she concluded that the technology of file sharing should be embraced: 'I think in the end if someone puts up our music on the net and people are downloading it, and what happens already, we have to embrace that and say, Look, that's great, it's getting out to some people who otherwise may not hear this music'.[92]

The alternative narrative of copyright users has been a populist one of community, liberation, and freedom. Julian Dibble is circumspect: 'Yet if MP3 advocates think that the money will inevitably flow straight into artists' pockets – or, indeed, that recording artists, as presently understood, will even necessarily exist under the new digital dispensation – then they should think a little harder. Though MP3 proponents are fond of using the rhetoric of revolution to describe their aims, the cultural transformation they promote is potentially more unsettling than most of them imagine. And as is typical with revolutions-in-progress, its final outcome may not be exactly what its instigators had in mind'.[93]

---

91 Background Briefing. 'The Future of Music', Radio National, Australian Broadcasting Commission, 11 July 2000.

92 Ibid.

93 Dibble, J. 'You Say You Want A Revolution?', *Intellectual Capital*, http://www.intellectualcapital.com, 20 May 1999.

CONCLUSION

This paper has presented some representative Australian responses to the dispute over Napster. Chris Gilbey is sympathetic to the desire of consumers to explore new technologies; Emmanuel Candi champions the cause of the recording industry against music pirates; and David Higgins questions whether the legal regulation of the Internet is effective. Such representative figures provide a spectrum of the opinions at play in the digital community, the legal system, and the mass media in Australia.

It is unclear which narrative prevailed. Chris Gilbey provided the optimistic opinion that the Napster controversy was beneficial for all the parties concerned: 'Everybody won. Metallica won. Napster won. The public won. Everybody won'.[94] A more pessimistic reading of the Napster case is that it represents the triumph of private property rights through technological measures and legislative backing. As P. Bernt Hugenholtz observes: 'Code will rule the Internet with ironic logic'.[95]

However, there has been a mild backlash to the hype and publicity about Napster. The argument is that both the doomsayers and the populists credit too much significance to the file-sharing program. In a column in the *Sydney Morning Herald*, John Casimir suggested that the furore over the dispute was disproportionate to the program.[96] He quoted a wry comment in a letter from the May edition of the music magazine *Q* from the United Kingdom: 'I've developed a novel way of effectively downloading free music from a piece of equipment found in

---

94 Rimmer, M. 'Interview with Chris Gilbey', Sydney, 28 June 2000.

95 Hugenholtz, P.B. 'Copyright, Contract and Code: What Will Remain of the Public Domain?', *Brooklyn Journal Of International Law*, 2000, Vol. 26, p. 77.

96 Casimir, J. 'A Tempting Taste Test', *The Sydney Morning Herald*, Icon, 24-30 June 2000, p. 8.

many homes across the UK. It's called a radio. Many of these models come attached to what's called a tape recorder which cleverly duplicates the desired tune onto a format that can be played time and time again'.[97]

97 Ibid.

CHAPTER SEVEN
BANGARRA DANCE THEATRE:
COPYRIGHT LAW AND INDIGENOUS CULTURE

Bangarra Dance Theatre seeks 'to maintain the link, with respect and integrity, between the traditional indigenous cultures of Australia and new forms of contemporary artistic expression, giving voice to social and political issues which speak to all people'.[1] It has developed an innovative and distinctive combination of traditional and contemporary dance, music and storytelling. Bangarra Dance Theatre has toured across Australia and overseas with its repertoire of original productions such as *Fish* and *Ochres,* and collaborations such as *Rites.* It has also adapted its performances for the mediums of television, film, and multi-media. Bangarra Dance Theatre has also been invited to present its unique dance style to large national and international gatherings. In particular, the group featured in the Opening Ceremony of the Sydney Olympic Games in the year 2000, and the accompanying cultural festival.

Bangarra Dance Theatre is exceptional in its level of legal literacy and competence. It has sought to reform and modify the operation of copyright law through their own local practices and agreements. Bangarra Dance Theatre faces particular difficulties in relation to copyright law because of its use of traditional Indigenous culture and heritage.[2] It has developed special arrangements to recognise the

---

1 Australia Dance Council, http://sunsite.anu.edu.au/ausdance/artists/companies/bangarra/bangarra.html

2 Janke, T. *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights.* Sydney: Australian Institute of Aboriginal and Torres Strait Islander Studies, 1998.

communal ownership of the traditional Indigenous culture and heritage. Bangarra Dance Theatre also deals with similar problems with copyright law that are faced by other performing arts companies and collaborative enterprises.[3] It must deal with the economic and moral rights of choreographers, composers, designers, and performers. Bangarra Dance Theatre must also oversee collaborations with other organisations – such as the Australian Ballet, and Sydney Organising Committee for the Olympic Games. They must take care to protect and guard the performances of the company from the threat of misappropriation.

This paper is primarily based upon an interview with the general manager of Bangarra Dance Theatre, Jo Dyer, conducted in September 1998.[4] It took place at the headquarters of the company at Pier 4/5, the Wharf, Walsh Bay. Jo Dyer first completed a law degree in Adelaide. She became interested in Aboriginal social justice issues working at the Human Rights Commission. Jo Dyer acted as the general manager of the Bangarra Dance Theatre. She crossed between a number of social arenas, talking to Indigenous communities, dealing with the legal system, and liaising with the media. Jo Dyer left Bangarra Dance Theatre in October 1999 and joined the Adelaide youth festival, *Come Out*.[5] She left the company in the hands of a caretaker general manager, Meryl Rogers. The position of general manager has since been filled by Andrew Booth.[6] The interview with the general manager, Jo Dyer, is supplemented with public statements by the creative principals in Bangarra Dance Theatre.

---

3 Pellicano, V. 'Dance and Copyright: Pas de Deux or Pas de Disaster?', *Media And Arts Law Review*, 1997, Vol. 2, p. 116.

4 Rimmer, M. 'Interview with Jo Dyer', Sydney, 15 September 1998.

5 Taylor, C. 'New Role for Dyer', *The Australian*, Monday, 4 October 1999.

6 Sexton, J., Strickland, K. and Lim, A. 'Funding Devil Now in the Detail', *The Australian*, Friday, 12 May 2000, p. 11.

This paper seeks to go beyond a merely formalistic view on the subject of copyright law and Indigenous culture. Most work predictably considers a number of prominent legal cases in the visual arts – the Dollar Bills case,[7] the Carpets case,[8] and the Bulun Bulun decision.[9] It also mentions policy documents such as the *Stopping The Rip-Offs* paper[10] and the *Our Culture, Our Future* project.[11] There is a gap, though, between the legal solutions offered and the concerns of Indigenous people. A few interesting theoretical pieces speculate upon the reasons for this gulf. Stephen Gray points out that the legal solutions are premised upon helping Indigenous people who still maintain a connection to the land.[12] Brad Sherman argues that the closed and self-referential logic of copyright law is to blame for the failure to properly address the concerns of Indigenous people.[13] Anne Barron seeks to explain the cultural misunderstanding over copyright law in terms of Emmanuel Levinas' theory of ethics.[14] This paper takes such questions as its point of

---

7 *Yumbulul* v *Reserve Bank of Australia* (1991) IPR 481.

8 *Milpurrurru* v *Indofurn Pty Ltd* (1994) 54 FCR 240; and *Milpurrurru* v *Indofurn Pty Ltd* [1997] 438 FCA (27 May 1997).

9 *Bulun Bulun and Milpurrurru* v *R & T Textiles Pty Ltd* (1998) 41 IPR 513.

10 Attorney General's Department. *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*. Canberra: The Australian Government, 1994.

11 Janke, T. *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights*. Sydney: Australian Institute of Aboriginal and Torres Strait Islander Studies, 1998.

12 Gray, S. 'Black Enough? Urban and Non-Traditional Aboriginal Art and Proposed Legislative Protection for Aboriginal Art', *Culture and Policy*, 1996, Vol. 7 (3), p. 29.

13 Sherman, B. 'From the Non-original to the Ab-original: A History', in Sherman, B. and Strowel, A. (eds) *Of Authors and Origins: Essays on Copyright Law*. Oxford: Clarendon Press, 1994, p. 111.

14 Barron, A. 'No Other Law? Author-ity, Property, and Aboriginal Art', in Bently, L. and Maniatis, S. (eds) *Intellectual Property and Ethics*. London: Sweet and Maxwell, 1998, p. 39.

departure. It examines such legal and theoretical concerns about copyright law and Indigenous culture in the context of a case study.

This paper is interested in dialogue over authorship, appropriation, and collaboration in relation to Indigenous culture. It is grounded in the particular local experience, knowledge and understanding of copyright law displayed by the performing arts company. Part 1 considers the special relationship between Bangarra Dance Theatre and the Munyarrun Clan. It examines the contractual arrangements developed to recognise communal ownership. Part 2 examines the role of the artistic director and choreographer. It looks at the founder, Carole Johnson,[15] and her successor, Stephen Page.[16] Part 3 focuses upon the role of the composer, David Page.[17] It examines his ambition to set up an Indigenous recording company, Nikinali. Part 4 looks at the contributions of such artistic designers such as Fiona Foley.[18] Part 5 deals with broadcasts of performances on television, film, and multi-media. Part 6 considers the collaborations of Bangarra Dance Theatre with the Australian Ballet, and the Sydney Organising Committee for the Olympic Games.[19] The Conclusion considers how Bangarra Dance

---

15 Johnson, C. 'Ideas on Appropriation: The Emergence of NAISA and Bangarra', in Hillis, C. (ed.) *Heritage and Heresy: Green Mill Papers 1997.* Canberra: Australian Dance Council, 1998, p. 47.

16 Potter, M. 'Feet to the Earth: Interview with Stephen Page', in *A Passion for Dance.* Canberra: National Library of Australia, 1997, p. 102.

17 Page, D., Page, S., and Beall, C. 'Bridging Three Worlds', in Bloustein, G. (ed.) *Musical Visions: Selected Conference Proceedings from the 6th National Australian/New Zealand IAPSM Conference and the Inaugural Arnhem Land Performance Conference.* Kent Town: Wakefield Press, 1999, p. 104.

18 Millner, J. 'Living the Red Desert: Fiona Foley Interview', *RealTime,* 2000, Vol. 35, p. 34.

19 Roberts, R. 'A Passion for Ideas: Black Stage', *Australasian Drama Studies,* 1998, Vol. 32, p. 3.

Theatre has played a part in a general campaign to increase protection of Indigenous culture in copyright law. [20]

PART 1
THE MUNYARRUN CLAN:
INDIGENOUS CULTURE

Bangarra Dance Theatre helps to foster links between Aboriginal communities in urban and rural areas. The company derives its cultural identity from the peoples of Yirrkala in north-east Arnhemland. The choreographer, Stephen Page, and the composer, David Page, formed a strong relationship with Djakapurra Munyarrun quite early on in their careers. Stephen Page first went to visit Yirrkala as a student at the National Aboriginal and Islander Dance School. He later forged a friendship and a kinship with Djakapurra Munyarrun on the basis of similar dance styles. This creative partnership developed into a relationship between the Page Brothers and the entire Munyarrun clan.[21] To clarify this association, Bangarra Dance Theatre has sought to formalise this partnership through contract law and copyright law. It has provided recognition of the communal ownership of the dances and songs by the Munyarrun Clan.

---

20 Australian Broadcasting Corporation. 'Collaborations: Using Indigenous Cultural Material in Contemporary Performance', Awaye, Radio National, Friday 14 May 1999.

21 Rimmer, M. 'Interview with Jo Dyer', Sydney, 15 September 1998.

Communal Ownership

First, Bangarra Dance Theatre was concerned that copyright law did not recognise the collective ownership of artistic expression and cultural heritage, because of a perception that it valorised romantic ideas of individual authorship and creative genius.

Bangarra Dance Theatre recognises that the right to use and reproduce dances, songs, and stories of the Munyarrun Clan resides in the traditional owners of those artistic works. The general manager, Jo Dyer, observes that there are complex hierarchies of knowledge at play:

> The dances and songs are owned by the community. Not everybody in the community will know all of the songs. One of the interesting things to come out of the Hindmarsh Island case[22] I think was the complete inability to recognise hierarchies of knowledge that exist. Certain elders will know of the sacred and spiritual significance of certain areas and others will not because they are not of that group and they are not elders or trusted custodians. That exists as classified information that only certain sections of the community know. That exists in white Australia and no one has any problems with that. The failure to extrapolate from one structure to another I find quite bewildering really.[23]

The traditional owners act as custodians and trustees in relation to particular items of cultural heritage. They have the authority to determine whether a dance, song or story may be used, by whom it may be published, and the terms on which it may be reproduced. Such power derives from their status within the clan, and factors such as their place of

---

22 *Katinyeri* v *The Commonwealth* (1998) 152 ALR 540.

23 Rimmer, M. 'Interview with Jo Dyer', Sydney, 15 September 1998.

conception, birth, residence, gender, age, and clan membership.[24] The traditional owners are responsible for any unauthorised use and reproduction of a dance, song, or story. They are required to punish those responsible for the breach of Aboriginal customary law.

Bangarra Dance Theatre was concerned that copyright law did not recognise the communal ownership of the Munyarrun clan in its traditional dances and songs. The general manager, Jo Dyer, articulated the passionate conviction, 'There needs to be a recognition that copyright resides within a community or a clan, and they need to be able to access justice and the legal system to ensure that their intellectual property rights are protected'.[25] She was worried about the implications of a number of legal decisions in the realm of the visual arts dealing with the ownership of Indigenous culture.

Bangarra Dance Theatre has reservations that the courts recognise the joint authorship of copyright works, but not the communal ownership of Indigenous art and culture. In *Yumbulul* v *Reserve Bank Of Australia And Others*, Justice French acknowledged that 'it may be that Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and the use of works which are essentially communal in origin'.[26] His Honour found that 'the question of statutory recognition of Aboriginal communal interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators'.[27]

---

24 Barron, A. 'No Other Law? Author-ity, Property and Aboriginal Art', in Bently, L. and Maniatis, S. (eds) *Intellectual Property and Ethics*. London: Sweet and Maxwell, 1998, p. 39.

25 Rimmer, M. 'Interview with Jo Dyer', Sydney, 15 September 1998.

26 *Yumbulul* v *Reserve Bank Of Australia* (1991) 21 IPR 481 at 490.

27 Id at p. 492.

However, the courts have become frustrated with the refusal of Federal Parliament to implement recommendations to reform copyright law in relation to Indigenous culture.[28] They have sought to circumvent the formal rules of copyright law through informal measures such as damages and equity. In *Milpurrurru And Others* v *Indofurn Pty Ltd And Others*, Justice von Doussa made a collective award to the artists rather than individual awards so that the artists could distribute it according to their custom.[29] His Honour was willing to give informal recognition of communal ownership of Indigenous art and cultural expression, although he was not prepared to offer formal acknowledgment. In *Bulun Bulun* v *R & T Textiles Pty*, Justice von Doussa found that the relationship between Bulun Bulun and the Ganalbingu people gave rise to fiduciary obligations.[30] He concluded that 'if the copyright owner of an artistic work which embodies ritual knowledge of an Aboriginal clan is being used inappropriately, and the copyright owner fails or refuses to take appropriate action to enforce the copyright, the Australian legal system will permit remedial action through the courts by the clan'.[31] The decision is essentially a symbolic one because an Indigenous community could only rely upon the judgment in an exceptional set of circumstances.

In the absence of copyright law reform, Bangarra Dance Theatre was forced to develop its own legal model as best as it could. The

---

28 Attorney General's Department. *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*. Canberra: Australian Government Publishers, October 1994; and Janke, T. *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights*. Sydney: Australian Institute of Aboriginal and Torres Strait Islander Studies, 1998.

29 *Milpurrurru* v *Indofurn Pty Ltd* (1994) 30 IPR 209.

30 *Bulun Bulun* v *R & T Textiles Pty Ltd* (1998) 41 IPR 513.

31 Id at 532.

performing arts company has entered into a letter of agreement with the Munyarrun Clan, through their representatives Djakapurra and Janet Munyarrun. In the agreement, Bangarra Dance Theatre recognises that the entire copyright in the dances and songs is vested in the Munyarrun Clan. It pays a fee to the community for permission to use the themes of traditional songs and dances. The general manager, Jo Dyer, reflects:

> We entered into an arrangement with the Munyarruns not so much because the courts had failed to recognise communal ownership but because regardless of the courts' position, we clearly were using their dances and songs, and the Clan should be paid for that use. There was no one individual who owned or had choreographed the dances: they belong to the Clan, and they have done for thousands of years.[32]

The letter of agreement goes beyond the legal decisions about Indigenous culture and copyright. It recognises the communal ownership of the Munyarrun clan at first instance, not as a last resort. However, the status of this private agreement is uncertain. It is debatable whether the letter of agreement would be enforceable, given that the *Copyright Act* 1968 (Cth) makes no provision for communal ownership. The matter would depend upon whether the courts would allow the parties to expand copyright law through contract law.[33] The problem is that the Federal Parliament has not explicitly addressed the interaction between copyright law and

---

32 Rimmer, M. 'Interview with Jo Dyer', Sydney, 15 September 1998.

33 The debate over whether private contracts can circumvent the limitations of copyright law has largely taken place in relation to digital works: Samuelson, P. and Opsahl, K. 'Licensing Information in the Global Information Market: Freedom of Contract Meets Public Policy', *European Intellectual Property Review*, 1999, Vol. 21 (8), p. 386.

contract law, even though it is essential to the operation of copyright law in social reality and industry practice.[34]

Economic Rights

Second, Bangarra Dance Theatre were concerned that copyright law would not sufficiently protect the economic interests of the Munyarrun Clan in relation to the cultural designs that were used in their performances.

The problem is that copyright law protects the form of expression of ideas, rather than the ideas themselves. Thus, it would be an infringement of copyright to copy the whole, or a substantial part, of a particular dance, song, or art work of the Munyarrun Clan. However, it would not be an infringement of copyright to copy a design style of the Munyarrun clan.

Bangarra Dance Theatre entrusted the creative artists, Stephen Page and David Page, with the responsibility of paying a share of their royalties onto the Munyarrun Clan. They included a clause in the commissioning arrangements with the key choreographer and composer that royalties should be paid to the Munyarrun clan for the creation of any new works in a particular style. The general manager, Jo Dyer, explains that the arrangement was almost like a 'sub-contract in the commissioning'.[35] However, the manner in which royalties have been paid to the Munyarrun Clan has evolved. After consideration, Bangarra

---

34 Attorney-General's Department and the Department of Communications, Information Technology And The Arts. 'Joint Supplementary Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into the *Copyright Amendment (Digital Agenda) Bill* 1999', Canberra: Australian Parliament House, 1999.

35 Rimmer, M. 'Interview with Jo Dyer', Sydney, 15 September 1998.

Dance Theatre assumed responsibility for paying the royalties to the Munyarrun Clan directly rather than 'sub-contract' the commissioning. This removed an unnecessary level of complexity in the contractual arrangements.

This arrangement seems rather revolutionary in the context of copyright law, because it provides recognition for the sources and inspirations of copyright work. It acknowledges that the new works of choreography and music are infused by the culture of the Munyarrun Clan.

Moral Rights

Third, Bangarra Dance Theatre was concerned that copyright law did not provide any comprehensive protection of moral rights.

At the time of drafting their agreement, the *Copyright Act* 1968 (Cth) provided individual creators with exclusive economic rights of reproduction and dissemination of their work. However, there was no allowance for the moral rights of attribution and integrity, which are important for Indigenous artists and their communities.

The letter of agreement recognises the moral concerns of the traditional custodians of the songs and dances. The permission for Bangarra to perform and adapt the songs and dances is granted upon a couple of conditions. The first condition is that Bangarra Dance Theatre liaises with representatives of the Munyarrun Clan as to the context in which the songs and dances are presented. This provides a role for a representative of the Munyarrun clan, Djakapurra Munyarrun, in participating and supervising the use of traditional dances and music. The second condition is that Bangarra Dance Theatre undertakes to preserve the integrity of the songs and dances used, as required by the Munyarrun Clan. It entrusts the artistic director, Stephen Page, to ensure

that the use of the traditional dances and songs is done with respect and sensitivity.

Bangarra Dance Theatre has sought authorisation and informed consent from the traditional custodians to approve the use and adaptation of Munyarrun cultural materials. The general manager, Jo Dyer, emphasises that there is a continuing process of consultation. Both Djakapurra Munyarrun and his sister Janet participate in the creative process. They divide their time between home in Yirrkala, and working with Bangarra Dance Theatre in Sydney and on tour. Stephen Page and David Page work strongly with Djakapurra Munyarrun, particularly when they are developing new works. They do not usually take particular myths, stories or dreamings from the Munyarrun Clan. Rather Stephen Page and David Page take inspiration from the feelings of sacredness and spirituality engendered by visiting the Yirrkala region. For instance, the production *Fish* was inspired by the mangrove areas in Arnhemland, and other bodies of water. Bangarra Dance Theatre hopes to develop further reciprocity with the Munyarrun Clan. It is seeking to establish cultural residences, which involve Bangarra dancers going back up with Djakapurra with his family, and spending with him over one, two-week periods.[36] It hopes that this project will give the artists a greater idea of the context of the dances and songs that are performed.

The letter of agreement contains a clause similar to a moral right of integrity. Bangarra Dance Theatre illustrates what practical measures are necessary to respect the moral right of integrity. It engages in a consultation and feedback process with the Munyarrun Clan because only

---

36 Australian Broadcasting Corporation. 'Collaborations: Using Indigenous Cultural Material in Contemporary Performance', Awaye, Radio National, Friday 14 May 1999.

the traditional custodians know what is appropriate. For example, it would be inappropriate in some cases for women to perform in particular dances. However, it is well in advance of copyright law because, even if a moral rights regime is introduced, there is no guarantee that it will go beyond protection of individual authors and recognise communal ownership.

The Federal Government has since introduced the *Copyright Amendment (Moral Rights) Act* 2000 (Cth). The Democrat Senator and the erstwhile chairman of Bangarra Dance Theatre, Aden Ridgeway, was concerned that the legislation provided that moral rights should subsist in individual creators, not communities.[37] He proposed an amendment, which provided, 'Moral rights in relation to an Australian indigenous cultural work created by an indigenous author, under the direction of an indigenous cultural group, may be held and asserted by a custodian nominated by the relevant indigenous cultural group as its representative for this Part'.[38] The Australian Labour Party refused to support this amendment, protesting that there was insufficient consultation. The Federal Government deferred the consideration of Indigenous culture and intellectual property to a later date.

Summary

The legal model developed by Bangarra Dance Theatre has a synchronicity with judicial responses to the treatment of Indigenous culture under copyright law. They both seek to circumvent the formal

---

37 Ridgeway, A. 'Second Reading of the *Copyright Amendment (Moral Rights) Bill* 1999', Senate, Hansard, 7 December 2000, p. 21062.

38 S 190A of the *Copyright Amendment (Moral Rights) Bill* 2000 (Cth).

rules of copyright law through the means of other legal regimes – such as contract law, equity law and fiduciary relationships. The legal model developed by Bangarra Dance Theatre has proved to be a meaningful and significant arrangement. The general manager, Jo Dyer, is confident that the company would advance this model in future situations. It could be used with any community who has guest artists who come to the company or with creative artists. The model developed by Bangarra Dance Theatre could also have a wider application. It could be used in future to help ensure that Indigenous artists use the artistic styles and designs of traditional custodians with respect and integrity. The legal model developed by Bangarra Dance Theatre is important for symbolic and material reasons. The contract serves to symbolise the sincerity and the respect that Bangarra Dance Theatre has for the Munyarrun Clan and its culture. It also provides for a cultural design fee, and the commissioning arrangements ensure that there is a flow of royalties from any new work to the community. However, the legal model developed by Bangarra Dance Theatre does have its limitations. The contract may prove to be unenforceable in the event of a conflict between the parties because it does not seem to have any strong basis in copyright law. It will also be of little help against third parties who seek to misappropriate Indigenous culture. Such private arrangements are only as strong as the ethics of the creators, distributors, and users of the cultural material. They are no substitute for genuine copyright law reform.

PART 2
URBAN CLAN:
DIRECTOR

Carole Johnson is a dancer, teacher, arts administrator, and activist. She established and directed New York City's Dancemobile. She was the founder and editor of *Feet*, the first news publication devoted to dance by African-American peoples. Carole Johnson came to Australia in 1972 as the principal dancer with the Elco Pomare Dance Company. She stayed in the country to work with Australia's Indigenous peoples. Carole Johnson founded the National Aboriginal and Islander Skills Development Association. She shaped a vision that enabled young Aboriginal and Islander people to study their cultural heritage while preparing for viable careers in dance. Between 1988 and 1989, Carole Johnson established Bangarra Dance Theatre Australia, the first independent Aboriginal and Islander modern dance company. She selected Stephen Page to take over from her as the artistic director and choreographer.

First, Carole Johnson is concerned that the wider Australian community appropriates Indigenous culture and heritage for the purposes of nation-building and commercial profit. She spoke of her distress about such artistic practices at the Green Mill Festival:

> Appropriation of culture, I define, as the taking of distinctive cultural symbols of one people and incorporating them into another culture while at the same time devaluing the people whose culture is being used. It is a political/cultural concept that applies to Euro-settler cultures such as Australia and the United States. It implies power versus non-power. The person/group that has power appropriates and the origins of the stolen cultural icons or processes are

> assimilated as quickly as possible while being deemed inconsequential to the new.[39]

Carole Johnson conceded that some individual Australian creative artists do respect and give recognition to Aboriginal people with whom they have a relationship and permission for exchanges. However, she recognised that the white society to which they belong suffers from a historical amnesia, which allows the value of Aboriginal people to be obliterated. There is a need to recover the aspects of Aboriginal culture that have been absorbed and assimilated into the nation-state. As Milan Kundera put in an aphorism: 'The struggle against power is the struggle of memory against forgetting'.[40]

Second, it is important to consider whether Indigenous artists are in turn engaging in the appropriation of Western culture and heritage. The founding director of Bangarra Dance Theatre, Carole Johnson, insisted that it was impossible for Indigenous people to appropriate European art and culture:

> Aboriginal/Islander people cannot appropriate European culture. It belongs to Aboriginal people because Anglo/European culture was forced on them in the process of white settlement. Early government policies and actions disassociated Aboriginal people, especially those from New South Wales and Victoria, from their traditional heritages and insisted that they operate within the European cultural framework. To exist within Australia's national cultural framework, such urban Aboriginal artists have been forced to operate from the European

---

39 Johnson, C. 'Ideas on Appropriation: The Emergence of NAISA and Bangarra', in Hillis, C. (ed.) *Heritage and Heresy: Green Mill Papers 1997*. Canberra: Australian Dance Council, 1998, p. 47.

40 Kundera, M. *The Book of Laughter and Forgetting*. New York: Penguin Books, 1979, p. 3.

> point of view. It has meant that most urban artists have had to make a very special effort to gain specific knowledge of the traditional part of their Aboriginal heritage.[41]

An alternative interpretation would be that the Indigenous artists are engaging in counter-appropriation. The critic Eric Michaels argues that Aboriginal artists are not exempted from the post-modern condition.[42] He believes that Aboriginal art is a practice of bricolage in which indigenous cultural resources are consciously remade and transformed in the encounter with the forms, materials, techniques and institutions of the modern West.

Third, it is important to the position of urban Indigenous artists. As Stephen Gray notes: 'Such artists occupy a doubly marginal position within Australian political and artistic debate: on the one hand, they suffer the social and economic deprivation associated with their "Aboriginality", while on the other they are stigmatised for not being "real" or "authentic" Aboriginal artists'.[43] Carole Johnson comments that urban Indigenous artists must consider and address the issues of authorship and ownership that are involved in the use of traditional Indigenous culture and heritage: 'There are important issues of ownership that urban Aboriginal people must work out when borrowing

---

41 Johnson, C. 'Ideas on Appropriation: The Emergence of NAISA and Bangarra', in Hillis, C. (ed.) *Heritage and Heresy: Green Mill Papers 1997*. Canberra: Australian Dance Council, 1998, p. 47.

42 Michaels, E. *Bad Aboriginal Art: Tradition, Media, and Technological Horizons*. Sydney: Allen and Unwin, 1994.

43 Gray, S. 'Black Enough? Urban and Non-Traditional Aboriginal Art and Proposed Legislative Protection for Aboriginal Art', *Culture and Policy*, Vol. 7 (3), 1996, p. 29.

and fusing from an Aboriginal culture that is not their own'.[44] Carole Johnson is ambivalent about urban Indigenous artists drawing upon traditional forms of Indigenous culture and heritage for inspiration. She recognises that artists are always engaged in borrowing influences and styles from one another. However, she warns that urban Aboriginal dancers must recognise their limits and not overstep what is permissible for them to do with traditional Aboriginal dance of other cultures that they have learned.[45] The question of what is an acceptable use of traditional Indigenous culture depends upon ethical practices.

Bangarra Dance Theatre is sensitive to the ethical issues involved in the use of traditional Indigenous cultural material. Accepting that appropriation is a fact of existence in a settler society and that the exchange of cultures is inevitable, Carole Johnson raises some important questions in relation to the use of Indigenous cultural material:

> * How or what can I individually do in my small way to make sure that the people, whose culture I'm borrowing and incorporating and making my own, are valued and counted and will be perceived as such by the dominant culture?
> * How can I make sure they are acknowledged, included, and a part of development and financially compensated?
> * What do I have to give up?[46]

---

44 Johnson, C. 'Ideas on Appropriation: The Emergence of NAISA and Bangarra', in Hillis, C. (ed.) *Heritage and Heresy: Green Mill Papers 1997*. Canberra: Australian Dance Council, 1998, p. 47.

45 Ibid.

46 Ibid.

The company seeks to ensure that there is respect, informed consent, negotiation, full and proper attribution, and the sharing of economic benefits in collaboration.

Bangarra Dance Theatre hired Stephen Page as the successor to Carole Johnson. He was employed full-time as the artistic director, and commissioned to choreograph new works for the company. This arrangement was quite progressive because the director retained the ownership of the copyright in the dramatic work under an exclusive licence. Stephen Page is a member of the Munaldjali clan of the Yugambeh tribe whose traditional land is in south-east Queensland. He studied dance at the college of the National Aboriginal and Islander Skills Development Association. After graduating, Stephen Page performed with the Sydney Dance Company. He returned after some time with the company to teach and direct at National Aboriginal and Islander Skills Development Association. Stephen Page joined Bangarra Dance Theatre as its principal choreographer in September 1991, and was appointed artistic director at the end of 1991. He has achieved major national and international recognition for his dance, choreography, and direction of the works *Ochres*, *Fish* and *Rites*.

Stephen Page speaks about the use and adaptation of Indigenous culture in a different register to that of Carole Johnson. He emphasises the aesthetics and ethics of negotiation and collaboration. In an interview with Michelle Potter, Stephen Page stresses the important role of collaboration and workshopping in choreography:

> In terms of our workshop and our process, it's very much a lot of storytelling, a lot of debating issues – contemporary issues today in our society. Before we do any form of physical movement, it's making sure everyone understands the dance language or the dance intention before we even practise it. I believe it's

> healthy for them and it stimulates the work every time it's every performed, because you can keep pruning it and adding to it – I tend to be a bit like the acupuncturist where he actually comes in and keeps stimulating the blood to the work. I think that's one of the best methods of working. I really like to come much more from the human base. I let them have a voice before they actually start throwing their body around. So that's how we work really. By the end of the day I'll make the last decision on what it should be, but it's very collaborative.[47]

As is apparent in one dispute in Bangarra Dance Theatre, there may also be conflict over the level of attribution among the key creators of a collaborative work. The assistant artistic director, Bernadette Walong, left the performing arts company in 1995 after a breakdown in communications with the artistic director, Stephen Page.[48] She alleged that the company had failed to acknowledge in promotional material her contribution to *Ochres*, on which the two had collaborated. However, Bangarra Dance Theatre insisted that it had given the assistant director full and proper attribution. Bernadette Walong left Bangarra Dance Theatre after she did not appear in the company's season at the Canberra Theatre Festival. A settlement was reached on copyright and royalties after her departure. This dispute highlights the difficulties involved in attribution in a collaborative work.

Stephen Page went through a crisis in 1998 and resigned. He hinted at problems with the board of management. Such tensions are common in the performing arts. The relationship between the artistic

---

47 Potter, M. 'Feet to the Earth: Interview with Stephen Page', in *A Passion for Dance*. Canberra: National Library of Australia, 1997, p. 102.

48 Staff Reporter. 'Walong Leaves Bangarra', *Dance Australia*, February/March 1996, Vol. 82, p. 9; and Turner, B. 'Bangarra Breakdown', *The Sydney Morning Herald*, Tuesday, 6 February 1996, p. 17.

director, the general manager, and the board of management can be a fraught one in the performing arts, especially where funding is precarious. This is evident in the dispute in the Australian Dance Theatre, in which the artistic director Meryl Tankard resigned under pressure from the Minister of Arts in South Australia.[49] Stephen Page also articulated his own worries about 'the complexities and diversity of what we were presenting. We were too much into the mainstream – too much energy was spent protecting this theatrical indigenous experience we were putting on for the rest of the world'.[50] However, Stephen Page committed himself to staying with Bangarra Dance Theatre until the end of 2001. He said, 'We didn't have a strong board then and now we do'.[51] Bangarra Dance Theatre's chairman is Senator Aden Ridgeway, and the deputy is Danny Gilbert of law firm Gilbert and Tobin.[52] Board members joining this year include businessmen Richard Longes and Graeme Galt. Given that the company has been expected to do so much with so little funding, Bangarra Dance Theatre has done well to survive and prosper.

---

49 Brissenden, A. and Van Ulzen, K. 'The Tankard Affair', *Dance Australia*, 1998, October/November, p. 26.

50 Lawson, V. 'Page's Long Rite of Passage', *The Sydney Morning Herald*, 29 November 1999.

51 Ibid.

52 Ibid.

PART 3

BLACKFELLA/ WHITEFELLA:

COMPOSER

Sydney-based composer and performer David Page is a descendant of the Munaldjali clan of the Yugambeh tribe of south-east Queensland. His musical career began with the release of two singles at the age of thirteen. David Page continued with music studies at the Centre for Aboriginal Studies in Music at Adelaide University.[53] This institution has established a reputation for encouraging its students to learn about traditional and contemporary forms of Aboriginal music. David Page describes the tensions at play in his work:

> But then I am more than an artist, I am an Aboriginal artist. And this is where the biggest challenge lies. On the one hand, I want to project Indigenous peoples in a positive light, providing an all important role model for young Aboriginal and Torres Strait Islander people. On the other hand I want all Australians to understand the pain, the difficulties, the realities of being an Indigenous Australian. For this reason I think my work is rather bitter sweet. I hope it is full of contrasts – optimistic, depressing, joyful, sad, shocking and light-hearted.[54]

As a composer for dance David Page has collaborated with his brother, choreographer Stephen Page, to create works for the National Aboriginal and Islander Skills Development Association, Sydney Dance Company,

---

53 For a history of the Centre for Aboriginal Studies in Music, see Ellis, C. *Aboriginal Music: Education for Living*. Brisbane: University of Queensland Press, 1985.

54 Page, D., Page, S., and Beall, C. 'Bridging Three Worlds', in Bloustein, G. (ed.) *Musical Visions: Selected Conference Proceedings from The 6th National Australian/New Zealand IAPSM Conference and the Inaugural Arnhem Land Performance Conference*. Kent Town: Wakefield Press, 1999, p. 104.

the Australian Ballet, and Bangarra Dance Theatre. He has also composed for, and acted in, musicals, television and film.

Bangarra Dance Theatre was inspired by the example of the Warumpi Band, the predominantly Aboriginal rock band famous for such songs 'Blackfella, Whitefella', and 'My Island Home'.[55] Following the lead of the Warumpi Band, who were fusing traditional Aboriginal music with rock and roll, Stephen Page did the same with traditional and contemporary dance styles. He first engaged in this kind of choreographic fusion in a piece of work called Warumpi Warumpi for an end of term workshop for the second year at the National Aboriginal and Islander Dance School. After this innovative work, Stephen Page said: 'That's when I knew that I wanted to continue'.[56]

Bangarra Dance Theatre has been influenced by the success of Yothu Yindi, a rock band also from Yirrkala in Arnhemland, Northern Territory.[57] Following the example of the band, the composer David Page has sought to bring together traditional Aboriginal music, with the rhythms of contemporary dance and pop music. Bangarra Dance Theatre has also learnt the importance of legal arrangements from Yothu Yindi. After negotiation with their elders, the band agreed to enter into a contract with Mushroom Records on the condition that the company waived copyright in the sound recording for the tribally owned music

---

55 McMillan, A. *Strict Rules*. Sydney: Hodder and Staughton, 1988; and Murray, N. *Sing for Me*, Countryman. Sydney: Sceptre, 1993.

56 Potter, M. 'Feet to the Earth: Interview with Stephen Page', in *A Passion for Dance*. Canberra: National Library of Australia, 1997, p. 102.

57 Hayward, P. (ed.) 'Access to the Mainstream: The Case of Yothu Yindi' in *Sound Alliances: Indigenous Peoples, Cultural Politics, and Popular Music in the Pacific*. London and New York: Cassell, 1998, pp. 175-209.

comprising half of their debut album *Homeland Movement*.[58] The group and the recording company have shared authorship of musical works and sound recordings on later albums. Bangarra Dance has also learnt lessons from Yothu Yindi about managing the difficulties of mainstream commercial success. In 1991, Yothu Yindi released a dance or 'filthy lucre' remix of their single *Treaty*. The single spent thirty weeks in the Australian top 100, promoted the album *Tribal Voice* and won a string of awards. Yothu Yindi was acclaimed for transmitting a political message to wide audience, but it was also criticised for selling out and cheapening its intended message.[59] The episode highlights the difficulties involved in reconciling commercial success with political integrity.

Bangarra Dance Theatre is based upon an artistic collaboration between the Page brothers and the Munyarrun Clan. David Page discusses the strengths and tensions at work in this partnership: 'Our experience is urban, theirs is traditional. Having this closeness is not always easy, but for us it is a great honour and it is enduring. Together we have shared our stories, our dreaming, our dance and song'.[60] David Page observes that the dance theatre company hopes to reach a universal audience through stories about belonging, identity, and connection that touch their own communities:

---

58 Castles, J. 'Tjungaringanyi: Aboriginal Rock', in Hayward, P. (ed.) *From Pop to Punk to Post-modernism*. Sydney: Allen and Unwin Pty Ltd, 1992, p. 25 at 26.

59 Hayward, P. (ed.) 'Access to the Mainstream: The Case of Yothu Yindi' in *Sound Alliances: Indigenous Peoples, Cultural Politics, and Popular Music in the Pacific*. London and New York: Cassell, 1998, pp. 175-209.

60 Page, D., Page, S., and Beall, C. 'Bridging Three Worlds', in Bloustein, G. (ed.) *Musical Visions: Selected Conference Proceedings from the 6th National Australian/New Zealand IAPSM Conference and the Inaugural Arnhem Land Performance Conference*. Kent Town: Wakefield Press, 1999, p. 104.

> It is our experience to perform one day in the city of Sydney, the next in the homelands of Arnhemland and then to reach the international audience through CDs and radio airplay. To mean something to such a diversity of people is a big responsibility. We must be more than an artefact, a tourist attraction, a smoke screen covering the truth of people's existence. We need to give people a sense of how human nature and experience is fundamentally the same for all people the world over. We need to cross barriers of language, technology, time and place. Dance and music are the best possible conveyors of these experiences and these messages.[61]

Bangarra Dance Theatre must be faithful to the particular experiences of Indigenous peoples, and yet at the same time reach a universal audience. It seeks to avoid the twin traps of being trapped in the ghetto, and being totally absorbed into an international commodity culture. Bangarra Dance Theatre has a prodigious task in educating people about Indigenous heritage, about retaining the languages, the stories, and the lands. There is still a lack of understanding towards the many cultures that form Indigenous Australia.

Bangarra Dance Theatre has acted as an umbrella organisation, and lent its support to a number of musical collaborations. It has provided a platform for a number of Indigenous musicians and performers in the *Black Vine* and the *Dance Clan* series. Bangarra Dance Theatre has featured such guests as Christine Anu, Leah Purcell, Archie Roach, Ruby Hunter, Jimmy Little, Tiddas, and the Stiff Gins. Such arrangements have been mutually beneficial. Bangarra Dance Theatre has lifted its profile and reputation by associating with such stars. In return, it has fostered and supported the careers of Indigenous musicians and performers. As

---

61 Ibid.

David Page observes: 'Emerging artists need to collaborate and network with each other to reinforce their existence and motivate the practice of our natural sharing abilities'.[62] It is also striking that such Indigenous musicians and performers have achieved their success with the help of non-Indigenous collaborators. They have been assisted by songwriters such as Neil Murray, scriptwriters like Scott Rankin, and producers like David Bridie, Brendan Gallagher, and Joe Camilleri.

Bangarra Dance Theatre has policed the musical work that has been performed under its auspices. The general manager, Jo Dyer, discovered on a number of occasions that its works have been used without authorisation by television and radio broadcasters.[63] The Aboriginal performer Leah Purcell started out as a singer in the musical *Bran Nue Dae*,[64] and subsequently starred in an autobiographical play, *Box the Pony*.[65] She has appeared as a guest of Bangarra Dance Theatre at the *Black Vine* series in 1997. The Australian Broadcasting Corporation taped the concert to play on the Aboriginal cultural program called 'Awaye'. Leah Purcell was upset that various pieces of the songs were being played in other contexts on radio programs broadcast by the Australian Broadcasting Commission. She did not want to have her work fixed in a recorded form at this stage of her career. In response, Bangarra Dance Theatre negotiated with the Australian Broadcasting Commission to stop the practice of playing such music out of context. It played an important

---

62 Ibid.

63 Rimmer, M. 'Interview with Jo Dyer', Sydney, 15 September 1998.

64 Chi, J. and Kuckles. *Bran Nue Dae*. Sydney and Broome: Currency Press and Magabala Books Aboriginal Corporation, 1991.

65 Rankin, S. and Purcell, L. *Box the Pony*. Sydney: Hodder Headline, 1999.

role in protecting the Indigenous performers and musicians who they work with.

Bangarra Dance Theatre is conscious that the support from within the mainstream, profit-making music industry toward Aboriginal and Torres Strait Islander music has been limited. The composer David Page observes:

> Many Indigenous performers have to work twice as hard as the average Australian in this field to fit into the mainstream music industry. And then, they are often catalogued and slotted into a pigeon hole when it comes time for the country to award these people for their hard work in creating an original style of music and story-telling.[66]

Furthermore, Bangarra Dance Theatre are also be concerned about the appropriation of Indigenous music by the mainstream musical industry. There is a high potential for exploitation where popular music adapts Indigenous music into hit-oriented recordings. Ade Kuyoki and Maroochy Barambah complained that a major recording organisation sought to acquire ownership of all copyright materials in a project about Indigenous Australian songs and stories.[67] They believed that the contract would breach traditional Aboriginal customary law. Such musical appropriation is also apparent overseas.[68] Most notoriously, the

---

66 Page, D., Page, S., and Beall, C. 'Bridging Three Worlds', in Bloustein, G. (ed.) *Musical Visions: Selected Conference Proceedings from the 6th National Australian/New Zealand IAPSM Conference and the Inaugural Arnhem Land Performance Conference.* Kent Town: Wakefield Press, 1999, p. 104.

67 Kukoyi, A. 'The Significance of an Indigenous-Owned Recording and Publishing Company in Australia', Bloustein, G. (ed.) *Musical Visions: Selected Conference Proceedings from the 6th National Australian/New Zealand IAPSM Conference and the Inaugural Arnhem Land Performance Conference.* Kent Town: Wakefield Press, 1999, p. 77.

68 Feld, S. 'Notes on the World Beat,' *Public Culture Bulletin*, 1988, Vol. 1 (1), p. 31.

Belgian producers Michel Sauchez and Eric Mouquet produced an album called *Deep Forest* by mixing recordings of chants by Pygmy people in the Ituri Forest, Zaire, with programmed keyboards and drum machines.[69] The pair took credit for the project, and did not share the royalties with the Indigenous people.

Bangarra Dance Theatre supports the development of Indigenous music through bodies run by Indigenous people. They hope to complement the performing arts company with a musical recording company. The composer David Page is working towards the establishment of a music-recording studio and label based in Sydney called Nikinali. The recording company has been given government-sponsored premises at The Wharf alongside the Bangarra Dance Theatre, Sydney Dance Company and the Sydney Dance Theatre Company. The composer David Page articulates the goals of Nikinali:

> * To help develop the styles of emerging Aboriginal and Torres Strait Islander artists
> * To help give them recognition
> * To increase the Australian Indigenous music market
> * To encourage role modelling for future generations
> * To develop each performer's experience of song writing and recording processes.[70]

---

69 Mitchell, T. *Popular Music and Local Identity: Rock, Pop, and Rap in Europe and Oceania*. London and New York: Leicester University Press, 1996, p. 54.

70 Page, D., Page, S., and Beall, C. 'Bridging Three Worlds', in Bloustein, G. (ed.) *Musical Visions: Selected Conference Proceedings from the 6th National Australian/New Zealand IAPSM Conference and the Inaugural Arnhem Land Performance Conference*. Kent Town: Wakefield Press, 1999, p. 104.

David Page hopes that Nikinali will facilitate networking and collaborations between Indigenous performers by sharing the similarity of cultural expression through song form. It will also allow the maintenance and preservation of musical works within the urban Aboriginal music industry. Furthermore, it might also be an antidote to musical appropriation.

However, there are a number of difficulties for Indigenous musicians and performers working outside the mainstream musical industry. The recording companies run by Indigenous persons and groups such as Nikinali, Daki Budtcha Pty Ltd and the Central Australian Aboriginal Media Association are largely dependent upon government funding. They are thus vulnerable to changes in funding policy and distribution. The recording companies have limited production capabilities. They can only have a small list of albums and signed acts. The Indigenous recording companies do not have the distribution networks of the major multinational companies. They will have difficulties getting publicity, marketing and retail support necessary for commercial success. It is a difficult dilemma for Indigenous musicians. They can either work in an unsympathetic mainstream music industry, or else join independent Indigenous recording companies.

PART 4
ALCHEMY:
DESIGNER

Bangarra Dance Theatre has collaborated with a number of artistic designers – including Fiona Foley, Lin Onus, and Peter England. Fiona Foley is an internationally recognised artist based in Hervey Bay,

Queensland, Australia. She was the artistic designer for the production *Alchemy*, and the forthcoming Olympic Games double bill, *Skin*, for Bangarra Dance Theatre. She was also the artistic designer for the production of *Ochre and Dust*, which was choreographed by Aku Kadogo for the Adelaide and Perth festivals. After studying art at the Sydney College of the Arts, Fiona Foley has exhibited her studio work in Australia and overseas. She helped set up and curate the Boomalli Aboriginal Arts Cooperative in 1988. Fiona Foley has been involved in a variety of community-based projects, from working as an artist-in-residence to executing public commissions in collaboration with local communities. For instance, she was employed as a silkscreen printer in Maningrida and Ramingining in Central Arnhemland in the 1990s . Fiona Foley has been involved in making public art in negotiation with local communities, such as the *Lie of the Land* for the National Reconciliation Conference in 1997, and art work for the Queen Street Mall in Brisbane in 1999. She has also been engaged in a number of overseas residences, including workshops at Modingar in India, and Niigata in Japan.

The artist Fiona Foley has worked on designing the sets for Aboriginal theatre and dance for Bangarra Dance Theatre. She emphasised that her role is to visualise the ideas of the director in a physical space.

> Yes, the first work I did was for Stephen Page's *Alchemy*, by Bangarra Dance Company. And I will be working on his upcoming production for the Olympic Arts festival in Sydney. The work is to be divided into 2 sections, one representing women, the other men. My brief is to design the 4 sets for the women's dance. When working with Stephen, maybe the best way to describe my role is to say that I visualise his ideas in physical space. He knows what he wants, and gives me key clues, for example: 'I want something to do with Lily

> Pads.' From there, I can run with the idea. I have spent a lot of time watching Bangarra performances and know many of the dancers well – I've shared houses with some of them – and this intimacy gives me a good understanding of what is needed in a set from the perspective of the dancers themselves.[71]

The director and the designers collaborate to express the physical images of the dance. They seek to complement the dance and music with suitable visual designs.

Fiona Foley celebrates the renaissance in Indigenous art and culture – from the use of watercolours by the Aranda artist, to the use of acrylic paint by the Papunya movement, and more recent applications of Western mediums by Indigenous artists. However, she is concerned about the appropriation of Indigenous artistic expression and cultural heritage. Fiona Foley is an outspoken critic of the appropriation of Aboriginal artistic expression and cultural heritage:

> As an executive member of the Aboriginal Artists Management Association, I witness the cultural theft of this country's indigenous arts, in many forms, on a daily basis. We all continue to experience a status quo whereby Australian history is regarded as beginning from the year 1788; prior to that date there is no formal 'history'. As the Sydney Olympics draws nearer, the quest for a new Australian nationalism will see a plethora of copyright abuses and breaches of the rights of Aboriginal art and culture.[72]

Fiona Foley comes to similar conclusions to Carole Johnson about the appropriation of Aboriginal and Torres Strait Islander art and culture.

---

71 Millner, J. 'Living the Red Desert: Fiona Foley Interview', *RealTime*, 2000, Vol. 35, p. 34.

72 Foley, F. 'Traditional Boundaries, New Perspectives', *Periphery*, Februrary 1994, No. 18, pp. 8-10.

She believes that the wider Australian community adopts Indigenous imagery to gain cultural credibility, but fails to acknowledge its history or context.

For instance, the artist Emily Kame Kngwarreye has been the subject of artistic appropriation by white Australian artists. In his recent series of paintings *Nature Speaks*,[73] the artist Imants Tillers has been drawn to Emily Kame Kngwarreye's *Yam Dreaming* on the basis of their visual elements.[74] Furthermore, there has been a media controversy about whether there has been a flood of fakes and frauds of the work of the artist Emily Kame Kngwarreye.[75] It has been alleged that artistic dealers were trying to pass off works by fellow Utopian community artists under the authorship of Emily Kame Kngwarreye. Such media scandals have confused and confounded the intense individualism of Western art, and the communal nature of Indigenous art and culture.

Fiona Foley comments that the appropriation of Aboriginal and Torres Strait Islander art and culture amounts to a violation of customary law:

> As Galarrwuy Yunipingu wrote, 'For Aboriginal people, it's not a simple case of stealing Aboriginal imagery or breaking Australian copyright laws. You're also stealing that person's life, ceremony and land'.[76]

---

73 Tillers, I. *Nature Speaks*. Sydney: Sherman Galleries, 1999; and James, B. 'Tillers Goes Bush', *The Sydney Morning Herald*, Saturday, June 5, 1999.

74 Nicholls, C. *From Appreciation to Appropriation: Indigenous Influences and Images in Australian Visual Art*. Adelaide: Flinders University Art Museum Gallery, 2000, p. 8.

75 McCulloch, S. 'Authentic Forgery: The Faking of Aboriginal Art', *Weekend Australian*, 7-8 October 1995, Review, pp. 1-2; McCulloch, S. 'Too Many Dots', *Weekend Australian*, 21-22 September 1996, Review, p. 5; and Greer, G. 'Selling Off the Dreaming', *Sydney Morning Herald*, 6 December, 1997, p. 5.

76 Foley, F. 'Traditional Boundaries, New Perspectives', *Periphery*, February 1994, No. 18, pp. 8-10.

Under customary law, traditional Indigenous artists are only allowed to paint particular stories and dreamings as prescribed by their skin name, family, knowledge, and ties to the land. They will be held responsible for the unauthorised reproduction of stories and dreamings by a third party, even if the artist had no control over or knowledge of what occurred. If the art work is misused, custodians can censure the artist by stopping them from painting, excluding them from the community, and seeking recompense. As Christine Nicholls notes: 'Painting a dreaming belonging to another, or rendering it in any form whatsoever, still amounts to a cultural theft as well as blasphemy and continues to be a capital offence and punishable by Indigenous law'.[77] However, under customary law, there are occasions when outsiders are given permission to use and adapt imagery belonging to another group.

Fiona Foley observes that the appropriation of Aboriginal and Torres Strait Islander art and culture does not only offend Indigenous customary laws, but it might also amount to an infringement of intellectual property laws:

> Intellectual property encompasses copyright, patents, design and trade marks. The next seven years will prove to be a mine-field of appropriation of Aboriginal and Torres Strait Islander cultural property ... Our cultural property will once again be appropriated, as it was in the national celebrations during the Bicentennial Year, 1988. Non-Aboriginal people willingly infringe the boundaries of Aboriginal and Torres Strait Islander copyright, either naively unaware of the implications, or knowingly prepared to steal indigenous imagery. This certainly is a legally blurred boundary for non-Aboriginal and non-Torres

---

77 Nicholls, C. *From Appreciation to Appropriation: Indigenous Influences and Images in Australian Visual Art*. Adelaide: Flinders University Art Museum Gallery, 2000, p. 8.

> Strait Islander people, but it is nevertheless a crime against the indigenous nations of Australia to continue blatantly to ignore issues of copyright.[78]

Fiona Foley observes that there is a gap between Western intellectual property laws, and Indigenous customary law. Copyright law grants individual creators with exclusive economic rights in respect of works and other subject matter reproduced to material form for a period of up to 50 years after the death of the author. By contrast, Indigenous customary law invests communities with cultural rights over tangible and intangible heritage in perpetuity. The misfit between the two systems may disadvantage Indigenous litigants.

There have been a number of initiatives to bridge the gap between Western copyright law and Indigenous customary law in the area of the visual arts. First, there have been a number of legal actions run by progressive lawyers and the National Indigenous Arts Association in order to reform copyright law, and gain publicity for this cause.[79] In response, the courts have engaged in formal innovations to protect Indigenous art and culture from misappropriation. They have provided informal recognition of communal ownership through awards of damages, and the use of fiduciary relationships. However, the courts have been unwilling to go further and recognise that there is inherent connection between Indigenous culture and native title in land.[80] Second, there has also been a successful campaign run by the National Indigenous

---

78 Foley, F. 'Traditional Boundaries, New Perspectives', *Periphery*, February 1994, No. 18, pp. 8-10.

79 *Yumbulul* v *Reserve Bank Of Australia* (1991) 21 IPR 481; *Milpurruru* v *Indofurn Pty Ltd* (1994) 30 IPR 209; and *Bulun* v *R & T Textiles Pty Ltd* (1998) 41 IPR 513.

80 *Bulun* v *R & T Textiles Pty Ltd* (1998) 41 IPR 513.

Arts Association to introduce an authenticity mark.[81] The use of such a trade mark designates that a product or a service was the result of the work of an Indigenous person or group. It is hoped that this mark will inhibit the appropriation of Indigenous art. Third, there has been a push for the introduction of a right of resale.[82] This would mean that Indigenous artists would receive money for every new sale of their work.

Bangarra Dance Theatre has drawn inspiration from the work of Emily Kame Kngwarreye for their next production *Shelter*. Stephen Page said: 'I've been in love with her stuff for a long time'.[83] Bangarra Dance Theatre will have to take care in the use and adaptation of the work of Emily Kame Kngwarreye. They will not want to be associated with the spate of appropriation of her work. Bangarra Dance Theatre will have to seek permission from the closest family members of Emily Kame Kngwarreye – Greenie Purvis, Lindsay Bird, Sammy Petyarre, Josie Petyarre and Jedda Kngwarreye.[84] They could employ the legal model that they used in relation to the Munyarrun Clan. That would allow for both the direct use of her work, and the indirect use of her cultural designs.

---

81 Annas, M. 'The Label of Authenticity: A Certification Trade Mark for Goods And services of Indigenous Origin', *Aboriginal Law Bulletin*, 1997, Vol. 3, No. 90, p. 6; and National Indigenous Arts Advocacy Association, http://www.niaaa.com.au/ index.html

82 Janke, T. *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights*. Sydney: Australian Institute of Aboriginal and Torres Strait Islander Studies, 1998, pp. 209-213.

83 Lawson, V. 'Page's Long Rite of Passage', *The Sydney Morning Herald*, 29 November 1999.

84 Isaacs, J. *Emily Kngwarreye – Paintings*. Sydney: Craftsman House, 1998.

PART 5
ARCHIVING EPHEMERA:
PERFORMERS

Whilst performing art companies are careful to protect the copyright interests of the key members of the creative team, consideration is not always given to the application of copyright law to the rights of performers. The general manager, Jo Dyer, comments: 'I don't think that performing arts organisations are necessarily that good at dealing with the nuances and complexities of copyright law in relation to performers' rights'.[85]

Bangarra Dance Theatre features a company of ten dancers, including Russell Page, the brother of the choreographer Stephen Page and the composer David Page. The dancers are employed on ten-month contracts with the company, from the beginning of February to the end of November each year. It is worth investigating what, if any, rights the performers have in relation to the recording and broadcast of their live performances on television, film, and multi-media.

Bangarra Dance Theatre is contemplating using film as a means to archive its performances and to increase the distribution of its work. There was a documentary about the Page brothers called *Urban Clan*.[86] Stephen Page worked with the maker of the documentary to shoot excerpts of *Ochres* in the studio for camera.[87] Inspired by this experience, Stephen Page spent two weeks shooting a version of *Fish* directly for

---

85 Rimmer, M. 'Interview with Jo Dyer', Sydney, 15 September 1998.
86 Mahrer, M. *Urban Clan*. Music Art Films/Ronin Films, 1997.
87 Burstow, S. *Ochres*. Sydney: ABC Arts, 1996.

film.[88] The general manager, Jo Dyer, envisions: 'The film will be a lasting testament to the work but it will be an entirely different kind of work from the *Ochres* style of performance'.[89] It will have the same choreographic elements and music, but it will be quite a different work than the live performance. As Michelle Potter comments: 'No archived material, including film and video recordings, can ever recreate the moment of performance. That moment is truly evanescent since it involves not only a specific space and time, but a specific connection with a specific space and time'.[90] Bangarra Dance Theatre also hopes that film recordings will increase the audience for its work both in Australia and overseas. The general manager, Jo Dyer, comments: 'There is no question that film is the most universal artistic medium'.[91] Bangarra Dance Theatre generated a strong response when the documentary about the Page Brothers, *Urban Clan*, was screened in Australia and Great Britain. It is anticipated that it will receive a similar positive reaction when it screens the film version of *Fish*. This television coverage creates a far greater amount of audience recognition than performance.

Bangarra Dance Theatre has also been involved to a limited extent in multi-media and new technologies. It gave permission for excerpts from three of its performances to be included on one of the Australia on CD titles, *Moorditj: Australian Indigenous Cultural Expressions*.[92] The

---

88 Page, S. *Fish*. Sydney: Music Arts Dance Films Pty Ltd, 1998.

89 Rimmer, M. 'Interview with Jo Dyer', Sydney, 15 September 1998.

90 Potter, M. 'Archiving the Evanescent: Dance Collections and Australia', *Voices*, Vol. 3 (3), 1993, p. 105.

91 Rimmer, M. 'Interview with Jo Dyer', Sydney, 15 September 1998.

92 Moorditj Consortium. *Moorditj: Australian Indigenous Cultural Expressions*. Canberra: Australia on CD, 1998.

protection of multi-media under copyright law is problematic.[93] The decision in *Galaxy Electronics Pty Ltd* v *Sega Enterprises Ltd* suggested that video computer games can be classified as cinematograph films.[94] There is some uncertainty, though, whether multi-media works can also be protected as cinematographic films.[95] However, Bangarra Dance Theatre has no plans to create further digital work in the future. The artistic director, Stephen Page, is more interested in the possibilities of television and film. The company, too, is devoting its energies to live performance and Indigenous issues. Bangarra Dance Theatre believes that dance companies such as Chunky Move are better suited to exploit the opportunities opened up by digital technologies.[96]

Of course Bangarra Dance Theatre needs to get permission from the Munyarrun Clan to broadcast any of its dances and songs on television, film, and multi-media. They also must get copyright clearances from the creative principals – the choreographer, the composer, and the designer. However, the question arises of whether Bangarra Dance Theatre also needs to obtain the consent of the performances to broadcast their performances.

At present, performers have rights under Part XIA of the *Copyright Act* 1968 (Cth) to bring an action against any person who makes an

---

93 Copyright Law Review Committee. *Simplification Of The Copyright Act 1968: Part 2. Rights and Subject Matter*. Canberra: Attorney-General's Department, 1999, p 83.

94 (1997) 37 IPR 462.

95 Aplin, T. 'Not in our Galaxy: Why 'Film' Won't Rescue Multimedia' *European Intellectual Property Review*, 1999, Vol. 21 (12), p. 633.

96 Chunky Move is developing a Web-supported CD-Rom allowing them to edit a choreographic work using motion capture technology. It is part of the Performing Arts Media Library pilot project, which explores the legal issues surrounding the production and distribution of performing arts products in the digital environment. Simondson, H. *Performing Arts Media Library: From Live Performance to the Digital Stage*. Melbourne: Cinemedia, 1999.

unauthorised use of their live performances.[97] They can prevent the fixation of live performances in a sound recording or a film.[98] They can also stop commercial dealings in unauthorised sound recordings or films.[99] However, the performers' rights only last for 50 years in respect of sound recordings, and 20 years in relation to films. They are furthermore exhausted once authorisation has been given for fixation.

Bangarra Dance Theatre accepts the status quo that performers should have some say about the representation of images in film, television, and multi-media. The general manager Jo Dyer observes:

> Certainly I think that there should be some kind of protection as to how their images are used. You should not be able to broadcast things around the world without having them accepted that this is going to happen.[100]

Bangarra Dance Theatre has been involved in a number of situations in which there needed to be clearance in respect of copyright works performed by the dancers. On one occasion, the television station SBS had to obtain the permission of performers to broadcast their performance at the Survival Concert on television.[101] On another occasion, the television station ABC had to acquire clearance from the performers to broadcast some of the footage from the Festival of the Dreaming in Tim Flannery's series, *The Future Eaters*.[102]

---

97 S 248J (1) of the *Copyright Act* 1968 (Cth).
98 S 248G (1) of the *Copyright Act* 1968 (Cth).
99 S 248G (2) of the *Copyright Act* 1968 (Cth).
100 Rimmer, M. 'Interview with Jo Dyer', Sydney, 15 September 1998.
101 Ibid.
102 Ibid.

A Discussion Paper released by the Federal Government proposed that performers should receive economic and moral rights over the reproduction, distribution and communication to the public of their performances.[103] In her report *Our Culture, Our Future,* Terri Janke supports the introduction of comprehensive performers' rights in the belief that it would help and advantage Indigenous performers.[104] However, there would still be problems, though, regarding communal ownership of Indigenous performances.

Bangarra Dance Theatre is uncertain about the introduction of extensive performers' rights. The general manager, Jo Dyer, reflects that it is a given that there is a lot of improvisation, workshopping, and collaboration involved in the creation of a new work. However, she is uncertain whether it is possible to recognise all of the contributions involved in this creative process. Jo Dyer observes that performers receive a cast listing:

> We obviously acknowledge the roles that people play. We do not have any original cast attribution where the work is constantly evolving all the time. So, beyond the acknowledgments to the director, the choreographer, the composer, the designers and the Munyarrun clan's input, there is a listing of the cast, and that is as far as we go.[105]

Jo Dyer contends that the creative principals – the choreographer, the composer, and the designer – deserve to have comprehensive economic

---

103 Attorney-General's Department and the Department of Communications and The Arts. Performers' Intellectual Property Rights: Discussion Paper. Canberra: Australian Government Publishers, 1997.

104 Miller, D. 'Collective Ownership in Spiritually Sensitive Works: Milpurrurru v Indofurn Pty Ltd', *Australian Intellectual Property Journal,* 1995, Vol. 6, p. 206.

105 Rimmer, M. 'Interview with Jo Dyer', Sydney, 15 September 1998.

and moral rights. By contrast, she believes that the performers should only enjoy limited rights because their contributions are dependent upon the director.

Jo Dyer stressed that a performing arts company such as Bangarra Dance Theatre had a clear hierarchy of roles and positions:

> Art just does not work as a co-operative, as communism in art. You do not get art. You need to have a creative vision and where that finally is going to lie is generally with the director. That is agreed by all of those who enter into collaborative, creative endeavour. As long as the delineations are agreed to from the start, and everybody has signed up to that, that is okay ... So I think that there should be some say in how performers' images are going to be used, but there is no power of veto in these kind of situations.[106]

The assertion of Jo Dyer that art does not work in a co-operative could be contested. This statement may be valid in relation to the artistic practices of major performing arts companies, but it ignores the collective practices of a number of smaller, radical theatre and dance companies.[107] However, there are good reasons why Bangarra Dance Theatre should be cautious and circumspect about performers' rights. It is sensible to let the director and his key collaborators take responsibility to look after the dances and songs of the Munyarrun Clan. It would be much more difficult to control and manage the use and adaptation of traditional Indigenous culture if all the performers had economic and moral rights in the performance.

---

106 Ibid.

107 For instance, Not Yet It's Difficult, one of the theatre groups involved in the Performing Arts Multimedia Library Project operates as a collective. Simondson, H. *Performing Arts Media Library: From Live Performance to the Digital Stage.* Melbourne: Cinemedia, 1999.

PART 6

FESTIVAL OF THE DREAMING:

FESTIVAL DIRECTOR

In 1997, Bangarra Dance Theatre was close to extinction because it was unable to generate through touring the sufficient revenue required to maintain professional standards, cover administrative costs, and develop new programs.[108] It was in dire straits because of a decline in funding from the Australia Council and ATSIC and a lack of commercial sponsorship for its works.[109] Fortunately, Bangarra Dance Theatre overcame this shortfall by gaining increased support from the New South Wales State Government. The performing arts company also obtained private sponsorship from the Internet service provider, Ozemail. Bangarra Dance Theatre has lobbied the Prime Minister, John Howard, for greater public funding from the Federal Government.[110] It stands to gain a great increase in funding in the wake of the Nugent Report into the Performing Arts.[111]

Bangarra Dance Theatre has supplemented such funding by commissioned work with major organisations such as the Australian Ballet and the Sydney Organising Committee for the Olympic Games.

---

108 This is a common problem in the performing arts. See Department of Communications, Arts, and the Information Economy. *Securing the Future: The Major Performing Arts Discussion Paper*. Canberra: Australian Government Publishers, 1995.

109 Pitt, H. 'From the World Stage to a Cultural Desert', *The Sydney Morning Herald*, Tuesday, 15 August 1996, p. 8.

110 Howard, J. 'Bangarra Dance Theatre, 10th Birthday Gala Fundraising Dinner', Transcript of the Prime Minister, Bangarra Dance Theatre, Walsh Bay, 29 October 1999.

111 Sexton, J., Strickland, K. and Lim, A. 'Funding Devil Now in the Detail', *The Australian*, Friday, 12 May 2000, p. 11.

They have entered into arrangements with private organisations for commissioned work.

Bangarra Dance Theatre was engaged in an artistic collaboration with the Australian Ballet to dance to Stravinsky's *Rite of Spring*.[112] The general manager, Jo Dyer, comments that it was very much an Australian Ballet work in terms of the producing structure:

> Bangarra Dance Theatre is administering the contracts and payment for the nine dancers involved in that collaboration. So it is almost as if we were acting as the dancers' agent. We have no copyright in the finished product. We have no rights to perform it.[113]

This agreement permitted the commissioning parties to use individual dancers in return for a commercial fee.

Bangarra Dance Theatre was commissioned as an entity by the Sydney Olympic Committee to participate in the Festival of the Dreaming. It charged the large organisation for employing the individual artists of the performing arts company, the company, and the company name. Such arrangements reflected the fact that the Sydney Olympic Committee had much bigger margins than a performing arts group like the Australian Ballet.

The director of the Festival of the Dreaming has championed Bangarra Dance Theatre. A member of the Bundjalung Nation, northern New South Wales, Rhoda Roberts is a trained actor who has worked as a performer in theatre, film, and television. She was also a presenter and a

---

112 Sykes, J. 'The Night the Earth Moved', *The Sydney Morning Herald*, Friday, 31 October 1997, p. 17.

113 Rimmer, M. 'Interview with Jo Dyer', Sydney, 15 September 1998.

reporter on the television station SBS. Rhoda Roberts has become a producer and a festival director. She was a co-founding member of Australia's first national Aboriginal theatre company, the Aboriginal National Theatre Trust. She was artistic director of the 1997 Festival of the Dreaming, the first of four international arts festivals leading up the Sydney Olympics held in the year 2000.

Rhoda Roberts is weary of the constant and incessant appropriation of Indigenous artistic expression and culture by the mainstream white community: 'We're tired of stories being told, not from our perspective, but narrated almost'.[114] Rhoda Roberts notes that the appropriation of Indigenous artistic expression and culture is nothing new. She recalls that the Aboriginal writer and inventor, David Unaipon, labelled the 'Leonardo of Australia', was a victim of literary appropriation in the 1930s .[115] The anthropologist Diane Bell provides a good account of the case in her book on the Hindmarsh Island in South Australia.[116] David Unaipon wrote a manuscript based on all the stories of his language group. Ramsay Smith bought the copyright to the stories for 150 pounds in March 1927. The book *Myths and Legends of the Australian Aboriginals* was published by Angus and Robertson in 1930 under the authorship of Ramsay Smith, even though the material was almost word for word a reproduction of the stories of David Unaipon. Rhoda Roberts concludes from this example that Aboriginal people have been constantly fighting to retain control over their culture.

---

114 Roberts, R. 'A Passion for Ideas: Black Stage', *Australasian Drama Studies*, 1998, Vol. 32, p. 3.

115 Ibid.

116 Bell, D. *Ngarrindjeri Wurruwarrin: A World That Is, Was, and Will Be.* Melbourne: Spinifex Press, 1998, pp. 130-131.

Rhoda Roberts registered her anxiety about well-meaning white dramaturges who hijack the work that has been developed by black writers, and then proceed to take the rights to the work. A good example of such appropriation would be the play, *Aboriginal Protestors.*[117] Originated by Gerhard Fischer, the Mudrooroo/Muller Project involved the framing of Muller's post-Brechtian German play about a failed revolution with a script written by Mudrooroo and workshopped by an Aboriginal theatre group in Sydney in 1991. The production was fostered, nurtured and professional produced by the Performance Space for the Sydney Festival. It was then invited to the Weimar Arts Festival as its top international billing. Noel Tovey was the director of the Mudrooroo/Muller Project, *The Aboriginal Protestors.*[118] He was going to take the show for five performances in Germany. However, the management claimed that it was the owner of the copyright work. Taking legal action, Noel Tovey was able to prove that he was the author of a dramatic work, because he had combined and adapted two texts by the joint authors, Mudrooroo and Muller. In the face of this evidence, the management was forced to recognise his ownership and settle the case. They were also compelled to divide the royalties equally instead of favouring the German playwright over Mudrooroo.

However, Rhoda Roberts thought that there could be situations where white directors could help improve work developed by black

---

117 Fischer, G. *The Mudrooroo/Muller Project: A Theatrical Casebook.* Sydney: New South Wales University Press, 1993; Gilbert, H. 'Pan-Aboriginality Meets Post-Modernism? – A Review of the Mudrooroo/Muller Project', *CRNLE Reviews Journal,* 1993, Vol. 2, p. 135; and Gilbert, H. *Sightlines: Race, Gender, and Nation in Contemporary Australian Theatre.* The University of Michigan: The University of Michigan Press, 1998.

118 Tovey, N. 'Discussion'. *Managing Rights – Indigenous Culture in the Digital Domain,* Brisbane: Arts Queensland, 21 September 1998.

writers. She cited, for example, the production of *Up the Road.* Rhoda Roberts acknowledged that there needed to be a lot of work done on the script by Johnny Harding. She believed that the director Neil Armfield was able to improve the level of the work. Rhoda Roberts paid tribute to his understanding: 'Neil does have that awareness and he's prepared to listen, just to listen to the language and people and so forth, and that obviously is captured on that production, but I think his level of direction showed as to the script I read initially'.[119] She emphasised that collaboration can be a positive experience, so long as the rights of ownership remain with the Indigenous artists.

In the Olympic Arts Festival, the artistic director Rhoda Roberts implemented a policy of Authorship and Control, so that Indigenous artists could retain the control of the product. She articulated her policy:

> The Olympic Arts Festivals established a policy very early on; that of Authorship and Control. In fact, I think they thought I was a bit mad when I kept pushing it, but I dug my heels in because I thought this was something that has to be set up, some sort of legacy and precedent. This is to say that the authorship of the product, activity or event and the control of its development and presentation should be in indigenous hands. This guideline was an aspiration, a goal to strive for and it did not inhibit collaborations or joint artistic ventures between indigenous groups and non-indigenous groups. On the contrary, it encouraged and made them celebratory and unique.[120]

Such ethical protocols play an important symbolic role through offering public recognition of the communal ownership of Indigenous culture.

---

119 Roberts, R. 'A Passion for Ideas: Black Stage', *Australasian Drama Studies,* 1998, Vol. 32, p. 3.

120 Id at 8.

They also have a practical, material effect by providing financial incentives and rewards for creative artists who respect Indigenous culture. However, the ethical protocols are limited in their scope and range. They do not prevent outsiders not party to the agreement from using Indigenous art and culture without authorisation. So it must not be thought that the ethical standards are a panacea that will solve all of the problems of the appropriation of Indigenous art and culture.

Bangarra Dance Theatre was commissioned to direct the Indigenous component of the Olympics Opening Ceremony, *Awakening*.

The director Stephen Page and the co-director Rhoda Roberts battled with the organisers of the ceremony to preserve authenticity in the Indigenous performance. A ceremony staff member reported: 'They really fought for what they wanted. Rhoda and Stephen walked out of meetings in tears when there was talk of flaming boomerangs and dot paintings. They wanted traditional stories, not a commercial version of Aboriginal Australia'.[121]

Djakapurra Munyarrun, the principal dancer of Bangarra Dance Theatre, played a key role in the Opening ceremony. He called to a new generation of spirits, which are drawn to the heartbeat of the land. The cast of dancers were drawn from a diverse range of Indigenous communities. There were 330 women from the Central Desert, 200 young people from four communities in Arnhem Land, 100 Torres Strait Islanders, and 400 dancers from around New South Wales. The sequence ended with a huge 32 metre tall red, yellow Wandjina – a spirit from the

---

121 Hope, D. 'Bangarra Aims for the Real Thing', *The Weekend Australian*, 16-17 September 2000, p. 24.

Kimberley region – being raised and suspended from the overhead cables and encircled by eight stilt walkers.

Bangarra Dance Theatre was also commissioned by the Olympic Arts Festival to create a full-length new work, *Skin*.[122] They produced a highly political work, perhaps to make sure that the integrity of their work was not compromised by being involved in a nationalistic and commercial event such as the Olympics. Stephen Page was interested in children, family, and kinship. The first part, *Shelter*, examines the strength, moral courage and traditional skills of Aboriginal women. It examines the toxic poisoning of their desert homeland through mining projects. The second part, *Spear*, explores the problems Aboriginal men face in urban and remote communities. It deals with such political issues – as deaths in custody, the stolen generation, alcoholism, and petrol sniffing. The production draws upon a number of influences. It is inspired by the paintings of Emily Kngwarreye, Fiona Foley, and Tracey Moffatt; and the work of the singer-songwriter Archie Roach, and the playwright Robert Merritt.

Bangarra Dance Theatre hopes to secure the financial viability of the company from their association with commercial organisations – such as the Olympics. The festival director Rhoda Roberts emphasised that one of the benefits of the Olympic Festival was that it generated employment for Indigenous artists: 'But what it's given us; we had seven hundred indigenous artists employed in this festival and probably about 550 of

---

122 Bangarra Dance Theatre. *Skin: Programme*. Sydney: Olympic Arts Festival, 2000. Jones, D. 'Skin Deep', *The Australian*, 21 September 2000, p. 20; and Sykes, J. 'Haunting Images of Aboriginal Australia', *The Sydney Morning Herald*, 21 September 2000, p. 13.

those are still working'.[123] Bangarra Dance Theatre also hopes to use the exposure gained during the Olympic Games as a springboard for international tours across America. It has already hired IMG as an agent to facilitate this world conquest. However, Bangarra Dance Theatre is aware of the risks involved in its collaboration with the Olympics. It must guard against the danger of being co-opted by the State to give the misleading impression to the world that Australia has achieved a happy reconciliation with its Indigenous people. Stephen Page is sensitive to the possibility of an Olympic boycott by Indigenous people in response to the Federal Government policies on native title, cultural heritage, and the Stolen Generation. He observes that 'there's been too much pain, the pain lingers, there are still people finding their mothers and fathers'.[124]

CONCLUSION

Bangarra Dance Theatre highlights that copyright law needs to become much more flexible and adaptable if it is to ever accommodate the diverse range of Aboriginal and Torres Strait cultures. It also demonstrates that Indigenous culture is not limited to art but embraces a wide variety of subject matter – storytelling, dance, theatre, music, design, television, film, and multi-media.

Bangarra Dance Theatre has been on the cutting edge of copyright law reform. In its agreements with the Munyarrun Clan, the creative

---

123 Roberts, R. 'A Passion for Ideas: Black Stage', *Australasian Drama Studies*, 1998, Vol. 32, p. 3.

124 Lawson, V. 'Page's Long Rite of Passage', *The Sydney Morning Herald*, 29 November 1999.

principals of the company, and outside collaborators, it has anticipated developments in Indigenous policy, moral rights and performers' rights.

Bangarra Dance Theatre has sought to extrapolate from its particular circumstances, and form some general conclusions about the nature of legal protection of Indigenous culture. It has supported a number of initiatives.

First, Bangarra Dance Theatre hosted a seminar convened by the Arts Law Centre of Australia on collaborations with Aboriginal communities in the area of contemporary performance.[125] It shared their experiences about copyright and royalties in collaborative projects with traditional Indigenous people with other companies such as the Marrugeku Company, the Woomera Aboriginal Corporation, and Cudjurie Films.

Second, Bangarra Dance Theatre provided a platform for Terri Janke, an Indigenous lawyer who wrote the *Our Culture, Our Future* report upon options for the reform of intellectual property.[126] It supported her call for new and specific legislation to protect Indigenous culture and intellectual property rights.

Finally, Bangarra Dance Theatre have also endorsed the introduction of an authenticity certification mark and labelling system in Australia by the National Indigenous Arts Advocacy Association.[127]

---

125 Australian Broadcasting Corporation. 'Collaborations: Using Indigenous Cultural Material in Contemporary Performance', Awaye, Radio National, 14 May 1999.

126 Janke, T. *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights*. Sydney: Australian Institute of Aboriginal and Torres Strait Islander Studies, 1998.

127 Gray, S. 'X-Ray Wallabies and Mickey Mouse: The Commodification of the 'Authentic' in Aboriginal Art', *Overland*, 2000, Vol. 159, p. 124; and Wiseman, L. 'The Protection of Indigenous Art and Culture in Australia: The Labels of Authenticity', *European Intellectual Property Review*, 2001, Vol. 22 (1), p. 14.

CHAPTER EIGHT
THE CATHEDRAL AND THE BAZAAR: THE FUTURE OF COPYRIGHT LAW

It is time to return to the contested notion of 'the pirate bazaar'. In a recent report, the BBC science correspondent Pallab Ghosh considers the continuing debate over the metaphor. In an interview, Eric Raymond observes:

> In *The Cathedral and the Bazaar*, I described the cathedral style of development as one that is essentially closed and inward-looking and has a strong authoritarian hierarchy and relies on secrecy.
>
> I describe the bazaar model as one in which you have an open, horizontal network of co-operators that tends to change fluidly over time.
>
> Many people have interpreted these metaphors that can be applied not just to software development.[1]

Pallab Ghosh notes that the current great thought among Internet gurus is that we are moving away from a world of authoritarian cathedrals towards anarchic bazaars – a world where content is free but money is made from backup services, packaging, merchandising. He highlights that companies will have to relinquish control in the new cyber bazaar in favour of greater freedom, give up secrecy in favour of greater openness. However, Pallab Ghosh notes with suspicion that the metaphor of the cathedral and the bazaar is 'fashionable management speak'.[2] Others also

---

1 Australian Broadcasting Corporation. 'Napster Court Ruling Eagerly Awaited', 7:30 Report, Australian Broadcasting Corporation, 4 January 2001.

2 Ibid.

have expressed doubts and reservations about the vivid imagery of Eric Raymond.[3]

The notion of copyright law as a 'cathedral' has become besieged. Formalists fear that the system of intellectual property is in a state of crisis. They have begun to doubt whether the formal rules and principles of copyright law can accommodate new forms of technology and cultural creation. The British lawyer and literary critic Anthony Julius observes:

> The law is in particular disarray at present. Not only does intellectual property law fail satisfactorily to resolve the competing claims made on it by authors and audiences, it has also failed to keep abreast of their activities. It doesn't protect them; it doesn't altogether comprehend what they're doing. Intellectual property no longer encompasses the field. It is thus both incoherent and incomplete, inadequate in two distinct senses ... It's adrift in cyberspace. Technology is outstripping the legal categories designed to contain it. And this is the only hope for the minimalists – that technology will simply make impossible the legal regulation of access to information.[4]

Furthermore, it seems that copyright law is having difficulties in maintaining its rarefied aura. David Vaver warns against such a mystification of copyright law: 'A degree of mystique and uncertainty in the part of intellectual property law regulated by the common law may be though tolerable because of the much-vaunted benefits flowing from the common law's adaptability and capacity for growth. Mysticism and

---

3 Bezroukov, N. 'Open Source Software Development as a Special Type of Academic Research (Critique of Vulgar Raymondism)', *First Monday*, 1999, Vol. 4 (10), http://www.firstmonday.org; Bezroukov, N. 'A Second Look at the Cathedral and Bazaar', *First Monday*, 1999, Vol. 4 (12), http://firstmonday.org; and Wayner, P. *Free for All: How Linux and the Free Software Movement Undercut the High-Tech Titans*. New York: Harper Business, 2000.

4 Julius, A. 'Art Crimes', in Freeman, M. and Lewis, A. (eds) *Law and Literature: Current Legal Issues Volume 2*. Oxford, New York: Oxford University Press, 1999, p. 499 at p 518.

uncertainty should not, however, be a feature of laws passed by Parliament'.[5]

The Copyright Law Reform Committee (CLRC) are architects of order.[6] They are seeking to shore up the breached and battered 'cathedral' of copyright law. The CLRC aim to impose a scientific order and unity on the unruly mass of copyright law. They seek to organise and classify the rules and principles of copyright law into a coherent matrix. The CLRC hope to rationalise and consolidate the subject matter of copyright law. They seek to ensure a uniformity of treatment. The CLRC want to dispense with doctrinal concepts that are seemingly anachronistic in the information age. They see ideas of authorship and material form as superfluous and redundant. The CLRC hope to quell the anarchy of the digital information. They place their faith in a technologically-neutral approach to answer the alarms.

The program of the CLRC is well-meaning, but ultimately misguided because it neglects and ignores the political fights at the heart of copyright law. As Keith Aoki warns, 'we should resist the understandable tendency to reach for a quick, technocratic set of Procrustean solutions that assume away the "messiness of the world"'.[7] However, a change in nomenclature will not solve many of the problems

---

5 Vaver, D. *Copyright Law*. Toronto: Irwin Law Inc., 2000, p 293.

6 Copyright Law Reform Committee. *Copyright Reform: A Consideration of Rationales, Interests and Objectives*. Canberra: The Attorney-General's Department, 1996; Copyright Law Reform Committee. *Fair Dealing under the Copyright Act*. Canberra: The Attorney-General's Department, 1997; Copyright Law Review Committee. *Simplification of the Copyright Act 1968: Part 1. Exceptions to the Exclusive Rights of Copyright Owners*. Canberra: The Attorney-General's Department, 1998; and Copyright Law Review Committee. *Simplification of the Copyright Act 1968: Part 2. Rights and Subject Matter*. Canberra: Attorney-General's Department, 1999.

7 Aoki, K. 'Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection', *Indiana Journal of Global Legal Studies*, 1998, Vol. 6, p. 11.

at the heart of copyright law. The report of the CLRC has come under attack for its representation of copyright law as universal, neutral, and integrated. Sam Ricketson observes: 'The CLRC proposals treat copyright as a closed system, holding out the prospect (perhaps unintentionally) that this will solve the challenge of a continually changing technological environment. But the real challenges to copyright owners may lie elsewhere, in the sphere of enforcement, technological anti-infringement measures, contractual provisions, and resolution of the difficult private international law issues that arise in the on-line environment'.[8] It seems unlikely that the Federal Government will transcend the industry compromises in place and achieve this artificial unity and order.

The concept of the 'pirate bazaar' seems much more appropriate than the idea of the 'cathedral'. It captures the current 'free for all' over copyright law at the moment. There are a number of skirmishes under way in a variety of fields concerning the ownership and control of culture. There are legal controversies over the plagiarism of texts, the daubing of paintings, the sampling of musical works, the authorship of plays, the collaboration between film-makers, the sharing of files over the Internet, and the appropriation of Indigenous culture. Such battles follow a familiar pattern – they start off as personal disagreements over authorship and collaboration within the confines of an artistic community, and escalate into full-blown legal dramas and media sensations attracting the attention of vested interest groups and the wider public.

---

8 Ricketson, S. 'Simplifying Copyright Law: Proposals from Down Under', *European Intellectual Property Review*, 1999, Vol. 21 (11), p. 537.

The idea of copyright law as a 'pirate bazaar' is also suggestive as to how these disputes are resolved. Kathy Bowrey observes that there is a greater possibility for copyright activism in the post-modern era:

> It may be much more difficult for the law to be as partial as it was in the past because of the access critics of copyright have to the mass media and thereby to the public and Parliament. Whilst in the 19th century the depressing condition of the real Grub Street hack could be manipulated by the successful writer and her/his parliamentary advocates to advance their own interest, in the 20th century those disserviced by copyright can advocate their own case.[9]

The popular controversies over copyright law have not been limited to the arena of the legal system. They have spilled out into a number of forums – various artistic communities, the courts, the parliament, and the media. In struggles for credibility, cultural space for copyright law takes diverse pragmatic shapes. The contestants squeeze and stretch its borders in order to best justify their own reality claims as legitimate and persuasive. Copyright law is more than just formal rules and principles, which have been laid down by parliament and interpreted by the courts. A number of social factors play an important role in the operation of the law. Questions of aesthetics and ethics are important. Industry agreements are quite influential. Contracts play an important part in the operation of copyright law. The media profile of personalities involved in litigation and policy debates is pertinent.

---

[9] Bowrey, K. *Don't Fence Me In: The Many Histories of Copyright Law*. Dissertation for the Doctor of Juridical Studies, Faculty of Law, University of Sydney, 1994.

PART 1
'CONTESTED CULTURE':
ARTISTIC COMMUNITIES

There is a need to evaluate the strategies and struggles of copyright activists. In a literature review of the work of the writers Ronald Bettig,[10] Debora Halbert,[11] Rosemary Coombe,[12] and Seth Shulman,[13] Brian Martin argued that there has been insufficient analysis of resistance to copyright law:

> What is to be done? All the authors describe some of the resistance to expanding intellectual property rights that is occurring, most of all Coombe, for whom the appropriation of trademarks is a central theme. However, none of the authors analyses opposition to intellectual property in any real depth. For example, the free software movement, which has produced an impressive library of highly useful programs (including the operating system Linux, which has received a fair bit of publicity), is given little attention. The authors do not systematically analyse resistance efforts to see what does and what doesn't work and how better campaigns could be organised.[14]

This study sought to fill this gap in literature. It provided a systematic analysis of the campaigns of copyright activists to reform the law. There

---

10 Bettig, R. *Copyrighting Culture: The Political Economy of Intellectual Property.* Boulder: Westview Press, 1996.

11 Halbert, D. *Intellectual Property in the Information Age: The Politics of Expanding Ownership Rights.* Westport, Conn.: Quorum, 1999.

12 Coombe, R. *The Cultural Life of Intellectual Properties: Appropriation, Authorship, and the Law.* Durham and London: Duke University Press, 1998.

13 Shulman, S. *Owning the Future.* Boston: Houghton Mifflin, 1999.

14 Martin, B. 'Interrogating Intellectual Property', *Prometheus,* 2000, Vol. 18 (1), p. 93.

have been various responses to the legal system, ranging from obedience and negotiation to opposition and evasion.

A goodly number of artists followed and obeyed the law. Some prime examples included Robin Morgan, Charles Bannon, David Williamson, and Metallica. They sought to protect their economic and moral interests through the law. In contrast to transgressive artists, copyright authors and owners claimed the status of being victims of copyright infringement. They sought to discredit artistic appropriation, denying that it has any artistic credibility or ethical standing. They called for an expansion of the legal rights and remedies that are available under copyright law. They attempted to garner the sympathy of the public through the mass media. The voices of copyright authors provided a counterpoint to those of the transgressive artists.

The second response was to stand in opposition to copyright law. A number of the creative artists – such as Helen Darville, Manne Schulze, and Negativland – became embroiled in legal controversy, because their artistic practices transgressed and violated the rules and principles of copyright law. They challenged fundamental notions of ownership, property, and possession. Such creative artists undermine romantic individualism and its understanding of identity, subjectivity, and creative agency.[15] They experiment with techniques of appropriation in various mediums. The creative artists undermine the notion of original authorship. They blur the difference between the original and the copy.[16] Such creative artists envisage the law as despotic, repressive, and unjust.

---

15 Carlin, J. 'Culture Vultures: Artistic Appropriation and Intellectual Property Law', *Columbia – VLA Journal of Law and the Arts*, 1988, Vol. 13, p. 103.

16 Butler, R. (ed.) *What is Appropriation? An Anthology of Critical Writings on Australian Art in the '80s and '90s.* Sydney: Power Publications, 1996.

It is a self-fulfilling prophecy. Their defiance towards the authority of the law elicits a harsh response.

Other artists sought to creatively re-interpret copyright law. They championed maverick judicial decisions, positive policy reforms, and best practices. They sought to negotiate a space within the law for their artistic practices. Such artists eschewed an outright confrontation with copyright law. Instead they hoped to enter into a negotiation and a dialogue with copyright law. Susan King engaged in a dialogue with policy-makers and copyright owners in an effort to reform copyright law. Jan Sardi lobbied the government to recognise screenwriters as one of the authors of cinematographic films. The general manager, Jo Dyer, deployed contract law to recognise the communal ownership of Indigenous culture and heritage. She also recognised the economic and moral interests in protecting cultural designs. This study suggests that contracts are important in areas of copyright law reform such as moral rights, performers' rights, digital rights, and Indigenous rights.[17] It is striking that such local negotiations are in advance of the grand changes proposed by the Federal Government.

The fourth response was to evade the operation of copyright law. Shawn Fanning, Ian Clarke, and Gene Khan designed software programs to bypass and circumvent legal regimes and political structures. They wanted to render law irrelevant and redundant through technological innovation. Such behaviour seems to validate the elegant hypothesis of Lawrence Lessig that 'code is law'.[18] The battle over access to culture has been increasingly displaced from the legal arena to the area of computer

---

17 Samuelson, P. and Opsahl, K. 'Licensing Information in the Global Information Market: Freedom of Contract Meets Public Policy', *European Intellectual Property Review*, 1999, Vol. 21 (8), p. 386.

18 Lessig, L. *Code and Other Laws of Cyberspace*. New York, NY: Basic Books, 1999.

code. File-sharing programs such as Napster, Freenet, and Gnutella have created a technological infrastructure which is based upon the principle of open access to information. They have been pitted against forms of technological control, such as trusted systems, rights management information, and surveillance devices. The architecture of the internet has been a site of struggle between users' freedoms and owners' controls.

Industry Groups

The history of copyright law is one of special pleading by industry groups.[19] In the 18th and 19th centuries, craft and industry-based organisations lobbied for new ways of protecting intellectual processes, know-how and products associated with the new manufacturing processes. In the late 20th century in Australia, professional guilds, industrial organisations, and collecting societies have played a similar role. They have sought to translate industrial agreements and market norms into legislative directives and commands.

Some special industry groups have been successful in this process of lobbying the Federal Government. The National Association for Visual Artists can claim some credit for inspiring the *Copyright Amendment (Moral Rights) Bill* 1997 (Cth). Notably, the Australian Writers Guild managed to revise the *Copyright Amendment (Moral Rights) Act* 2000 (Cth). Furthermore, the Australian Record Industry Association was assiduous in pushing for the introduction of the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth). Such organisations have deployed a mixture of

---

19 Rose, M. *Authors and Owners: The Invention of Copyright*. Cambridge: Harvard University Press, 1993; Sherman, B. and Bently, L. *The Making of Modern Intellectual Property Law: The British Experience 1760-1911*. Cambridge: Cambridge University Press, 1999; and Bowrey, K. 'Art, Craft, Good Taste and Manufacturing: The Development of Intellectual Property Laws', *Law in Context*, 1997, Vol. 15 (1), p. 78.

tactics to lobby the Federal Government. They have co-opted creators to provide testimonials on behalf of copyright owners. The special interest groups have been involved in consultations with the Executive, the Federal Parliament, and the public service. They have also sought to put pressure on political parties through public media attention.

Other professional associations and organisations have been less influential. The Media Arts and Entertainment Alliance have pushed in vain for the introduction of comprehensive performers' rights in audio and audio-visual work. The Screen Directors' Association of Australia was also unsuccessful. It failed to have directors recognised as 'authors' and 'owners' for the purposes of the pay television re-transmission scheme. The larger question of whether directors are 'authors' and 'owners' of films has been postponed until parliamentary debate over the simplification report. Similarly, the quite worthy case of the Australian Cinematographers' Society was ignored and overlooked. The National Indigenous Arts Advocacy Association lobbied for the introduction of legislation protecting Indigenous culture and heritage. However, its proposals have met with legislative procrastination and compromise.

There has been strong pressure on the Federal Government from industry groups, professional groups, and collecting societies to maintain the autonomy of particular areas of cultural production. There is an incipient trend towards self-regulation in copyright law. The government seems to be giving increasing legal recognition to voluntary industry codes of conduct and practice. For instance, the *Copyright Amendment (Moral Rights) Act* 2000 (Cth) gives explicit legislative recognition to voluntary codes of practice.[20] Similarly, the *Copyright Amendment (Digital*

---

20 SS 195AR (2)(f), 195AR (3)(g), 195AS (2)(f) and 195AS (3)(g) of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth).

Agenda) Act 2000 (Cth) takes account of industry codes in relation to Internet service provider liability.[21] Such developments raise the spectre of copyright law fragmenting and collapsing into a series of sui generis regimes.

There could be a concern that the Federal Government is the captive of such special interest groups. This sense of alienation and exclusion has lead to a sense of suspicion about decision-making processes. As Lawrence Lessig observes: 'We are profoundly skeptical about the product of democratic processes. We believe, rightly or not, that these processes have been captured by special interests more concerned with individual than collective values'.[22] As a result, copyright law is partial, selective and discriminating in its treatment of authors and the work they produce. It privileges certain kinds of cultural production, and it denies protection to other kinds of works.

In the future, the Federal Government would be well advised to commission further reports into the impact of copyright law reform on artistic communities. The Performing Arts and Multimedia Library (PAML) pilot project was a promising idea.[23] The project sought to investigate the impact of digital rights and moral rights on a number of performing arts companies – The Melbourne Symphony Orchestra, Chunky Move, Arena Theatre and Not Yet It's Difficult. The PAML pilot project did not realise its full potential. The voices of the artists, performers, and producers were rather marginalised by the legal players in the project. Another interesting project is the series of case studies

---

21 S 36 (1A) of the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth).

22 Lessig, L. *Code and other Laws of Cyberspace.* New York, NY: Basic Books, 1999, p. 219.

23 Simondson, H. *Performing Arts Media Library: From Live Performance to the Digital Stage.* Melbourne: Cinemedia, 1999.

commissioned by the World Intellectual Property Organisation (WIPO) by Terri Janke into intellectual property and Australian Indigenous culture.[24] It offers the opportunity to explore the impact of copyright law and other forms of intellectual property on Indigenous communities. Such projects seem to be the way forward to ensure that copyright legislation does not unduly hamper or harm artistic communities and cultural production.

PART 2
THE SYMBOL TRADERS: LEGAL RELATIONS

The lawyers played an instrumental role and a symbolic position in litigation over copyright ownership and infringement. As David Marr observes: 'The lawyers serve as gatekeepers of speech and property'.[25] The lawyers did not merely rehearse the formal rules and principles of copyright law. They were quite creative in interpreting legislation and judicial decisions to meet the objectives of their clients. As the academic Maureen Cain comments:

> Lawyers are imaginative traders in words. But these symbol traders are also creative. They invent categories and these categories are constitutive of practices and institutions with which their clients can achieve their objectives.[26]

---

24 WIPO. *Draft Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*. Geneva: WIPO, 2000.

25 Rimmer, M. 'Interview with David Marr', Sydney, 2 November 1998.

26 Cain, M. 'The Symbol Traders' in Cain, M. and Harrington, C. (eds) *Lawyers in a Postmodern World: Translation and Transgression*. Buckingham: Open University Press, 1994, p. 33.

The lawyers translated the objectives and demands of their clients into an acceptable legal discourse. They also expanded that discourse by either distinguishing or likening their clients' situation from the case law and legislation.

The lawyers play an important part outside the arena of the courtroom. The solicitors Andrew Greenwood and Peter Banki played a negative, spoiling role in the Demidenko affair. They provided a fighting opinion in an effort to deter the threat of litigation against their clients, Helen Darville and her publisher Allen and Unwin. The barrister Robyn Layton took a positive, offensive stance in the Daubism dispute. Her sabre-rattling resulted in driller Jet Armstrong agreeing to give up the daubed painting of Charles Bannon. The barrister David Catterns had a passive part to play in the controversy over *Heretic*. He was hired by the playwright David Williamson to send a message to the Sydney Theatre Company that he was serious about enforcing the terms of his contract. The game-playing of the lawyers fits into a wider pattern of legal strategies – such as forum-shopping, preventing cases from reaching decision, and causing them to be decided on issues other than merits.[27] The goal of such tactics is to secure a positive result without need for adjudication by the courts.

The lawyers also play a significant part in managing cases in the courtroom. The producer Jane Scott relied upon a bevy of lawyers to defend her interpretation of contracts with the distributor Pandora Films, and the composers David Hirschfelder and Ollie Olsen. Napster hired the celebrity, marquee lawyer, David Boies, to defend the company against

---

27 LoPuck, L. and Weyrauch, W. 'A Theory of Legal Strategy', *Duke Law Journal*, 2000, Vol. 46, p. 1405.

charges that it was guilty of authorising copyright infringement. There are a number of legal tactics at play in the contests over copyright law in the courtroom. The lawyers seek to persuade judges through exploiting the fluid nature of the legal doctrine, social norms, and the prejudices of the decision-maker.[28] They also seek to constrain the behaviour of the courts through case selection, record-making, legal planning, and media pressure.

Furthermore, the lawyers acting for repeat-players engage in long-term strategies of litigation. As David Vaver points out, powerful copyright interests with worldwide inventories spend much time and money in analysing judicial trends, and in choosing what case to bring before which jurisdiction to produce the desired result.[29] He observes: 'Other jurisdictions may then be persuaded, by a system of "log-rolling", to accept the favourable precedent obtained by the group. The precedent will then be publicised and used to cover new situations, while unfavourable precedents will be denigrated or distinguished as decisions on special facts'.[30] Witness the web of litigation taken by the Recording Industry Association of America (RIAA) against file-sharing companies such as Napster. Such action is intended to secure favourable precedents, which can then be applied, not only in the United States, but across the world.

There is room for further sociological research into the interaction between legal profession and intellectual property law. It would be worth mapping the market for legal services in respect of intellectual property. There could be divisions made between major generalist law firms,

---

28 Ibid.

29 Vaver, D. *Copyright Law*. Toronto: Irwin Law Inc., 2000, p 135.

30 Ibid.

specialist intellectual property boutique firms, solicitors and barristers. Further research could be undertaken into the role of the lawyer in publishing, the music industry, television, film, and Internet-based companies. It could be seen how they manage intellectual property portfolios, organise contracts, conduct litigation, and provide policy advice. It would be worth identifying relationships between lawyers and their clients. Strong links could be drawn between law firms and various copyright industries: publishing, record companies, the performing arts, television, film, on-line services, and Indigenous culture. There is a need to articulate the strategies and tactics of lawyers in litigation and policy reform.

Courts

The courts have been anxious about making judgments in respect of cultural controversies because they have no claim to any special expertise in art or aesthetics. This was apparent in the case of *Schott Musik International* v *Colossal Records* in which the Federal Court had to adjudicate between competing expert views.[31] At first instance, Justice Tamberlin warned that judges should exercise caution when assessing matters of artistic taste, appreciation, and aesthetic values, so that they do not impose their views upon society.[32] It was necessary to pay due regard to the broad spectrum of taste and values. On appeal, there was argument over whether judges make aesthetic judgments. Justice Hill claimed that the court was an inappropriate forum for the making of

---

31 *Schott Musik International GBH & Co and Others* v *Colossal Records Of Australia Pty Ltd And Others* (1997) 38 IPR 1.

32 *George Hensher Ltd* v *Restawile Upholstery (Lancs) Ltd* [1975] RPC 31; *Bleistein* v *Donaldson Lithographing Co* (1903) 188 US 239; and *Hay & Hay Construction Co Ltd* v *Sloan* (1957) 12 DLR (2d) 397.

aesthetic judgments.[33] He reasoned that an objective test would relieve the court from the danger of being an arbiter of taste and engaging in artistic censorship.[34] By contrast, Justice Wilcox doubted that an objective test would wholly relieve the court from involvement in artistic censorship or matters of taste.[35] He pointed out that, unattractive as the prospect may be, judges would be forced to make subjective judgments.

The first response of the courts is to apply formal rules and principles in respect of controversies over copyright law. They seek to uphold the legitimacy and the authority of their judgments. The courts impress that they are merely interpreters of parliamentary intention. They insist that they must look at the legislation and judicial precedents; and not consider political, economic, or cultural considerations. Brad Sherman reflects:

> The narrow and limited nature of the normative discussions is highlighted and, to an extent, generated by the increasingly self-referential nature of copyright law. By this I mean that copyright law sees its own components in legal categories ... This heightened self-referentiality means that copyright law refers, increasingly, to its own criteria for evaluation, models for change, and, perhaps most importantly of all, self-criticism. It also means that while copyright law is cognitively open to new forms of subject matter, it is normatively closed in the manner in which it deals with and treats that subject matter.[36]

---

33 *Schott Musik International GBH & Co and Others* v *Colossal Records Of Australia Pty Ltd And Others* (1997) 38 IPR 1 at 5-13.

34 *George Hensher Ltd* v *Restawhile Upholstery Lanes Ltd* [1975] RPC 31 at 63; and *Federal Commissioner Of Taxation* v *Murray* (1990) 92 ALR 671 at 690.

35 *Schott Musik International GBH & Co and Others* v *Colossal Records Of Australia Pty Ltd And Others* (1997) 38 IPR 1 at 2-5.

36 Sherman, B. 'From the Non-original to the Ab-original: A History', in Sherman, B. and Strowel, A. (eds) *Of Authors and Origins: Essays on Copyright Law*. Oxford: Clarendon Press, 1994, p. 111 at 114-115.

Thus, Justice Patel took strict formalistic approach as to whether Napster was guilty of vicarious and contributory copyright infringement. She focused upon the text of the *Digital Millennium Copyright Act* 1998 (US), and the relevant case law. Justice Patel did not focus closely upon the technology of file-sharing. She refused to entertain larger political considerations about the freedom of speech. She also ignored an invitation to investigate matters of competition policy. As a result, Justice Patel arrived at a judgment, which was highly favourable to the copyright owners.

The second approach of the courts is to creatively re-interpret copyright law in light of policy considerations. They have sought to accommodate new subject matter, within the structures of this formal system. For instance, the South Australian federal court judge Justice von Doussa is an interesting example of judicial creativity. His Honour heard the Daubism dispute in Chapter Two, and presided over *Bulun Bulun and Milpurrurru* v *R & T Textiles Pty Ltd*[37] and *Milpurrurru* v *Indofurn Pty Ltd* [38] mentioned in Chapter Seven in the discussion of Bangarra Dance Theatre. Justice von Doussa is one of the most daring and adventurous Australian jurists in intellectual property. He is exceptional in his willingness to give a space in his judgments to let artists speak about their intentions and views about their work. However, Justice von Doussa is only prepared to go so far in his judicial creativity. For instance, he decided the case of *Bulun Bulun and Milpurrurru* v *R & T Textiles Pty Ltd* on the narrowest possible ground in relation to fiduciary duties.[39] He was unwilling to

---

37 (1998) 41 IPR 513.

38 (1994) 54 FCR 240

39 (1998) 41 IPR 513.

contemplate other claims based upon native title law and equity, perhaps because of the fear of peer scrutiny on appeal.

A third approach of the courts would idealistically seek guidance from the philosophical ideals and rationales of copyright law. They would return to first principles in the face of new forms of cultural production and technologies. Lawrence Lessig recognises that the hesitancy of courts is grounded in caution and prudence. He argues that judges need to take a more creative, activist, committed stance:

> In cases of simple translation (where there are no latent ambiguities and our tradition seems to speak clearly), judges should firmly advance arguments that seek to preserve original values of liberty in a new context. In these cases there is an important space for activism. Judges should identify values and defend them, not necessarily because these values are right, but because if we are to ignore them, we should do so only because they have been rejected – not by a court but by the people.
>
> In cases where translation is not so simple (cases that have latent ambiguities), judges, especially lower court judges, have a different role. In these cases, judges (especially lower court judges) should kvetch. They should talk about the questions these changes raise, and they should identify the competing values at stake. Even if the decision they must adopt in a particular case is deferential or passive, it should be deferential in protest. These cases may well be a place for prudence, but to justify their passivity and compensate for allowing rights claims to fail, judges should raise before the legal culture the conflict presented by them. Hard cases need not make bad law but neither should they be treated as if they were easy.[40]

Under this approach, the courts would no longer foreclose or shut down questions of economics, politics, and cultural consideration. They would

---

40 Lessig, L. *Code and other Laws of Cyberspace.* New York, NY: Basic Books, 1999, pp. 222-223.

have to grapple with forms of regulation beyond formal rules and principles – such as market forces, technological code, and social norms.

It is imperative that the courts seize the initiative in dealing with controversies over copyright law. Otherwise, there is a danger that judicial institutions will become increasingly irrelevant in relation to adjudication of disputes over copyright ownership and infringement. The courts no longer have a monopoly over the resolution of copyright disputes. They are increasingly being displaced by private solutions – mediators, arbitrators, and alternative dispute resolution specialists. The government is encouraging the diversion of litigation away from the courts. For instance, there is a provision in the *Copyright Amendment (Moral Rights) Act* 2000 (Cth), which states that the parties must seek mediation.[41] Furthermore, the report of the House of Representatives Committee on copyright enforcement advocates the wider use of alternative dispute resolution, and a role for the Federal Magistrates Court in respect of copyright disputes.[42] As a result, the courts will increasingly be a last resort in copyright disputes. There needs to be further research into copyright law and civil litigation. An article by Beth Thornberg called 'Going Private' shows the way forward.[43] She examines how the role of the courts is being undermined in matters of intellectual property by private arbitrators, special bodies like the Internet Corporation for Assigned Names and Numbers (ICANN), and technological measures.

---

41 S 195AZA (3) of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth).

42 House of Representatives Standing Committee on Legal and Constitutional Affairs. *Cracking Down on Copycats: Enforcement of Copyright in Australia*. Canberra: The Parliament of the Commonwealth of Australia, 2000, pp. 74-76.

43 Thornburg, E. 'Going Private: Technology, Due Process, and Internet Dispute Resolution', *University of California at Davis Law Review*, December 2000 (forthcoming).

PART 3
LAW AS IMAGE:
THE MEDIA

A consideration of copyright law should not stop at an examination of the social effects of legislation and litigation. It must also investigate how copyright law represented in popular culture and the mass media. The sociologist Austin Sarat advocates further study into the 'law as image':

> Exploring the legal imagination in and through mass mediated images, exploring law as image, is, I believe, the next frontier for our work ... It will, if taken seriously, challenge some of the key assumptions of our work even as it calls on us to develop new competencies. We will be impoverished if we allow ourselves to ignore the imagined world of law, or if we too quickly reassure ourselves that our familiar, comfortable questions and tools will be adequate as we confront that world.[44]

It is important to explore the collective imagination of copyright law in the mass media. Such a study may shed light upon the popular beliefs, fantastic myths and paranoid conspiracies that circulate about copyright law.

The mass media plays an instrumental role in copyright law reform. The creative artists are accomplished publicists, campaigning for copyright law reform in the mass media. They are authors of tracts, manifestos, and revolutionary pamphlets. Beth Spencer wrote of her personal experiences with copyright law in her article, 'I'd Like to Have

---

44 Sarat, A. 'Imagining the Law of the Father: Loss, Dread, and Mourning in *The Sweet Hereafter*', *Law And Society Review*, 2000, Vol. 34 (1), pp. 40-41.

Permission to be Post-Modern, But I'm not Sure Who to Ask'.[45] Manne Schulze released a polemic on 'The Death of Daubism? The Case against the Introduction of Moral Rights'.[46] Susan King delivered her manifesto, 'Quiet Pillage', about copyright law and sampling at a copyright conference and has disseminated it in print and on the Internet.[47] In the wake of the *Heretic* affair, Wayne Harrison held forth on copyright law and the dramatic arts in interviews with *The Sydney Morning Herald.* Jan Sardi campaigned on the behalf of the moral rights of screenwriters in the newspapers, on radio, in television interviews, and on the Internet.[48] His radio discussion with Rebecca Goreman was read into Hansard by Labor Party politicians.[49] The first artistic director of Bangarra Dance Theatre, Carole Johnson, has been outspoken on the subject of cultural appropriation at the Green Mills conference.[50] Such interventions represent an attempt to address and educate the public, and by doing so influence the legislative agenda of the Federal Government.

The community of editors, journalists, reporters, and critics play an important role in the various controversies over copyright law. The mass media can also be used as a supplement or an alternative to forms of legal dispute resolution. Parties may enlist the support of sympathetic journalists and columnists and seek to resolve disputes over

---

45 Spencer, B. 'I'd Like to Have Permission to be Post-Modern, But I'm not Sure Who to Ask', *Jacket*, Number 1, http://www.jacket.zip.com.au/jacket01/spencer.

46 Schulze, M. 'The Death of Daubism? The Case against the Introduction of Moral Rights', *Artlines*, 1997, Vol. 2 (4), p. 4.

47 King, S. 'Quiet Pillage: The Case for Free Noise', *Artlines*, 1997, Vol. 2 (4), p. 1.

48 Goreman, R. 'Interview with Jan Sardi', The PM Program, Australian Broadcasting Corporation, 20 June 1997.

49 Melham, D. 'Debate on the *Copyright Amendment Bill* 1997', Hansard for the House of Representatives, 25 June 1997.

50 Johnson, C. 'Ideas on Appropriation: The Emergence of NAISA and Bangarra', in Hillis, C. (ed.) *Heritage and Heresy: Green Mill Papers 1997.* Canberra: Australian Dance Council, 1998, p. 47.

appropriation in the mass media. Such disputes are judged by public opinion. In the Demidenko affair, *The Courier-Mail* and *The Sydney Morning Herald* sought to expose that Helen Darville had appropriated a Ukrainian identity and texts from various historical and literary texts. In the Daubist dispute, *The Adelaide Advertiser* played a key role in the litigation over the daubing of a painting by Charles Bannon. In the *Heretic* dispute, *The Sydney Morning Herald* played an active role in pitting the playwright David Williamson and the director Wayne Harrison against one another. In the *Shine* case, *The Sydney Morning Herald* and specialist film journals sought to publicise the contractual dispute between the producer and the distributor. In the Napster litigation, journalists played a role in analysing and interpreting the various legal fights.

There are doubts about the norms and standards regarding appropriation that are present in the interpretative community of journalists. The journalists did not have any particular expertise in copyright law. As David Higgins observes:

> I don't have legal or IT training. Not many journalists have formal training in the area they report on. Some develop skills as they go along, but most rely on their contacts to supply expert information. Many journalists like to swap rounds just as politicians change their portfolios.[51]

Given this generalist knowledge of all fields, not just law, the creative artists question the authority of critics in the mass media to judge and assess their work. Helen Darville and her supporters complained about being victimised by the media. Wayne Harrison is critical of the 'media

---

51 Rimmer, M. 'Correspondence with David Higgins', Sydney, 25 July 2000.

circus' that accompanied the controversy over *Heretic*. The creative artists risk censure for violating the standards of criticism and discussion that are acceptable in the public sphere. They are open to accusations of agitprop, rabble-rousing, and muck-raking. Such cases raise questions about reputation, censorship, and freedom of communication.

This paper claims that the mass media plays a very active and significant role in the interpretation, application, and reform of copyright law. It is not just a mirror upon which the law is simply reflected without distortion or disturbance. First, the mass media is instrumental in litigation over copyright infringement. Lawyers and their clients use publicity to pre-empt legal action. Second, the mass media can also be used as an alternative to forms of legal dispute resolution. Parties may enlist the support of sympathetic journalists and columnists and seek to resolve disputes over appropriation in the mass media. Such disputes are judged by public opinion. Third, the mass media plays an important educative role in relation to copyright law. The creative artists' experience of copyright law is often mediated by the mass media. Their understanding of legal judgments, legislation, and policy is affected by the information that is disseminated on print, radio, TV, and the Internet. Fourth, the mass media plays an instrumental role in relation to copyright law reform. The creative artists use the media as a platform from which to lobby the government. Finally, the mass media is a site at which copyright law intersects with a number of other areas of law – such as defamation, privacy, and authenticity marks.

CONCLUSION

This thesis provides a 'history of the present' of copyright law in Australia during the last decade of the twentieth century. It is an important addition to the literature. As Kathy Bowrey comments:

> An interest in philosophy and culture takes you to the outer limits of copyright law. It is not so much that the territory is completely unknown, but it is a twilight zone. Those that have mapped it have sketched features of a long gone past or drawn visionary copyright futures. What they have seen and described is something other worldly – imaginary domains. No-one has thought it relevant to track the terrain shared by law, philosophy and culture in the here and now.[52]

This 'history of the present' describes how creative artists interpret and make sense of copyright law. It attempts to map and understand the variety and diversity of the law's presence in everyday life. There are many difficulties of course in writing about the here and now. The action may seem chaotic, formless, and even a little bizarre. As Salman Rushdie observes: 'Reality is a question of perspective; the further you get from the past, the more concrete and plausible it seems – but as you approach the present, it inevitably seems more and more incredible'.[53] It is important, though, to document the flux, and cross-currents of copyright law in this time of crisis.

The thesis provides an archive of oral histories about copyright law. It is based upon interviews with a range of creative artists – plagiarists, Daubists, samplers, film vandals, cyber-punks, and

---

52 Bowrey, K. 'The Outer Limits of Copyright Law: Where Law Meets Philosophy And Culture', *Law and Critique*, 2001, forthcoming.

53 Rushdie, S. *Midnight's Children*. London: Picador, 1981.

Indigenous artists. The archive of oral histories contains a range of stories and narratives about copyright law. It illuminates the strategies of creative artists in dealing with copyright law – litigation, contract law, and technological measures. It also highlights the tactics of copyright activists for copyright law reform – organising an artistic community, seeking help from sympathetic lawyers, lobbying the Federal Government, and enrolling the support of the media. However, it is difficult to bring about cultural change. The creative artists have to struggle to be heard amongst a chorus of established voices – copyright owners, collecting societies, and advocacy groups. They will have to fight hard for their views and opinions about copyright law to be taken seriously by policy-makers, courts, and the public. This archive of oral histories and narratives is by no means complete. It can be augmented and supplemented by new stories and narratives about copyright law.

In the spirit of encouraging a dialogue and conversation about copyright law, it is appropriate that the last word should go to a creative artist. Robyn Archer is a performer, singer, and festival director. She is a passionate advocate for the recognition of performers' rights.[54] Robyn Archer explores themes of ownership, access, and identity, across a range of cultural domains. She stresses the linkages between various disputes:

> The notion of Ownership sits at the very centre of the human story of this continent – it was there long before Europeans first set foot on the land, in a complex web of widely acknowledged custodial powers. The claim of Ownership by Europeans, specifically the colonising British, is, as we all know, at the vortex of the current storms which rage round everything Australia needs to attend to as a matter of urgency – cultural, political, societal, ethical, and

---

54 Rimmer, M. 'Correspondence with Robyn Archer', Adelaide, 11 October 1998.

philosophical. Next to this, who 'owns' my website copy, seems small potatoes, and yet the disputes are linked.[55]

Robyn Archer gives a sense of the temporal connection between the past, the present, and the future in the debate over copyright law. She links the historical debate over the ownership of land and culture with the current disputes over authorship, collaboration, and appropriation, and the imminent controversies over copyright law in the digital age.

---

55 Archer, R. *Cultural Crossroads: Ownership, Access, Identity*. Sydney: Australian Key Centre for Cultural and Media Policy, 24 November 1997.

APPENDIX ONE
METHODOLOGY

This paper is based upon dialogical research and oral histories. It is in a sense of a collaborative piece of work. The oral historian Michael Frish observes that the interviewer and informant have a 'shared authority'. [1] It is evident that both participants in an interview are responsible for its creation and share its authorship. The interviewer is an active participant in the interview process. They choose the informants; they set the questions; they record the interview and edit the transcript; they decide which interviews to publish; and contextualise the stories within a historical and cultural background.[2] Interviewees, too, can claim credit for an oral history because they are providing the substance of the story. They are also constantly interpreting and analysing their own motives and actions as they recall and describe them. Furthermore, the informants had the opportunity to revise the form and the content of the interviews. Some of them played an active part in editing and rewriting the written transcript of the interview. They also checked the final discussions.

Conducting Interviews

This paper tells personal stories from the specific standpoint of a particular subject group. I engage in dialogue with transgressive artists who have been called plagiarists, Daubists, samplers, hijackers, film vandals, cyber-punks, and Indigenous artists. Debora Halbert considers how intellectual property owners represent users who subscribe to a

---

1 Frish, M. *A Shared Authority: Essays on the Craft and Meaning of Oral History and Public History*. Albany: State University of New York, 1990, p. 22.

2 Ritchie, D. *Doing Oral History*. New York: Twayne Publishers, 1995.

different ethic, such as sharing, common access or co-operative production, as 'pirates':[3]

> Property narratives provide clear distinctions between what is mine and what is yours. Intellectual property narratives attempt to extend this clear cut ownership into the world of intellectual property. Defining 'good users' and 'deviant users' is especially important in the area of intellectual property law because the property these laws deal with is very abstract. How, for instance, do you really own an expression of an idea? Technology further confounds the problems of ownership by fundamentally challenging the very notion of intellectual property. Technology challenges intellectual property by making it easier to duplicate and 'pirate' creations with the end result exactly the same as the original product. Given the possibilities of exchange, it is important for industries to construct deviants in order to shore up their property rights.[4]

The protagonists of this paper have been pilloried by their opponents. Helen Darville was accused of plagiarism, kleptomania, and psychosis. Manne Schulze and driller Jet Armstrong were called Daubists, graffitists, and vandals. Wayne Harrison was called a hijacker. Jan Sardi and other members of the Australian Writers' Guild were called 'film vandals'. The inventors of Napster and other file-sharing programs have been called 'anarchists'.

Some will not agree with my choice of informants. Why sympathise with pirates, thieves, and vandals? Others will insist that I should have sampled a wider group of people? What about professional associations? Unions? Copyright collecting societies? Public interest groups? Such organisations certainly seek to speak on behalf of artists. However, they have a number of forums to promote their case. It would

---

3 Halbert, D. 'Intellectual Property Piracy: The Narrative Construction of Deviance', *International Journal for the Semiotics of Law*, 1997, Vol. 10, p. 55.

4 Ibid.

be self-indulgent to transcribe their already well-publicised attitudes. So a deliberate decision was made to focus upon creative artists, rather than their representatives.

Twenty unstructured discussions with copyright activists were conducted over the course of 1998,[5] 1999,[6] and 2000.[7] The subjects were not selected randomly nor were they stratified to secure representativeness. A couple of creative artists were already known to me. I had talked to Craig Cormick and Alana Harris on previous occasions about artistic appropriation. A number of the creative artists were approached after they made public interventions in debates over copyright law reform. This was the case with Manne Schulze, Susan King, Wayne Harrison, and Jan Sardi. A number of people were nominated by my informants as good people to talk to. Both John Tranter and Craig Cormick referred me to Beth Spencer. The Australian Film Finance Corporation suggested that I should talk to Jane Scott. The informants were drawn from different fields of cultural production – literature, art, music, drama, film, new technology, and Indigenous culture.

---

5 Rimmer, M. 'Interview with Craig Cormick', Canberra, 8 July 1998; Rimmer, M. 'Interview with John Tranter', Sydney, 23 July 1998; Rimmer, M. 'Telephone Interview with Helen Simondson', Melbourne, 2 September 1998; Rimmer, M. 'Interview with Alana Harris', Canberra, 10 September 1998; Rimmer, M. 'Interview with Jo Dyer', Sydney, 15 September 1998; Rimmer, M. 'Correspondence with Robyn Archer', Adelaide, 11 October 1998; Rimmer, M. 'Interview with David Marr', Sydney, 2 November 1998; Rimmer, M. 'Interview with Beth Spencer', Melbourne, 28 December 1998; and Rimmer, M. 'Interview with Susan King', Melbourne, 29 December 1998.

6 Rimmer, M. 'Correspondence with Wayne Harrison', London, 24 February 1999; Rimmer, M. 'Interview with Manne Schulze', Sydney, 25 March 1999; Rimmer, M. 'Interview with Keith Lupton, John Mifsude, and Michael Ward of the Film Finance Corporation', Sydney, 27 April 1999; Rimmer, M. 'Interview with Jan Sardi', Melbourne, 30 April 1999; and Rimmer, M. 'Interview with Jane Scott', Sydney, 29 July 1999.

7 Rimmer, M. 'Interview with Chris Gilbey', Sydney, 28 June 2000; and Rimmer, M. 'Correspondence with David Higgins', Sydney, 25 July 2000.

In most cases, I conducted personal interviews with the copyright activists. Nine discussions took place in Sydney; three conversations occurred in Melbourne; and another two were taken in Canberra. The informants were told of the aims and anticipated uses of the project to which they were making their contribution. They were informed of the mutual rights in the oral history process. There should be discussions as to editing, access restrictions, copyrights, prior use, and the expected disposition and dissemination of all forms of the record. The interviews had no set questions but were goal-directed. However, the informants were asked about a range of matters by the end of the interviews. The discussions were recorded. The interviewees have known that I have been making notes and recording the interviews on tape. They had an opportunity to read what I have written about them, to comment, correct, and engage with my analysis.[8] The benefit of this feedback is that I could check the accuracy of the facts, and the expression of the opinions. I also had the opportunity to re-evaluate and reconsider my own point of view during the exchange of ideas and opinions.[9]

In particular cases, it was necessary to engage in correspondence, mainly because of the tyranny of distance. Robyn Archer sent me an e-mail because she was constantly travelling in preparation for the Adelaide festival. Wayne Harrison sent a fax because he had left the Sydney Theatre Company and taken up a position at Back Row Productions in London. Helen Simondson conducted a telephone conversation because she was in Melbourne working with Cinemedia. David Higgins, too, sent an e-mail for the sake of convenience.

---

8 Bell, D. *Ngarrindjeri Wurruwarrin: A World that Is, Was, and Will Be.* Melbourne: Spinifex Press, 1998.

9 Gilroy, P. *The Black Atlantic: Modernity and Double Consciousness.* London: Verso, 1993.

There is certainly a risk of complicity with the informants of my interviews. In the process of information exchange, it was evident that the interviewees sought to convince their interviewers to adopt their points of view. As the oral historian, Donald Ritchie comments: 'A certain amount of intellectual seduction – interviewees trying to make interviewers agree with them – may take place'.[10] The interviewees were players and partisans in controversies about copyright law, and have positions and reputations to defend. They wanted the researcher to see events from their perspective, to validate their positions, to get historical vindication. For instance, the screenwriter Jan Sardi was a passionate advocate for the introduction of moral rights for writers. He argued that there was a need to have a joint authorship between the key creative team of screenwriters, directors, and producers. However, he was sceptical about the inclusion of other collaborators in the film-making process, such as the performers, and the cinematographer. This point of view reflected the case of the Australian Writers Guild. It was important to critically analyse the arguments of my informants, and not accept them at face value. There is an imperative to weigh evidence and create a convincing account of people, movements, and past events. So there is a need as a researcher to demonstrate scholarly scepticism.

In a number of cases, I was unable to gain access to individuals who would be able to shed some light upon copyright controversies. The barrister Robyn Layton declined to revisit the Daubism dispute because she had not followed the latest developments in relation to moral rights law. The playwright David Williamson was unwilling to engage in conversation because of work commitments. The performer Robert Roberts initially agreed to an interview but it did not go ahead because of

---

10 Ritchie, D. *Doing Oral History*. New York: Twayne Publishers, 1995, p. 97.

personal and professional crises in her life. A few others declined to reply.

There is a difficulty involved with being denied authorisation or permission for an interview. The biographer Janet Malcolm observes that the writer may be prone to invent things or be spiteful if information is withheld from him or her:

> When a writer is refused permission to quote, his moral salvation is no better assured; in fact, his scope for immoral action may be even greater. Since he cannot unread what he has read, unsee what he has seen, unimagine what he has imagined – and since he is not a discreet lawyer carefully guarding his clients' secrets but a professional blabbermouth and tattle-tale – the denial of permission to quote may act as a spur not only to his ingenuity but to his malice.[11]

Furthermore, there is a need to guard against being prejudiced against those sources who will not talk. For instance, the debate over the play *Heretic* performed by the Sydney Theatre Company involved two main players. The director Wayne Harrison agreed to enter into correspondence about theatre and copyright law. However, the playwright David Williamson declined to be interviewed about copyright law and the performing arts, because of other pressing work commitments. This resulted in a rather one-sided perspective of the story.

Editing Interviews

This paper transforms the raw data of the interviews into pointed narratives. It is possible that this project could stop at the point of collecting an archive of narratives about copyright law and intellectual

---

11 Malcolm, J. *The Silent Woman: Syvlia Plath and Ted Hughes.* London: Pan MacMillan, 1994, p. 114.

property. It is tempting to let the oral histories speak for themselves. It would allow the artists to discuss copyright law without mediation or negotiation of other parties. However, there are difficulties with presenting the oral histories, with the minimum of organisation and commentary. Stylistically, it would create a confusion of styles, idioms, and languages. In terms of content, it would create risks of reliability and representation. There is a need to subject the oral histories to the filters of editing, analysis, and interpretation.

The written transcripts are not a literal reproduction of the sound recording. The documents have been crafted in a form that will answer to the needs of successful presentation and communication. Furthermore, the informants had the opportunity to revise the form and the content of the interviews. Some of them played an active part in editing and rewriting the written transcript of the interview. Manne Schulze revised the form and content of the interview, adding greater detail about Daubism, and erasing repetitions, elisions, and infelicities. John Tranter added some elaborations, clarifications and footnotes to the transcript. Similarly, Beth Spencer expressed her desire to revise and rework the written transcription of the interview. By contrast, a number of other informants made minimal alternations. Jan Sardi made some minor corrections and changes to the transcript. Other participants were content to leave the transcripts as they were written. David Marr gave carte blanche to do whatever was needed with the transcript.

In rewriting the interviews, I sought to contextualise the information conveyed in the transcripts by the informants. The discussion of artistic practices and forms was put into a wider historical movement of traditions dealing with appropriation. The personal stories about copyright litigation and policy reform were analysed against the background of legal knowledge. They were supplemented by legal

decisions, policy documents, and parliamentary debates. Furthermore, there was also extensive monitoring of media - newspapers, radio, television, and the Internet. Dossiers were developed about the cultural controversies.

The informants had the opportunity to read and comment upon the final drafts of the thesis. Manne Schulze reviewed and discussed Chapter Two.[12] He entered into the collaborative process of dialogue with great enthusiasm. Susan King was content with what had been written in Chapter Three.[13] Wayne Harrison entered into a long correspondence over the form and content of Chapter Four.[14] He wanted to correct the public record about some of the facts that surrounded the controversy of *Heretic*. He also sought to put the dispute over *Heretic* into a wider context of disputes over authorship and collaboration within the performing arts. Jan Sardi made a few corrections in relation to Chapter Five.[15] Jane Scott clarified the various roles of the collaborators involved in the film *Shine*.[16] She also up-dated the developments in the litigation over *Shine* since the first interview. Chris Gilbey[17] and David Higgins[18] were happy with the final form of Chapter Six. They had nothing more to

---

12 Rimmer, M. 'Supplementary Interview with Manne Schulze', Sydney, 20 December 2000.

13 Rimmer, M. 'Supplementary Correspondence from Susan King', Sydney, 22 January 2001.

14 Rimmer, M. 'Supplementary Correspondence from Wayne Harrison', London, 9 January 2001, and Rimmer, M. 'Supplementary Correspondence (II) from Wayne Harrison', London, 22 January 2001.

15 Rimmer, M. 'Supplementary Correspondence from Jan Sardi', Melbourne, 28 November 2000.

16 Rimmer, M. 'Supplementary Telephone Interview with Jane Scott', Sydney, 15 December 2000.

17 Rimmer, M. 'Supplementary Correspondence from Chris Gilbey', Sydney, 1 February 2001.

18 Rimmer, M. 'Supplementary Correspondence from David Higgins', Sydney, 1 February 2001.

add. Jo Dyer provided good feedback in relation to Chapter Seven.[19] Such interchanges give a sense of the diverse dialogues that went on between the interviewer and the range of informants.

It was important also to guard against the possible exploitation of interviewees and be sensitive to the ways in which their interviews might be used. They must respect the right of the interviewee to refuse to discuss certain subjects, to restrict access to the interview, or under extreme circumstances to be anonymous. Some material was excluded because it is of a sensitive nature. For instance, the contracts between Bangarra Dance Theatre and the Munyarrun clan could not be reproduced, because of commercial confidentiality. In such cases, there were good reasons why the information was not placed in the public domain. Other material was not published because it might be considered defamatory. Some of the informants were very candid about what they thought about some of the players in the controversies. Obviously that material could not be reprinted.

A number of interviews were vying for inclusion in the thesis. It was inevitable that some would be selected, and others excluded in the final process of rewriting. There was great competition over what story would be told in relation to literary works in Chapter One. The interviews with the author Beth Spencer[20] and the biographer and journalist David Marr[21] were fascinating discussions in their own right. In the end, they formed a background to the Demidenko affair. There was also uncertainty about what narrative should deal with digital works in Chapter Six. In the end, the interviews with John Tranter,[22] the poet

---

19 Rimmer, M. 'Supplementary Correspondence from Jo Dyer', Adelaide, 1 June 2000.

20 Rimmer, M. 'Interview with Beth Spencer', Melbourne, 28 December 1998.

21 Rimmer, M. 'Interview with David Marr', Sydney, 2 November 1998.

22 Rimmer, M. 'Interview with John Tranter', Sydney, 23 July 1998.

and editor of the e-zine Jacket, and Helen Simondson,[23] the project manager of the Performing Arts and Media Library, were overshadowed by the controversy over Napster. There were also a number of potential focal points in relation to copyright law and Indigenous culture in Chapter Seven. An interview was conducted with the Canberra novelist Craig Cormick.[24] Another was performed with Alana Harris, an Indigenous photographer based in Canberra.[25] In the end, the experience of Bangarra Dance Theatre became the focal point of Chapter Seven because it seemed to have greater implications for a wide range of artistic endeavours. Furthermore, there is only a fragment from my correspondence with Robyn Archer in Chapter Eight.[26] Much more could have been used. My apologies are extended to those people whose thoughts and attitudes I recorded but was unable to use. The constraints of time and space worked against these collaborations seeing their way into print.

Analysing Interviews

This thesis interprets the oral histories and narratives in terms of interpretative communities, social fields, and cultural semiotics. It transforms the raw data of the interviews into material deserving of discussion, commentary, and organisation. This thesis considers the competing discourses that exist about copyright law in a number of particular communities. In particular, it focuses upon the artistic community, the legal system, and the media. This thesis considers how

---

23 Rimmer, M. 'Telephone Interview with Helen Simondson', Melbourne, 2 September 1998.

24 Rimmer, M. 'Interview with Craig Cormick', Canberra, 8 July 1998.

25 Rimmer, M. 'Interview with Alana Harris', Canberra, 10 September 1998.

26 Rimmer, M. 'Correspondence with Robyn Archer', Adelaide, 11 October 1998.

creative artists enter into a dialogue with aesthetic theories about appropriation - such as romanticism, modernism and post-modernism. It examines how creative artists are guided by ethical standards, protocols, and norms. This inquiry explores the lived experience of copyright law. It highlights how creative artists understand copyright law, the ways in which the law affects their artistic practice, and what they do in response. This thesis also investigates the representations of appropriation in the mass media. It examines how creative artists use public channels of communication to lobby for copyright law reform.

The American lawyer and literary critic Stanley Fish was the first to popularise and publicise the idea of 'interpretative communities'.[27] He has been described by his detractors as 'the Donald Trump of American academia, a brash, noisy entrepreneur of the intellect who pushes his ideas in the conceptual marketplace with all the fervour with which others peddle second-hand Hoovers'.[28] Stanley Fish sought to explain whether the text or the reader was the source of authority in interpretation. He defined 'interpretative communities' as 'made up of those who share interpretative strategies not for reading (in the conventional sense) but for writing texts, for constituting their properties and assigning their intention'.[29] Stanley Fish argued that this concept explained the stability of interpretation among different readers (they belong to the same community) and the variety of interpretation in the career of a single reader (they belong to different communities). He submitted that this idea explained how disagreements could be debated

---

27 Fish, S. *Doing what Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*. Durham: Duke University Press, 1989, p. 141.

28 Eagleton, T. 'The Estate Agent', *London Review of Books*, 2 March 2000, p. 10.

29 Fish, S. *Doing what Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*. Durham: Duke University Press, 1989, p. 141.

in a principled way, because of the stability in the make up of groups and therefore in the opposing positions they make possible.

However, the concept of interpretative communities has been criticised by radicals and conservatives alike.[30] There are a number of deficiencies and weaknesses in relation to its account of interpretation, community, and authority. It must be recognised that the abstract concept of interpretative communities is of limited explanatory power. It is useful in structuring and organising the various discourses in the stories.[31] Yet it will not account for all the unruly facts in the disputes. It is thus important that the idea of interpretative communities is grounded in a social and historical context.

The French sociologist Pierre Bourdieu has developed a theory of social fields.[32] It is a way of going beyond the internal analysis and external explication of hermeneutics and semiotics. Pierre Bourdieu notes:

> A field is a structured social space, a field of forces, a force field. It contains people who dominate and others who are dominated. Constant, permanent relationships of inequality operate inside this space, which at the same time becomes a space in which the various actors struggle for the transformation or preservation of the field. All the individuals in this universe bring to the competition all the (relative) power at their disposal. It is this power that defines their position in the field and, as a result, their strategies.[33]

---

30 Goldsmith, A. 'Is there Any Backbone in this Fish? Interpretative Communities, Social Criticism, and Transgressive Legal Practice', *Law and Social Inquiry*, 1998, Vol. 23 (2), p. 373.

31 The concept of interpretative communities has also been applied by Andrew Fieldsend in his doctoral thesis on Maori cultural property, and Louise Harmon in her essay on Jeff Koons and copyright law: Harmon, L. 'Law, Art, and the Killing Jar', *Iowa Law Review* , 1994, Vol. 79, p. 367 at 409.

32 Bourdieu, P. 'The Force of Law: Toward a Sociology of the Juridical Field', *The Hastings Law Journal*, 1987, Vol. 38, p. 805.

33 Bourdieu, P. *On Television and Journalism*. London: Pluto Press, 1996, p. 41.

Pierre Bourdieu claims that individual agents and collectivities are engaged in competition for monopoly over the interests or resources specific to each field. They may be fighting over economic capital - the wealth an individual or group has accumulated in the form of wealth, power, and technology. Or they may be contesting over symbolic capital - degree of accumulated authority, knowledge, prestige, reputation, and debts of gratitude. Individual agents engage in 'strategies' to accumulate economic and symbolic capital within a given static socio-cultural context. By contrast, collectivities embark on 'struggles' to bring about social change. Pierre Bourdieu observes that the victors of this battle are able to impose symbolic goods upon others in an act of 'symbolic violence'. That is, they have the power to impose instruments of knowledge and an expression of social reality on recipients who have little choice about whether to accept them or reject them.

Pierre Bourdieu comments that a number of fields structure social space. For the purposes of this paper, the three key fields include the field of cultural production,[34] the juridical field,[35] and the field of journalism.[36] Pierre Bourdieu observes that each field is relatively autonomous from other fields, because the stakes over which struggle takes place are different in each field. However, he points out that the fields are structurally homologous because they are linked by sets of practices enacted across fields. In particular, the fields all exist in relation to the field of power, the dominant and pre-eminent field of any society.

---

34 Bourdieu, P. *The Field of Cultural Production: Essays on Art and Literature.* Cambridge and Oxford: Polity Press, 1993.

35 Bourdieu, P. 'The Force of Law: Toward a Sociology of the Juridical Field', *The Hastings Law Journal*, 1987, Vol. 38, p. 805.

36 Bourdieu, P. *On Television and Journalism.* London: Pluto Press, 1996.

There have been a number of legal applications of the sociological theories of Pierre Bourdieu.[37] They have empirically examined the specific power struggles over interpretative competence that structure the field of legal practitioners and endeavoured to determine their impact on the production of authoritative representations of the social world. However, there have been no studies of intellectual property. There are of course weaknesses in this approach, too. John Frow offers a thorough critique of Pierre Bourdieu's work on the sociology of symbolic forms.[38] He argues that Bourdieu provides an inadequate account of power, class and aesthetics. In his opinion, the French sociologist is guilty of a 'descriptive relativism', because he fails to provide an independent space for criticism.

Peter Haas defines an 'epistemic community' as a network of professionals with recognised expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue area.[39] It may consist of professionals from a variety of disciplines and backgrounds. Peter Haas mentions a number of characteristics of an 'epistemic community'. The members have a shared set of normative and principled beliefs, which provide a value-based rationale for the social action of community members. They also have shared causal beliefs, notions of validity, and a common policy enterprise. Epistemic community analysis is used a lot in social science literature to explain the emergence of regulation. Technocratic lawyers are the axis

---

37 Parker, C. *Just Lawyers.* Oxford: Oxford University Press, 1999, p. 120; Abbott, A. *The System of Professions.* Chicago: University of Chicago Press, 1988; Shamir, R. *Managing Legal Uncertainty.* Durham: Duke University Press, 1995; and Dezalay, Y. and Garth, B. *Dealing in Virtue: International Commercial Abritration and the Construction of a Transnational Legal Order.* Chicago: University Of Chicago, 1996.

38 Frow, J. *Cultural Studies and Cultural Value.* Oxford: Clarendon Press, 1995, pp. 5-7.

39 Haas, P. 'Introduction: Epistemic Communities and International Policy Coordination', *International Organization,* 1992, Vol. 46 (1), p. 1.

around which the intellectual property epistemic community revolves. Through their infiltration of networks, they discipline other communities. The concept of an epistemic community draws a strong connection between professionalism, knowledge and power.

This paper is interdisciplinary minded in its approach. It seeks to occupy a border territory between different genres, disciplines, and fields of knowledge.[40] This paper breaks down the rigid distinctions between art, law, and the media. I share the view of Rosemary Coombe that the disciplines disrupt and transform one another:

> There is little purchase ... in constructing an ideal bridge to join two autonomous realms of modernity that enabled their emergence as discrete and naturalized domains of social life. An exploration of law and culture will not be fruitful unless it can transcend and transform its initial categories. A continuous mutual disruption – the undoing of one term by the other – may be a more productive figuration than the image of relationship or joinder.[41]

This paper is populist in the sense that it appeals to a number of different audiences and readers. It seeks to enable dialogue and conversation between a number of different social groups - artists, lawyers, and journalists. This approach encourages a genuinely open and inclusive debate about the nature and scope of copyright law. It also ensures that this discussion is grounded in the everyday communication, and not the abstract and esoteric languages of particular disciplines and professions.

---

40 Young, A. *Imagining Crime: Textual Outlaws and Criminal Conversations*. London: Sage Publications, 1996, p. 25.

41 Coombe, R. *The Cultural Life of Intellectual Properties: Appropriation, Authorship, and the Law*. Durham and London: Duke University Press, 1998, p. 9.

BIBLIOGRAPHY

PART 1

INTERVIEWS

1998

Rimmer, M.

'Interview with Craig Cormick', Canberra, 8 July 1998.

'Interview with John Tranter', Sydney, 23 July 1998.

'Telephone Interview with Helen Simondson', Melbourne, 2 September 1998.

'Interview with Alana Harris', Canberra, 10 September 1998.

'Interview with Jo Dyer', Sydney, 15 September 1998.

'Correspondence with Robyn Archer', Adelaide, 11 October 1998.

'Interview with David Marr', Sydney, 2 November 1998.

'Interview with Beth Spencer', Melbourne, 28 December 1998.

'Interview with Susan King', Melbourne, 29 December 1998.

1999

Rimmer, M.

'Correspondence with Wayne Harrison', London, 24 February 1999.

'Interview with Manne Schulze', Sydney, 25 March 1999.

'Interview with Keith Lupton, John Mifsude, and Michael Ward of the Film Finance Corporation', Sydney, 27 April 1999.

'Interview with Jan Sardi', Melbourne, 30 April 1999.

'Interview with Jane Scott', Sydney, 29 July 1999.

2000

Rimmer, M.

'Supplementary Correspondence from Jo Dyer', Adelaide, 1 June 2000.

'Interview with Chris Gilbey', Sydney, 28 June 2000.

'Correspondence with David Higgins', Sydney, 25 July 2000.

'Supplementary Correspondence from Jan Sardi', Melbourne, 28 November 2000.

'Supplementary Telephone Interview with Jane Scott', Sydney, 15 December 2000.

'Supplementary Interview with Manne Schulze', Sydney, 20 December 2000.

2001

Rimmer, M.

'Supplementary Correspondence from Wayne Harrison', London, 9 January 2001.

'Supplementary Correspondence (II) from Wayne Harrison', London, 22 January 2001.

'Supplementary Correspondence from Susan King', Sydney, 22 January 2001.

'Supplementary Correspondence from Chris Gilbey', Sydney, 1 February 2001.

'Supplementary Correspondence from David Higgins', Sydney, 1 February 2001.

PART 2

REFERENCES

Abbott, A. *The System of Professions.* Chicago: University of Chicago Press, 1988.

Abramson, C. 'Digital Sampling and the Recording Musician: A Proposal for Legislative Protection', *New York University Law Review,* 1999, Vol. 74, p. 1660.

Adams, A. and McKibbins, P. 'Sampling without Permission Is Theft', *Billboard,* 5 March 1994, in Negativland. *Fair Use: The Story of the Letter U and the Number 2.* Concord: Seeland, 1995, p. 158.

Adeney, E. 'Moral Rights/Statutory Licence: The Notion of Debasement in Australian Copyright Law', *Australian Intellectual Property Journal,* 1998, Vol. 9, p. 21.

Adeney, E. 'The Moral Right of Integrity of Authorship: A Comparative View of Australia's Proposals to Date', *Australian Intellectual Property Journal,* 1998, Vol. 9, p. 179.

Adler, A. 'Post-modern Art and the Death of Obscenity Law', *The Yale Law Journal,* 1990, Vol. 99, p. 1359.

Alderson, M. 'Moral Rights in Film – Towards a Director's Copyright?', *Media and Arts Law Review,* Vol. 1, 1996, p. 61.

Ames, E. 'Beyond Rogers v. Koons: A Fair Use Standard for Appropriation', *Columbia Law Review,* 1993, Vol. 93, p. 1473.

Anderson, N. and Greenberg, D. 'From Substance to Form: Legal Theories of Pashukanis and Edelman', *Social Text,* 1983, Vol. 7, p. 69.

Anderson, P. 'Art Is Not Property: Claims and Counter-Claims in the Moral Rights Debate', *Eyeline,* 1989, Vol. 8, p. 6.

Anderson, P. 'Copyright and Moral Rights: Setting the Agenda for the 1990s', *Eyeline*, 1990, Vol. 11, p. 8.

Anderson, P. 'Aboriginal Imagery: Influence, Appropriation or Theft', *Eyeline*, 1990, Vol. 12, p. 8.

Anderson, P. 'Copyright and Moral Rights – Finding the 'Write' Balance', *Arts and Entertainment Law Review*, 1994, Vol. 5, p. 68.

Anderson, P. 'On the Legal Limits of Art', *Arts and Entertainment Law Review*, 1994, Vol. 5, p. 70.

Anderson, P. 'The Author and Copyright Law: From Criticism to Policy', *Culture and Policy*, 1996, Vol. 7 (1), p. 65.

Anderson, P. 'Introduction: Indigenous Copyright', *Culture and Policy*, 1996, Vol. 7 (3), p. 1.

Anderson, P. and Collie, I. *Evident Tensions: Law and Culture in the Age of Post-Modernism*. Sydney: Arts Law Centre, 1994.

Anderson, P. and Saunders, D. (eds) *Moral Rights Protection in a Copyright System*. Brisbane: Griffith University, 1992.

Andrews, K. 'Second Reading of the *Copyright Amendment (Digital Agenda) Bill* 2000', House of Representatives, Hansard, 27 June 2000, p. 18354.

Annas, M. 'The Label of Authenticity: A Certification Trade Mark for Goods and Services of Indigenous Origin', *Aboriginal Law Bulletin*, 1997, Vol. 3, No. 90, p. 6.

Antill, J. and Coles, P. 'Copyright Duration: The European Community Adopts "Three Score Years and Ten"', *European Intellectual Property Review*, 1996, Vol. 18 (7), p. 379.

Aoki, K. 'Contradiction and Context in American Copyright Law', *Cardozo Arts And Entertainment Law Journal*, 1991, Vol. 9, p. 302.

Aoki, K. 'Adrift in the Intertext: Authorship and Audience "Recoding" Rights – Comment on Robert H. Roststein, "Beyond Metaphor: Copyright Infringement and the Fiction of the Work"', *Chicago – Kent Law Review*, 1993, Vol. 68, p. 805.

Aoki, K. 'Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain. Part 1', *Columbia – VLA Journal of Law and the Arts*, 1993-1994, Vol. 18, p. 1.

Aoki, K. 'Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain. Part 2', *Columbia – VLA Journal of Law and the Arts*, 1994, Vol. 18, p. 191.

Aoki, K. '(Intellectual) Property and Sovereignty: Notes toward a Cultural Geography of Authorship', *Stanford Law Review*, 1996, Vol. 48, p. 1293.

Aoki, K. 'Considering Multiple and Overlapping Sovereignties: Liberalism, Libertarianism, National Sovereignty, 'Global' Intellectual Property, and the Internet', *Indiana Journal of Global Legal Studies*, 1998, Vol. 5, p. 443.

Aoki, K. 'Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection', *Indiana Journal of Global Legal Studies*, 1998, Vol. 6, p. 11.

Aplin, T. 'Not In Our Galaxy: Why 'Film' Won't Rescue Multimedia' *European Intellectual Property Review*, 1999, Vol. 21 (12), p. 633.

Archer, R. *Cultural Crossroads: Ownership, Access, Identity.* Sydney: Australian Key Centre for Cultural and Media Policy, 24 November 1997.

Armstrong, M, Lindsay, D. and Watterson, R. *Media Law in Australia.* Melbourne: Oxford University Press, 1995.

Arts Law Centre of Australia. *Push the Button: Music Seminar*. Sydney: Harbourside Brasserie, 7 December 2000.

Ashcroft, B., Griffiths, G., and Tiffin, H. (eds) *The Post-Colonial Studies Reader*. London: Routledge, 1995.

Atchison. 'The Cave-Ins', *The Adelaide Advertiser*, 28 September 1991.

Attorney General's Department. *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*. Canberra: The Australian Government, 1994.

Attorney General's Department. *Proposed Moral Rights Legislation for Copyright Creators: Discussion Paper*. Canberra: The Australian Government, 1994.

Attorney General's Department. *Performers' Intellectual Property Rights: Scope of Extended Rights for Performers under the Copyright Act 1968*. Canberra: Australian Government Printing Services, 1997.

Attorney-General's Department and the Department of Communications, Information Technology and the Arts. 'Joint Supplementary Submission to The House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into the *Copyright Amendment (Digital Agenda) Bill* 1999', Canberra: Australian Parliament House, 1999.

Auslander, P. 'Legally Live: Performance in/of the Law', *The Drama Review*, 1997, Vol. 41 (2), p. 9.

Australian Broadcasting Corporation. 'Collaborations: Using Indigenous Cultural Material in Contemporary Performance', Awaye, Radio National, Australian Broadcasting Corporation, 14 May 1999.

Australian Broadcasting Corporation. 'MP3 - The Internet's Threat to the Music Moguls', 7:30 Report, Australian Broadcasting Corporation, 15 July 1999.

Australian Broadcasting Corporation. 'Click to the Beat', Lateline, Australian Broadcasting Corporation, 28 October 1999.

Australian Broadcasting Corporation. 'Government Caught in Net Copyright Wrangle', 7:30 Report, Australian Broadcasting Corporation, 10 March 2000.

Australian Broadcasting Corporation. 'The Future of Music', Background Briefing, Radio National, Australian Broadcasting Corporation, 11 July 2000.

Australian Broadcasting Corporation. 'Industry Win Over Napster May Not Stop Music Downloads', 7:30 Report, Australian Broadcasting Corporation, 28 July 2000.

Australian Broadcasting Corporation. 'Online Music – Download or Freeload?', Australia Talks Back, Radio National, Australian Broadcasting Corporation, 1 August 2000.

Australian Broadcasting Corporation. 'Napster Court Ruling Eagerly Awaited', 7:30 Report, Australian Broadcasting Corporation, 4 January 2001.

Australian Copyright Council. *Australia Council: National Symposium on Moral Rights*. Sydney Opera House, 29-30 November 1979, p. 52.

Australian Film Commission. *Cultural Development and Copyright – A Portfolio Perspective*. Communications and the Arts Portfolio Forum. Intellectual Property Task Force, 15 August 1995.

Australian Government. *Creative Nation: Commonwealth Cultural Policy*. Canberra: Department of Communications and the Arts, 1994.

Australian Screen Directors Association. *Submission to The House of Representatives Standing Committee on Legal and Constitutional Affairs*. Canberra: Parliament House, 1 October 1999.

Badin, R. 'An Appropriate(d) Place in Transformative Value: Appropriation Art's Exclusion from *Campbell* v *Acuff-Rose Music, Inc'*, *Brooklyn Law Review*, 1995, Vol. 60, p. 1653.

Bangarra Dance Theatre. *Skin: Programme.* Sydney: Olympic Arts Festival, 2000.

Banki, P. 'Copyright and Plagiarism', *Australian Society of Authors*, Seminar, 23 March 1996.

Bannister, J. 'It Ain't what You Say, It's the Way that You Say It: Could Freedom of Political Expression Operate as a Defence to Copyright Infringement in Australia?', *Copyright Reporter*, 1996, Vol. 14 (1), p. 22.

Barber, L. 'Original Sins: Everything Old Is New Again, Especially in Hollywood', *The Australian*, 14 October 1998, p. 21.

Barber, L. 'D Minor for Shine Lawsuit', *The Australian*, 14 June 2000, p. 5.

Barlow, J. 'Selling Wine without Bottles, the Economy of Mind on the Global Net', *Australian Intellectual Property Law Bulletin (Supplement)*, 1994, Vol. 7, p. 1.

Barron, A. 'No Other Law? Author-ity, Property, and Aboriginal Art', in Bently, L. and Maniatis, S. (eds) *Intellectual Property and Ethics.* London: Sweet and Maxwell, 1998, p. 39.

Barthes, R. *Image – Music – Text.* London: Fontana, 1977.

Bates, J. *The Genius of Shakespeare.* London: Macmillan Publishers Ltd, 1997.

Baulch, L., Fulton, G. and Preisler, S. *Performers' Copyright.* Sydney: Australia Copyright Council, 1994.

Baume, N. 'Learning from the Dreamtime', *Art and Australia*, 1988, Vol. 26 (1), p. 77.

Baumgarten, J. 'On the Case against Moral Rights', in Anderson, P. and Saunders, D. (eds) *Moral Rights Protection in a Copyright System.* Brisbane: Griffith University, 1992, p. 13.

Behrendt, L. 'In Your Dreams: Cultural Appropriation, Popular Culture and Colonialism', *Law/Text/Culture*, 1998, Vol. 14 (1), p. 256

Bell, D. *Ngarrindjeri Wurruwarrin: A World that Is, Was, and Will Be.* Melbourne: Spinifex Press, 1998.

Benjamin, W. 'Unpacking My Library', in *Illuminations.* New York: Schocken Books, 1995, p. 60.

Bennie, A. 'Question of Belief as Writer, Director Split over Heretic', *The Sydney Morning Herald*, 2 April 1996, p. 3.

Bennie, A. 'Ungodly Row over Heretic', *The Sydney Morning Herald*, 2 April 1996, p. 13.

Bennie, A. 'Fighting White Males', *The Sydney Morning Herald*, 6 April 1996, p. 21.

Bennie, A. 'Writers Talk up a Crisis', *The Sydney Morning Herald*, 8 October 1996, p. 11.

Bennie, A. 'Exit Stage Writers, Pursued by Smoke', *The Sydney Morning Herald*, 28 January 1998.

Bently, L. 'Sampling and Copyright: Is the Law on the Right Track?', *Journal of Business Law*, 1989, p. 113, p. 405.

Bently, L. 'Copyright and the Death of the Author in Law and Literature', *Modern Law Review*, 1994, Vol. 57, p. 973.

Bently, L. 'Of Authors and Origins: Book Review', *European Intellectual Property Review*, 1995, Vol. 17 (4), p. 210.

Bently, L. and Sherman, B. 'Cultures of Copying: Digital Sampling and Copyright Law', *Entertainment Law Review*, 1992, Vol. 3 (5), p. 158.

Bently, L. and Sherman, B. 'The Ethics of Patenting: Towards a Transgenic Patent System', *Medical Law Review*, 1995, Vol. 3, p. 279.

Bently, L. and Sherman, B. 'Copyright Aspects of Art Laws', in Parmer, H. *Art Loans*. London: Kluwer, 1997, p. 239.

Bettig, R. *Copyrighting Culture: The Political Economy of Intellectual Property*. Boulder: Westview Press, 1996.

Beyer, L. 'Intentionalism, Art, and the Suppression of Innovation: Film Colorization and the Philosophy of Moral Rights', *Northwestern University Law Review*, 1988, Vol. 82 (4), p. 1011.

Bezroukov, N. 'Open Source Software Development as a Special Type of Academic Research (Critique of Vulgar Raymondism)', *First Monday*, 1999, Vol. 4 (10), http://www.firstmonday.org

Bezroukov, N. 'A Second Look at the Cathedral and Bazaar', *First Monday*, 1999, Vol. 4 (12), http://firstmonday.org

Bhabha, H. *The Location of Culture*. London: Routledge, 1994.

Binder, G. 'The Law-As-Literature Trope', in Freeman, M. and Lewis, A. (eds) *Law and Literature: Current Legal Issues Volume 2*. Oxford, New York: Oxford University Press, 1999, p. 63.

Bloom, H. *The Anxiety of Influence: A Theory of Poetry*. New York: Oxford University Press, 1973.

Boon, A, Greenfield, S. and Osborn, G. 'Complete Control? Judicial and Practical Approaches to the Negotiation of Commercial Music Contracts', *International Journal of the Sociology of Law*, 1996, Vol. 24, p. 89.

Booth, T. *The Cross Examination of Law and Literature: Cooper, Hawthorne, Stowe, and Melville*. Cambridge: Cambridge University Press, 1987.

Bourdieu, P. 'The Force of Law: Toward a Sociology of the Juridical Field', *The Hastings Law Journal*, 1987, Vol. 38, p. 805.

Bourdieu, P. *Language and Symbolic Power*. Cambridge, Massachusetts: Harvard University Press, 1991.

Bourdieu, P. *The Field of Cultural Production: Essays on Art and Literature*. Cambridge and Oxford: Polity Press, 1993.

Bourdieu, P. *On Television and Journalism*. London: Pluto Press, 1996.

Bowrey, K. *Don't Fence Me In: The Many Histories of Copyright Law*. Dissertation for the Doctor of Juridical Studies, Faculty of Law, University of Sydney, 1994.

Bowrey, K. 'Copyright, the Paternity of Artistic Works, and the Challenge Posed by Postmodern Artists', *Intellectual Property Journal*, 1994, Vol. 8, p. 285.

Bowrey, K. 'Copyright, Photography and Computer Works – The Fiction of an Original Expression', *The University of New South Wales Law Journal* 1995, Vol. 18 (2), p. 278.

Bowrey, K. 'Who's Writing Copyright's History?', *European Intellectual Property Review*, 1996, Vol. 18 (6), p. 322.

Bowrey, K. 'Art, Craft, Good Taste and Manufacturing: The Development of Intellectual Property Laws', *Law in Context*, 1997, Vol. 15 (1), p. 78.

Bowrey, K. 'Ethical Boundaries and Internet Cultures', in Bently, L. and Maniatis, S. (eds) *Intellectual Property and Ethics*. London: Sweet and Maxwell, London, 1998, p. 1.

Bowrey, K. 'The Making of Modern Intellectual Property Law: A Book Review', *European Intellectual Property Review*, 2000, Vol. 22 (7), p. 343.

Bowrey, K. 'The Outer Limits of Copyright Law: Where Law Meets Philosophy and Culture', *Law and Critique*, 2001, forthcoming.

Bowrey, K. 'Retrospective Futures?', *Media and Arts Law Review*, 2001, forthcoming.

Boyle, J. 'A Theory of Law and Information: Copyright, Spleens, Blackmail and Insider Training', *California Law Review*, 1992, Vol. 80 (6), p. 1413.

Boyle, J. *Shamans, Software, and Spleens: Law and the Construction of the Information Society*. Cambridge: Harvard University Press, 1996.

Boyle, J. 'Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors', *University of Cincinnati Law Review*, 1997, Vol. 66 (1), p. 177.

Boyle, J. 'The Relations of Reproduction', *Times Literary Supplement*, 4 July 1997.

Boyle, J. 'A Politics of Intellectual Property: Environmentalism for the Net', *Duke Law Journal*, 1997, Vol. 47, p. 86.

Bradbury, M. *No, Not Bloomsbury*. London: Arena, 1987.

Braithwaite, J. and Drahos, P. *Global Business Regulation*. Cambridge: Cambridge University Press, 2000.

Braithwaite, W. 'From Revolution to Constitution: Copyright, Compulsory Licences and the Parodied Song', *University of British Columbia Law Review*, 1984, Vol. 18 (1), p. 35.

Brissenden, A. and Van Ulzen, K. 'The Tankard Affair', *Dance Australia*, 1998, October/November, p. 26.

Britain, I. *Once an Australian: Journeys with Barry Humphries, Clive James, Germaine Greer and Robert Hughes*. Melbourne: Oxford University Press, 1997.

Brooks, R. 'Two-Day Stage Epic Ends Hall's Beautiful Friendship', *The London Times*, 20 January 2001.

Brown, J. 'MP3 Free-For-All', *Salon*, 3 February 2000.

Brown, M. 'Pants-Down Radio Humour Unacceptable to Hanson', *The Sydney Morning Herald*, 29 August 1997.

Browne, S. 'Liz Seeks Peace from the Storms of the Stage', *The Sydney Morning Herald, Northern Herald*, 23 May 1996, p. 31.

Brudenall, P. 'The Collective Administration of Copyright and Competition Policy: Tension in the Digital Age', *Australian Intellectual Property Journal*, 1997, Vol. 8 (3), p. 121.

Brudenall, P. 'Fair Dealing in Australian Copyright Law: Rights of Access under the Microscope', *University of New South Wales Journal*, 1997, Vol. 20 (2), p. 443.

Bruner, E. 'Abraham Lincoln as Authentic Reproduction: A Critique of Postmodernism', *American Anthropologist*, 1994, Vol. 96 (2), p. 397.

Buckland, A. 'Rap, Parody, and Fair Use: *Luther R Campbell aka Luke Skyywalker, ET AL* v *Acuff-Rose Music, Inc*', *Sydney Law Review*, 1995, Vol. 17, p. 592.

Burke, K. *A Grammar of Motives*. Berkeley and Los Angeles: University of California Press, 1945.

Burr, S. 'Artistic Parody', *Cardozo Arts and Entertainment Law Journal*, 1996, Vol. 14, p. 65.

Burstow, S. *Ochres*. Sydney: ABC Arts, 1996.

Buskirk, M. 'Commodification as Censor: Copyrights and Fair Use', *October*, 1992, Vol. 60, p. 83.

Butler, R. 'Two Readings of Gordon Bennett's The Nine Ricochets', *Eyeline*, 1992, Vol. 19, p. 18.

Butler, R. 'Duchamp's Queer Signature', *Arena Journal*, 1996, No. 6, p. 109.

Butler, R. *An Uncertain Smile: Australian Art in the '90s*. Sydney: Artspace, 1996.

Butler, R. (ed.) *What Is Appropriation? An Anthology of Critical Writings on Australian Art in the '80s and '90s.* Sydney: Power Publications, 1996.

Cain, M. 'The Symbol Traders' in Cain, M. and Harrington, C. (eds) *Lawyers in a Postmodern World: Translation and Transgression.* Buckingham: Open University Press, 1994.

Campbell, D. 'Constitutionality of Copyright Act Upheld', *Copyright World*, 1997, Vol. 70, p. 6.

Campbell, D. 'Display of Employer's Symbol by Union Infringed Copyright', *World Intellectual Property Report*, 1997, Vol. 11, p. 80.

Campbell, D. 'Pornographic Parody Was Not Copyright Infringement, Court Rules', *World Intellectual Property Report*, 1997, Vol. 11, p. 300.

Campbell, R. 'No Fault in Classic Beat-up', *The Canberra Times*, 30 July 1997, p. 11.

Capon, E. *Jeffrey Smart Retrospective.* Sydney: Art Gallery of New South Wales, 1999.

Carey, P. *Jack Maggs.* Brisbane: University of Queensland Press, 1997.

Carlin, J. 'Culture Vultures: Artistic Appropriation and Intellectual Property Law', *Columbia – VLA Journal of Law and the Arts*, 1988, Vol. 13, p. 103.

Carmenaty, R. 'Terry Gilliam's Brazil: A Film Director's Quest for Artistic Integrity in a Moral Rights Vacuum', *Columbia – VLA Journal of Law and the Arts*, 1989, Vol. 14, p. 91.

Carnachan, R. 'Sampling and the Music Industry: A Discussion of the Implications of Copyright Law', *Te Mata Koi: Auckland University Law Review*, 1999, Vol. 8 (4), p. 1033.

Casimir, J. 'A Tempting Taste Test', *The Sydney Morning Herald*, Icon, 24-30 June 2000, p. 8.

Cassrels, D. 'Grand Theft Audio', *The Courier-Mail*, 22 April 2000.

Castles, J. 'Tjungaringanyi: Aboriginal Rock', in Hayward, P. (ed.) *From Pop to Punk to Post-modernism*. Sydney: Allen and Unwin Pty Ltd, 1992, p. 25.

Chanan, M. *Repeated Takes: A Short History of Recording and its Effects on Music*. London: Verso, 1995.

Chaos Music. '15% Levy for the Distribution of Online Music Proposal', 10 August 2000, Media Centre, http://www.chaosmusic.com.

Chi, J. and Kuckles. *Bran Nue Dae*. Sydney and Broome: Currency Press and Magabala Books Aboriginal Corporation, 1991.

Chomsky, N. *Year 501: The Conquest Continues*. London: Verso, 1993.

Chuck D. 'Online Music: Will Small Music Labels and Entrepreneurs Prosper in The Internet Age', House Committee on Small Business, United States Congress, 24 May 2000.

Chumbawamba. 'Frequently Asked Questions', July 2000, http://www.chumba.com/-faq.htm

Clements, P. *The Improvised Play: The Work of Mike Leigh*. London: Methuen, 1983.

Cochrane, P. 'Wayne's Expanding World', *The Sydney Morning Herald*, 8 May 1996, p. 18.

Collie, I. 'Multimedia and Moral Rights', in Arts Law Centre of Australia. *Multimedia and the Law*. Sydney: Australian Film Television and Radio School, 1994, p. 10.

Collinge, A. 'Facing the Music', Insight, SBS, 16 November 2000.

Connor, S. 'Postmodern Performance' in *Postmodernist Culture: An Introduction to Theories of the Contemporary*. Oxford: Basil Blackwell, 1989.

Coombe, R. ''Same As It Ever Was': Rethinking the Politics of Legal Interpretation', *McGill Law Journal*, 1989, Vol. 34, p. 603.

Coombe, R. 'Room for Manoeuvre: Toward a Theory of Practice in Critical Legal Studies', *Law and Social Inquiry*, 1989, Vol. 14 (1), p. 69.

Coombe, R. *Cultural Appropriations: Intellectual Property Laws and the Cultural Politics of Postmodernism.* PhD Dissertation. Stanford University, 1992.

Coombe, R. 'Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue', *Texas Law Review*, 1991, Vol. 69, p. 1853

Coombe, R. 'The Celebrity Image and Cultural Identity: Publicity Rights and the Subaltern Politics of Gender', *Discourse*, 1991, Vol. 14 (3), p. 59.

Coombe, R. 'Postmodernity and the Rumor: Late Capitalism and the Fetishism of the Commodity/Sign', in Stearns, W. and Chaloupka, W. *Jean Baudrillard: The Disappearance of Art and Politics*. London: MacMillan, 1992.

Coombe, R. 'Tactics of Appropriation and the Politics of Recognition in Late Modern Democracies', *Political Theory*, 1993, Vol. 21, p. 411.

Coombe, R. 'The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy', *Canadian Journal of Law and Jurisprudence*, 1993, Vol. 6 (2), p. 249.

Coombe, R. 'Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders' in Woodmansee, M. and Jaszi, P. (eds) *The Construction of Authorship*. Durham and London: Duke University Press, 1994.

Coombe, R. 'Challenging Paternity: Histories of Copyright', *Yale Journal of Law and the Humanities*, 1994, Vol. 6, p. 397.

Coombe, R. 'Finding and Losing One's Self in the Topoi: Placing and Displacing the Postmodern Subject in Law', *Law and Society Review*, 1995, Vol. 29 (4), p. 599

Coombe, R. 'Left Out on the Information Highway', *Oregon Law Review*, 1996, Vol. 75, p. 237.

Coombe, R. 'Authorial Cartographies: Mapping Proprietary Borders in a Less-Than-Brave New World', *Stanford Law Review*, 1996, Vol. 48, p. 1357.

Coombe, R. 'The Properties of Culture and the Possession of Identity: Postcolonial Struggle and the Legal Imagination', in Ziff, B. and Rao, P. (eds) *Borrowed Power: Essays on Cultural Appropriation*. New Brunswick (NJ): Rutgers University Press, 1997.

Coombe, R. 'Critical Cultural Legal Studies', *Yale Journal of Law and the Humanities*, 1998, Vol. 10, p. 463.

Coombe, R. *The Cultural Life of Intellectual Properties: Appropriation, Authorship, and the Law*. Durham and London: Duke University Press, 1998.

Coombe, R. 'Intellectual Property, Human Rights, and Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity', *Global Legal Studies Journal*, 1998, Vol. 6, p. 59.

Coombe, R. and Cohen, J. 'The Law and Late Modern Culture: Reflections on *Between Facts and Norms* from the Perspective of Critical Cultural Legal Studies', *Denver University Law Review*, 1999, Vol. 76 (4), p. 1029.

Coombes, A. 'The Recalcitrant Object: Culture Contact and the Question of Hybridity', in Barker, F., Hulme, P., and Iversen, M. *Colonial Discourse, Postcolonial Theory*. Manchester: Manchester University Press, 1994, p. 89.

Cooper, M. 'Moral Rights and the Australian Film and Television Industries', *Copyright Reporter*, 1997, Vol. 15 (4), p. 166.

Copyright Law Reform Committee. *Copyright Reform: A Consideration of Rationales, Interests and Objectives*. Canberra: The Attorney-General's Department, 1996.

Copyright Law Reform Committee. *Fair Dealing under the Copyright Act*. Canberra: The Attorney-General's Department, 1997.

Copyright Law Review Committee. *Simplification of the Copyright Act 1968: Part 1. Exceptions to the Exclusive Rights of Copyright Owners*. Canberra: The Attorney-General's Department, 1998.

Copyright Law Review Committee. *Simplification of the Copyright Act 1968: Part 2. Rights and Subject Matter*. Canberra: Attorney-General's Department, 1999.

Copyrites. 'Film Directors – Consultation on Copyright', Canberra: Department of Communications, Information Technology and the Arts, 2000, Issue 32, p. 15.

Coslovich, G. 'Writing the Wrongs', *The Age*, 29 September 1998.

Cramer, S. (ed.) *Postmodernism: A Consideration of the Appropriation of Aboriginal Imagery*. Brisbane: Institute of Modern Art, 1989.

Crosby, M. 'Performers and the WIPO Performances and Phonograms Treaty' in Saunders, D. and Sherman, B. (eds) *From Berne to Geneva: Recent Developments in International Copyright and Neighbouring Rights*. Brisbane: Australian Key Centre for Cultural and Media Policy, 1997.

Curnow, W. *Imants Tillers and the 'Book of Power'*. Sydney: Craftsman House, 1998.

Darmopil, S. 'New Rights for Performers', *Artlines*, 1998, Vol. 3 (1), p. 5.

Darnton, R. *The Literary Underground of the Old Regime*. Cambridge, Mass.: Harvard University Press, 1982.

Darnton, R. *The Kiss of Lamourette: Reflections in Cultural History*. New York and London: WW Norton And Company, 1990.

Darnton, R. *The Forbidden Best-Sellers of Pre-Revolutionary France*. New York and London: WW Norton and Company, 1995.

Darville, H. *The Hand that Signed the Paper*. Sydney: Allen and Unwin, 1994.

Davidson, J. 'How Big Business Can Fight Piracy', *The Australian Financial Review*, 3-4 June 2000, p. 22.

Davidson, J. 'Napster Beats Free Sex, Notes Business', *The Australian Financial Review*, 3 August 2000.

Davidson, J. 'US Court Downloads On Napster', *The Australian Financial Review*, 14 February 2001, p. 1.

Davidson, J. 'Music Labels' Grip on Artists Won't Last', *The Australian Financial Review*, 14 February 2001, p. 26.

Davies, T. (ed) 'Hou Leong', *Artlines*, 1995, Vol. 1 (1), p. 8.

Davila, J. *Hysterical Tears*. Melbourne: Greenhouse Books, 1985.

Davila, J. *The Mutilated Pieta*. Sydney: Art & Text Monograph, 1985.

Davila, J. 'Aboriginality: A Lugubrious Game?', *Art & Text*, 1987, No. 23, p. 53.

Davila, J. *Juanito Laguna*. London: Christendale Gallery, 1995.

Davila, J. 'Dear A&D Reader', *Art and Cultural Difference Hybrids and Cultures. Art and Design Profile, No. 43*. London: Academy Group, 1995.

Davila, J. 'The Art Curator, Our Cultural Transponder', *Arena Journal*, 1996, No. 6, p. 117.

Davila, J. 'Friends of the People'. Brisbane: Institute of Modern Art, 1997.

Davis, M. *Gangland: Cultural Elites and the New Generationalism*. Sydney: Allen and Unwin Pty Ltd, 1997.

Davison, M. 'Parallel Importing of Copyright Material in a Digital Age: Why It Should Be Lawful and Why It May Never Be', *Federal Law Review*, 1997, Vol. 25, p. 262.

Dawson, N. 'The Law of Literature: Folklore and Law' in *Tall Stories?: Reading Law and Literature*, Aldershot: Dartmouth Publishing Company, 1996.

Dean, A. 'NetPD Wants to be Web's Police Department', Forbes.com, 5 May 2000.

Dean, M. *Critical and Effective Histories: Foucault's Methods and Historical Sociology* London and New York: Routledge, 1994.

Deck, D. 'Fine Tuning Fair Use Music Parody: A Proposal for Reform in Acuff-Rose Music. v Campbell', *University of Detroit Mercy Law Review*, 1993, Vol. 71, p. 59.

Department of Communications, Arts and the Information Economy. *Securing the Future: The Major Performing Arts Discussion Paper*. Canberra: Australian Government Publishers, 1999.

Depel, C. '2 Live Crew's Commercial Parody Raps Knuckles of US Copyright Law', *European Intellectual Property Review*, 1994, Vol. 16 (8), p. 358.

Derrida, J. *Spectres of Marx: The State of Debt, the Work of Mourning and the New International*. New York: Routledge, 1994.

Dery, M. 'Culture Jamming: Hacking, Slashing and Sniping in the Empire of Signs', *Essential Media*, http://www.essentialmedia.com/Shop/Dery.html

Dessaix, R. (ed.) *Speaking Their Minds: Intellectuals and the Public Culture in Australia*. Sydney: ABC Books, 1998.

Dezalay, Y. and Garth, B. *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*. Chicago: University of Chicago, 1996.

Di Leonardo, M. *Exotics at Home: Anthropologies, Others, American Modernity*. Chicago: The University of Chicago Press, 1998.

Dibble, J. 'You Say You Want a Revolution?', *Intellectual Capital*, http://www.intellectualcapital.com, 20 May 1999.

Dibble, J. 'Idee Fixe: Immaterial World', *Feed Magazine*, 17 April 2000.

Dixon, J. and Cassidy, E. *Virtual Futures*. London, New York: Routledge, 1998.

Doan, A. 'NetPD Wants To Be Web's Police Department', Forbes.com, 5 May 2000.

Dobrez, L. 'What Colour Is White? A European Experience of Aboriginal Australia', in Hardy, J. *Stories of Australian Migration*. Kensington: University of New South Wales Press, 1988.

Dobrez, L. (ed.) *Identifying Australia in Postmodern Times*. Canberra: Bibliotech, 1994.

Donovan, P. 'Napster: The Great Refrain Robbery', *The Age*, News Extra, 15 July 2000, p. 2.

Donovan, Z. 'New Art Controversy Features the Queen', *The Adelaide Advertiser*, 20 January 1992, p. 3.

Drahos, P. 'Decentring Communication: The Dark Side of Intellectual Property', in Campbell, T., and Sadurski, W. (eds). *Freedom of Communication*. Aldershot: Dartmouth, 1994, p. 249.

Drahos, P. 'Information Feudalism in the Information Society', *The Information Society*, 1995, Vol. 11, p. 209.

Drahos, P. 'Community and Creativity: The Role of Copyright', *Copyright Reporter*, 1995, Vol. 13 (1), p. 4.

Drahos, P. 'The Visual Artist in the Global Information Economy', *Communications Law Bulletin*, 1995, Vol. 14 (3), p. 1.

Drahos, P. 'Global Property Rights in Information: The Story of TRIPS at the GATT', *Prometheus*, 1995, Vol. 13 (1), p. 6.

Drahos, P. 'Global Law Reform and Rent-Seeking: The Case of Intellectual Property', *Australian Journal of Corporate Law*, 1996, Vol. 7, p. 45.

Drahos, P. *A Philosophy of Intellectual Property*. Aldershot: Dartmouth Publishing Company, 1996.

Drahos, P. 'Indigenous Knowledge and the Duties of Intellectual Property Owners', *Intellectual Property Journal*, 1997, Vol. 11, p. 179.

Drahos, P. 'States and Intellectual Property: The Past, the Present and the Future' in Saunders, D. and Sherman, B. (eds) *From Berne to Geneva: Recent Developments in International Copyright and Neighbouring Rights*. Brisbane: Australian Key Centre for Cultural and Media Policy, 1997.

Drahos, P. 'Biotechnology Patents, Markets And Morality', *European Intellectual Property Review*, 1999, Vol. 21 (9), p. 441.

Drahos, P. (ed.) *Intellectual Property*. Aldershot: Ashgate, Dartmouth, 1999.

Dubecki, L. 'Net Music Bonanza Plays On', *The Age*, 31 July 2000.

Dworkin, G. 'Authorship of Films and the European Commission Proposals for Harmonising the Term of Copyright', *European Intellectual Property Review*, 1993, Vol. 15 (5), p. 16.

Eagleton, T. *Literary Theory: An Introduction*. Oxford: Blackwell, 1983.

Eagleton, T. 'How Do We Feed the Pagodas?' *The New Statesman*, 20 March 1987, p. 8.

Eagleton, T. 'Capitalism, Modernism and Postmodernism', in Lodge, D. (ed.) *Modern Criticism and Theory: A Reader*. London: Longman, 1988, p. 393.

Eagleton, T. *The Illusions of Postmodernism*. Oxford: Blackwell Publishers, 1996.

Eagleton, T. 'The Estate Agent', *London Review of Books*, 2 March 2000, p. 10.

Eccles, J. ''Heretic' Preceded by a Clash of Orthodoxies', *The Sunday Age, Agenda*, 14 July 1996, p. 7.

Edelman, B. *Ownership of the Image: Elements for a Marxist Theory of Law*. London: Routledge, 1979.

Edelman, B. 'The Law's Eye: Nature and Copyright', in Sherman, B. and Strowel, A. (eds) *Of Authors And Origins: Essays On Copyright Law*. Oxford: Clarendon Press, 1994, p. 79.

Editorial. 'Heretic and Players', *The Sydney Morning Herald*, 10 April 1996.

Editorial. 'Freedom on Line in Digital Curbs', *The Australian Financial Review*, 14 February 2001, p. 34.

Editorial. 'It's Time To Tame Wild World Web', *The West Australian*, 9 May 2000.

Eisenberg, J. 'Censorship by Brute Force: Free Speech after Andres Serrano', *Communications Update*, 1997, p. 4.

Eisenberg, J. 'The Perils of Pauline', *Communication Update*, 1998, No. 148, p. 18.

Eisenberg, J. 'Sex, Satire and Middle-Class Morality: Reflections on Some Recent Defamation Cases', *Media International Australia*, 1999, Vol. 92, p. 19.

Ellinson, D. 'Unauthorised Reproduction of Traditional Aboriginal Art', *The University of New South Wales Law Journal*, 1994, Vol. 17 (2), p. 327.

Ellinson, D. 'Protecting Copyright Creators: The Proposed Moral Rights Legislation', *Law Institute Journal*, 1995, p. 1129.

Ellis, C. *Aboriginal Music: Education for Living*. Brisbane: University of Queensland Press, 1985.

Endelman, H. 'Regulating Culture: The Audiovisual Controversy in the GATT Accord', *Boston College International and Comparative Law Review*, 1995, Vol. 18 (2), p. 443.

Enright, N. *Blackrock*. Sydney: Currency Press, 1996.

Evans, B. 'Low-Risk Policy Pays for STC', *The Sydney Theatre Company*, 22 July 1994, p. 20.

Faunce, T. and Drahos, P. 'Trade Related Aspects of Intellectual Property Rights (TRIPS) and the Threat to Patients: A Plea for Doctors to Respond Internationally', *Medicine and Law*, 1998, Vol. 17, p. 299.

Feld, S. 'Notes on the World Beat,' *Public Culture Bulletin*, 1988, Vol. 1 (1), p. 31.

Feld, S. *Sound and Sentiment: Birds, Weeping, Poetics and Song in Kaluli Expression*, Philadelphia: University of Pennsylvania Press, 1990.

Feld, S. 'Voices in the Rainforest', *Public Culture*, 1991, Vol. 4 (1), p. 131.

Feld, S. 'From Schizophrenia to Schismogenesis: On the Discourses and Commodification Processes of "World Music" and "World Beat"'

in Keil, C. and Feld, S. *Music Grooves*. Chicago: University of Chicago Press, 1994.

Fern, L. *William Robinson*. Sydney: Craftsman House, 1995.

Fuegi, J. *Brecht and Company: Sex, Politics, and the Making of the Modern Drama*. New York : Grove Press, 1994.

Fischer, G. *The Mudrooroo/Muller Project: A Theatrical Casebook*. Sydney: University of New South Wales Press, 1993.

Fish, S. *Is There a Text in This Class? The Authority of Interpretative Communities*. Cambridge: Harvard University Press, 1980.

Fish, S. *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*. Durham: Duke University Press, 1989.

Fisher III, W. 'Reconstructing the Fair Use Doctrine', *Harvard Law Review*, 1988, Vol. 101 (8), p. 1659.

Fishkoff, S. 'Pain or "Shine"', *The Jerusalem Post*, 23 February 1997.

Fist, S. 'Wolf Playing at Muso's Door', *The Australian*, 16 May 2000.

Fitzpatrick, P. *The Mythologies of Modern Law*. London and New York: Routledge, 1992.

Foley, F. 'Traditional Boundaries, New Perspectives', *Periphery*, February 1994, No. 18, p. 8.

Foss, P. 'Mammon or Millennial Eden? Interview with Imants Tillers', *Art & Text*, 1988, Vol. 23/ 24, p. 124.

Foss, P. 'Juanito Laguna in the Banana Republic', *Art & Text*, 1992, No. 41, p. 50.

Foster, H. (ed.) *Postmodern Culture*. London: Pluto Press, 1983.

Foster, H. *Recodings – Art, Spectacle, Cultural Politics*. Seattle: Bay Press, 1985.

Fourmile, H. 'Some Background to Issues Concerning the Appropriation of Aboriginal Imagery', in Cramer, S. (ed.) *Postmodernism: A Consideration of the Appropriation of Aboriginal Imagery*. Brisbane: Institute of Modern Art, 1989, p. 6.

Fourmile, H. 'Aboriginal Heritage Legislation and Self-Determination', *Australian-Canadian Studies*, 1989, Vol. 7 (1-2), p. 45.

Fray, P. and Nicholas, G. 'Openings', *The Sydney Morning Herald*, 28 April 1998, p. 24

Freeman, D. *Margaret Mead and Samoa: The Unmaking of an Anthropological Myth*. Cambridge, Mass.: Harvard University Press, 1983.

Freeman, J. 'Sing Sing Rejoices in Shared History', *The Sydney Morning Herald*, 21 May 1996, p. 13.

Friedman, B. 'Note: from Deontology to Dialogue: The Cultural Consequences of Copyright', *Cardozo Arts and Entertainment Law Journal*, 1994, Vol. 13, p. 157.

Frish, M. *A Shared Authority: Essays on the Craft and Meaning of Oral History and Public History*. Albany: State University of New York, 1990.

Frow, J. 'Repetition and Limitation: Computer Software and Copyright Law', *Screen*, 1988, Vol. 29 (1), p. 4.

Frow, J. 'Face Value: A Review of *Contested Culture* by Jane Gaines', *Cultural Studies*, 1991, Vol. 5 (3), p. 396.

Frow, J. 'Cultural Markets', in Jacka, E. (ed.) *Continental Shift: Globalisation and Culture*. Sydney: Local Consumption Publications, 1992, p. 7.

Frow, J. 'Timeshift: Technologies of Reproduction and Intellectual Property', *Economy and Society*, 1994, Vol. 23 (3), p. 290.

Frow, J. *Cultural Studies and Cultural Value.* Oxford: Clarendon Press, 1995.

Frow, J. 'Elvis' Fame: The Commodity Form and the Form of the Person', *Cardozo Studies in Law and Literature,* 1995, Vol. 7 (2), p. 131.

Frow, J. 'Information as Gift and Commodity', *New Left Review,* 1996, No. 219, p. 89.

Frow, J. *Time and Commodity Culture: Essays in Cultural Theory and Postmodernity.* Oxford: Oxford University Press, 1997.

Frow, J. 'Public Domain and Collective Rights in Culture', *Intellectual Property Journal,* 1998, Vol. 13, p. 39.

Frow, J. 'Res Publica', *Australian Book Review,* 1999, Vol. 208, p. 23.

Frow, J. 'Public Domain and the New World Order in Knowledge', *Social Semiotics,* 2000, Vol. 10 (2), p. 173.

Fujiwara, C. 'The Third Voice', *Feed Magazine,* 17 March 2000, http://www.feedmag.com

Gaines, J. *Contested Culture: The Image, the Voice and the Law.* London: British Film Industry Publishing, 1992.

Gaines, J. 'The Absurdity of Property in the Person', *Yale Journal Law and Humanities,* 1998, Vol. 10, p. 537.

Gallagher, C. and Greenblatt, S. *Practicing New Historicism.* Chicago and London: The University of Chicago Press, 2000.

Gamache, B. 'Union Display of Employer's Mark Does Not Constitute "Use" of Mark', *World Intellectual Property Report,* 1997, Vol. 11, p. 40.

Garon, J. 'Director's Choice: The Fine Line between Interpretation and Infringement of an Author's Work', *Columbia – VLA Journal of Law and the Arts,* 1988, Vol. 12, p. 277.

Gelder, K. and Jacobs, J. *Uncanny Australia: Sacredness and Identity in a Postcolonial Nation*. Melbourne: Melbourne University Press, 1998.

Geller, P.E. 'La Propriété Littéraire et Artistique: A Book Review', *Intellectual Property Journal*, 1990, Vol. 6, p. 113.

Gengler, B. 'Giant Edel Joins Rebel Napster', *The Australian*, IT Section, 9 January 2001, p. 34.

Gieryn, T. *Cultural Boundaries of Science: Credibility on the Line*. Chicago: University of Chicago, 1999.

Gilbert, H. 'Pan-Aboriginality Meets Post-Modernism? – A Review of the Mudrooroo/Muller Project', *CRNLE Reviews Journal*, 1993, Vol. 2, p. 135.

Gilbert, H. *Sightlines: Race, Gender, and Nation in Contemporary Australian Theatre*. The University of Michigan: The University of Michigan Press, 1998.

Gilbert, H. and Tompkins, J. *Post-Colonial Drama: Theory, Practice, Politics*. London: Routledge, 1996.

Gilbey, C. *The Infinite Digital Juxebox*, Hardie Grant Books, Melbourne, 2000.

Giles, S. *Bertolt Brecht and Critical Theory: Marxism, Modernity and the Threepenny Lawsuit*. Bern: Peter Lang, 1997.

Gilroy, P. *The Black Atlantic: Modernity and Double Consciousness*. London: Verso, 1993.

Gilroy, P. *Small Acts: Thoughts on the Politics of Black Cultures*. London: Serpent's Tail, 1993.

Ginsburg, J. 'Moral Rights in a Common Law System', in Anderson, P. and Saunders, D. (eds) *Moral Rights Protection in a Copyright System*. Brisbane: Griffith University, 1992, p. 13.

Ginsburg, J. 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America', in Sherman, B. and Strowel, A. (eds) *Of Authors and Origins: Essays on Copyright law.* Oxford: Clarendon Press, 1994.

Goldberg, D. and Bernstein, R. 'Demi Moore, Dr. Seuss and Seinfeld', *The New York Law Journal*, 16 May 1997, p. 1.

Goldberg, R.L. *Performance Art: From Futurism to the Present.* London: Thames and Hudson, 1988.

Goldsmith, A. 'Is There Any Backbone in this Fish? Interpretative Communities, Social Criticism, and Transgressive Legal Practice', *Law and Social Inquiry*, 1998, Vol. 23 (2), p. 373.

Goldsworthy, P. 'The Dewogging of Helen Demidenko' in *Navel Gazing.* Melbourne: Penguin Books, 1998, p. 26.

Golvan, C. *Words and Law.* Melbourne: Penguin Books, 1989.

Golvan, C. 'Aboriginal Art and the Protection of Indigenous Cultural Rights', *Aboriginal Law Bulletin*, 1992, Vol. 2 (56), p. 5.

Golvan, C. 'Writers' Agreements with Publishing and Strategies for Overcoming Unfair Contracting Practices', in Turner, J. and Williams, P. (eds) *The Happy Couple: Law and Literature.* Sydney: Federation Press, 1994, p. 233.

Golvan, C. 'Aboriginal Art and Copyright – An Overview and Commentary Concerning Recent Developments', *Culture and Policy*, 1996, Vol. 7 (3), p. 5.

Golvan, C. 'Aboriginal Copyright – an Update', *Media and Arts Law Review*, 1997, Vol. 2, p. 55.

Golvan, C. 'Aboriginal Art and Copyright: An Overview and Commentary Concerning Recent Developments', *European Intellectual Property Review*, 1999, Vol. 21 (11), p. 599.

Golvan, C. and McDonald, M. *Writers and the Law.* Sydney: The Law Book Company Limited, 1986.

Gordon, W. 'Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship', *The University of Chicago Law Review*, 1990, Vol. 57, p. 1009.

Goreman, R. 'Interview with Jan Sardi', PM Program, Australian Broadcasting Corporation, 20 June 1997.

Gray, S. 'Wheeling, Dealing and Deconstruction: Aboriginal Art and the Land Post-Mabo', *Aboriginal Law Bulletin*, Vol 3, No. 63, 1993, p. 10.

Gray, S. 'Aboriginal Designs and Copyright: Can the Australian Common Law Expand to Meet Aboriginal Demands?' in Turner, J. and Williams, P. (eds) *The Happy Couple: Law and Literature.* Sydney: The Federation Press, 1994, p. 241.

Gray, S. 'Enlightenment or Dreaming? Attempting to Reconcile Aboriginal Art and European Law', *Arts and Entertainment Law Review*, 1995, Vol. 2, p. 18.

Gray, S. 'Freedom or Fossilisation: Proposed Legislative "Protection" for the Work of Aboriginal Artists', 50th Anniversary Conference Australasian Law Teachers' Association, *Cross Currents: Internationalism, National Identity and Law*, 1995.

Gray, S. 'Squatting in Red Dust: Non-Aboriginal Law's Construction of the "Traditional" Aboriginal Artist', *Law in Context*, 1996, Vol. 14 (2), p. 29.

Gray, S. 'Black Enough? Urban and Non-Traditional Aboriginal Art and Proposed Legislative Protection for Aboriginal Art', *Culture and Policy*, 1996, Vol. 7 (3), p. 29.

Gray, S. 'Vampires Round the Campfire: Indigenous Intellectual Property Rights and Patent Laws', *Alternative Law Journal*, 1997, Vol. 22 (2), p. 60.

Gray, S. 'X-Ray Wallabies and Mickey Mouse: The Commodification of the "Authentic" In Aboriginal Art', *Overland*, 2000, Vol. 159, p. 124.

Gray, S. 'Blot on the Landscape', *The Australian's Review of Books*, 2000, Vol. 5 (10), p. 8.

Grayson, I. 'Napster Must Face the Music', *The Australian*, 8 August 2000, p. 34.

Gredley, E. and Maniatis, S. 'Parody: A Fatal Attraction? Part 1: The Nature of Parody and its Treatment in Copyright', *European Intellectual Property Review*, 1997, Vol. 19 (7), p. 339.

Gredley, E. and Maniatis, S. 'Parody: A Fatal Attraction? Part 2: Trade Mark Parodies', *European Intellectual Property Review*, 1997, Vol. 19 (8), p. 412.

Greenberg, L. 'The Art of Appropriation: Puppies, Piracy and Post-modernism', *Cardozo Arts and Entertainment Law Review*, 1992, Vol. 11, p. 1.

Greer, G. 'Selling Off the Dreaming', *The Sydney Morning Herald*, 6 December, 1997, p. 5.

Grenville, K. *Joan Makes History* Brisbane: University of Queensland Press, 1988.

Grishin, S. *Garry Shead: The D.H. Lawrence Paintings*. Sydney: Craftsman House, 1993.

Grishin, S. *Garry Shead: Encounters with Royalty*. Sydney: Craftsman House, 1997.

Gruzauskas, D. 'Performers' Rights: The Right of Personality and the Possibility of a Proprietary Right', *Australian Intellectual Property Journal*, 1995, Vol. 6, p. 92.

Haas, P. 'Introduction: Epistemic Communities and International Policy Coordination', *International Organization*, 1992, Vol. 46 (1), p. 1.

Halbert, D. 'Intellectual Property Piracy: The Narrative Construction of Deviance', *International Journal for the Semiotics of Law*, 1997, Vol. 10, p. 55.

Halbert, D. *Intellectual Property in the Information Age: The Politics of Expanding Ownership Rights*. Westport, Conn.: Quorum, 1999.

Hall, M. 'Copyright – Moral Rights', *Australian Intellectual Property Law Bulletin*, 1997, Vol. 9 (10), p. 148.

Hallett, B. 'Now the Carlton Crucible Circus is Over, On with the Play', *The Sydney Morning Herald*, 29 April 1998, p. 5.

Hallett, B. 'Road Takes Us on a Joyous Journey', *Sydney Morning Herald*, 17 August 1998, p. 12.

Hamilton, I. *In Search of J.D. Salinger*. London: Heinemann, 1988.

Hamilton, I. *Writers in Hollywood 1915-1951*. New York: Harper and Row Publishers, New York, 1990.

Hamilton, I. *Keepers of the Flame: Literary Estates and the Rise of Biography*. London: Hutchinson, 1992.

Hamilton, M. 'Appropriation Art and the Imminent Decline in Authorial Control over Copyrighted Works', *Journal of the Copyright Society of the USA*, 1994, Vol. 42, p. 93.

Hardie, M. 'The Aboriginal Copyright Cases', *Artlink*, 1990, Vol. 10, p. 39.

Hardie, M. 'Current Litigation in Native Title and Intellectual Property: Bulun Bulun and Milpurrurru v R&T Textiles', *Aboriginal Law Bulletin*, 1997, Vol. 3, p. 18.

Harmon, L. 'Law, Art, and the Killing Jar', *Iowa Law Review*, 1994, Vol. 79, p. 367.

Harris, M. 'Scientific and Cultural Vandalism', *Alternative Law Journal*, 1996, Vol. 21 (1), p. 28.

Harris, M. 'The Narrative of Law in the Hindmarsh Island Royal Commission', *Law in Context*, 1996, Vol. 14 (2), p. 115.

Harris, R. 'Metallica Sues over Copyright', *The Australian*, 9 May 2000.

Harris, R. 'Napster Ordered to Stop Downloads', *The Age*, 13 February 2001.

Harris, S. 'Arts Uproar over Defaced Painting', *The Adelaide Advertiser*, 27 September 1991, p. 1.

Harris, S. 'Dabbling in Darling Daubs', *The Adelaide Advertiser*, 11 November 1997.

Harrison, W. 'The Theatre of War', *The Sydney Morning Herald*, 19 December 1994, p. 14.

Harrison, W. 'From the Director', *The Sydney Morning Herald, The Good Weekend*, 27 July 1996, p. 8.

Harrison, W. 'STC Boss Laments Leo's Show', *The Sydney Morning Herald*, 16 January 1999, p. 7.

Harrison, W. 'Cost of Festivals Higher than You Think', *The Sydney Morning Herald*, 16 January 1999, p. 47.

Harty, J. 'Directors Dropped from Rights Scheme', *Encore*, 28 June, 2000.

Harvey, D. *The Condition of Post-Modernity*. Cambridge: Basil Blackwell Ltd, 1989.

Hayward, P. *Music at the Borders: Not Drowning Waving and their Engagement with Papua New Guinean Culture (1986-96)*. Sydney: John Libbey and Company Ltd, 1998.

Hayward, P. (ed.) 'Access to the Mainstream: The Case of Yothu Yindi' in *Sound Alliances: Indigenous Peoples, Cultural Politics, and Popular Music In The Pacific*. London and New York: Cassell, 1998, p. 175.

Heilemann, J. 'David Boies: The Wired Interview', *Wired*, October 2000, Vol. 8 (10).

Heyward, M. *The Ern Malley Affair*. Brisbane: University of Queensland Press, 1993.

Hicks, S. 'From Sundance to Golden Globes: How Shine Seduced Hollywood' in Caputo, R. and Burton, G. *Second Take: Australian Film-makers Talk*. Sydney: Allen and Unwin, 1999, p. 305.

Higgins, D. 'Metallica Gets Heavy with its Fans', *The Sydney Morning Herald*, 5 May 2000, p. 1.

Higgins, D. 'Download and Be Damned', *The Sydney Morning Herald*, 19 May 2000, p. 15.

Higgins, D. 'Slipping through the Net', *The Sydney Morning Herald*, 22 June 2000, p. 38.

Higgins, D. 'The War for Words', *The Sydney Morning Herald* , 30 June 2000, p. 15.

Higgins, D. 'Trouble in the Pumpkin Patch as Band Puts Album on Web', *The Sydney Morning Herald*, 14 September 2000, p. 3.

Hill, K. 'Exit Playwright, Stage Left, Enter Alarms and Incursions', *The Sydney Morning Herald*, 27 April 1998, p. 3.

Hoorn, J. 'Positioning the Post-Colonial Subject: History and Memory in the Art of Gordon Bennett', *Art and Australia*, 1993, Vol. 31 (2), p. 216.

Hope, D. 'Bangarra Aims for the Real Thing', *The Weekend Australian*, 16-17 September 2000, p. 24.

House of Representatives Standing Committee on Legal and Constitutional Affairs. *Advisory Report on the Copyright Amendment (Digital Agenda) Bill 1999.* Canberra: The Parliament of the Commonwealth Of Australia, 1999.

House of Representatives Standing Committee on Legal and Constitutional Affairs. *Cracking Down on Copycats: Enforcement of Copyright in Australia.* Canberra: The Parliament of the Commonwealth Of Australia, 2000.

Howard, J. 'Bangarra Dance Theatre, 10th Birthday Gala Fundraising Dinner', Transcript of the Prime Minister, Bangarra Dance Theatre, Walsh Bay, 29 October 1999.

Hryce, M. 'Performers' Rights Now – MEAA's View' *Artlines*, 1998, Vol. 3 (1), p. 18.

Hugenholtz, P.B. 'Copyright, Contract and Code: What Will Remain of the Public Domain?', *Brooklyn Journal of International Law*, 2000, Vol. 26, p. 77.

Huggins, J. 'Respect v Political Correctness', *Australian Author*, 1994, Vol. 26 (3), p. 12.

Hughes, R. *The Shock of the New.* London: Thames and Hudson, 1980, 1991.

Hughes, R. *Nothing if not Critical: Selected Essays on Art and Artists.* London: Harper Collins, 1990.

Hughes, R. *Culture of Complaint: The Fraying of America.* New York: Oxford University Press, 1993.

Hughes, R. *American Visions.* London: The Harvell Press, 1997.

Hughes, S. 'Droit De Suite: A Critical Analysis of the Approved Directive', *European Intellectual Property Review*, 1997, Vol. 19 (12), p. 695.

Hull, C. 'Net Effect: Criminal Records and Free Music Online Pose a Social and Economic Threat', *The Canberra Times*, 6 May 2000.

Hunt, S. '(I'm a) Back Door Man', *Perfect Beat*, 2000, Vol. 4 (4), p. 29.

Hunt, S. and Stratton, J. 'Two Paulines to Choose from: An Interview with Simon Hunt/Pauline Pantsdown', *Perfect Beat*, Vol. 4 (4), p. 34.

Hutcheon, L. *A Theory of Parody: The Teachings of Twentieth-Century Art Forms*. New York and London, 1985.

Hutchings, A. 'Authors, Art, and the Debasing Instinct: Law and Morality in the Carmina Burana Case', *Sydney Law Review*, 1997, Vol. 19 (3), p. 385.

Imprimatur. *The Imprimatur Music Trial Report*. http://www.musictrial.com/contents.html.

Indyk, I. 'Assimilation or Appropriation: Uses of European Literary Forms in Black Australian Writing', *Australian Literary Studies*, 1992, Vol. 15 (4), p. 249.

Indyk, I. 'Future Fantastic', *The Australian's Review of Books*, 1998, Vol. 3 (5), p. 10.

Intellectual Property and Competition Review Committee. *Interim Report*. Canberra: Australian Government, 2000.

Intellectual Property and Competition Review Committee. *Review of Intellectual Property Legislation under the Competition Principles Agreement*. Canberra: Australian Government, 2000.

Isaacs, J. *Emily Kngwarreye - Paintings*. Sydney: Craftsman House, 1998.

Jacka, E. (ed) *Continental Shift: Globalisation and Culture*. Sydney: Local Consumption Productions, 1992.

James, B. 'Tillers Goes Bush', *The Sydney Morning Herald*, 5 June 1999.

James, M. 'Some Joy at Last for Cinematographers', *European Intellectual Property Review*, 2000, Vol. 22 (3), p. 131.

Jameson, F. 'Postmodernism and Consumer Society', in Foster, H. (ed.) *Postmodern Culture*. London: Pluto Press, 1983, p. 111.

Jameson, F. 'The Politics of Theory: Ideological Positions in the Postmodernism Debate', in Lodge, D. (ed.) *Modern Criticism and Theory: A Reader*. London: Longman, 1988, p. 373.

Janke, T. 'Protecting Australian Indigenous Arts and Cultural Expression: A Matter of Legislative Reform or Cultural Policy?' *Culture and Policy*, 1996, Vol. 7 (3), p. 13.

Janke, T. *Our Culture, Our Future: Proposals for The Recognition and Protection of Indigenous Cultural and Intellectual Property*. Sydney: Australian Institute of Aboriginal and Torres Strait Islander Studies, 1997.

Janke, T. *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights*. Sydney: Australian Institute of Aboriginal and Torres Strait Islander Studies, 1998.

Janke, T. 'Respecting Indigenous Cultural and Intellectual Property Rights', *The University of New South Wales Law Journal*, 1999, Vol. 22 (2), p. 631.

Jaszi, P. 'Toward a Theory of Copyright: The Metamorphoses of 'Authorship'', *Duke Law Journal*, 1991, p. 455.

Jaszi, P. and Woodmansee, M. 'The Ethical Reaches of Authorship', *The South Atlantic Quarterly*, Vol. 95 (4), 1996, p. 947.

Jencks, C. *What Is Post-modernism?* London: Academy Editions, 1986.

Jinman, R. 'Vandalism or Enhancement', *The Australian*, 3 December 1996, p. 14.

Johnson, C. 'Ideas on Appropriation: The Emergence of NAISA and Bangarra', in Hillis, C. (ed.) *Heritage and Heresy: Green Mill Papers 1997*. Canberra: Australian Dance Council, 1998, p. 47.

Johnson, T. 'Re-appropriation', in Cramer, S. (ed.) *Postmodernism: A Consideration of the Appropriation of Aboriginal Imagery*. Brisbane: Institute of Modern Art, 1989, p. 11.

Johnson, T. *Across Cultures*. Melbourne: University of Melbourne Gallery, 1993.

Johnson, V. 'Mona Lisa and the Highway Blues: Aboriginal Art in the Museum Context, *Eyeline*, 1991, Vol. 14, p. 19.

Johnson, V. 'The Unbounded Biennale: Aboriginal Art Now', *Art and Australia*, 1993, Vol 31. (1), p. 49.

Johnson, V. *Copyrites: Aboriginal Art in the Age of Reproductive Technologies*. Sydney: National Indigenous Arts Advocacy Association and Macquarie University, 1996.

Johnson, V. *Michael Jagamara Nelson*. Sydney: Craftsman House, 1997.

Jonas, S. 'Tony Kushner's 'Angels'' in Vorlicky, R. (ed.) *Tony Kushner in Conversation*. The University of Michigan Press: Ann Arbor, 1998, p. 157.

Jonas, S, Proehl, G. and Lupu, M. (eds) 'Tony Kushner's "Angels"' in *Dramaturgy in American Theater: A Source Book*. New York: Harcourt Brace, 1997, p. 472.

Jones, D. 'Skin Deep', *The Australian*, 21 September 2000, p. 20.

Jones, L. 'An Artist's Entry into Cyberspace: Intellectual Property on the Internet', *European Intellectual Property Review*, 2000, Vol. 22 (2), p. 79.

Jost, J., Totaro, G. and Tyshing, C. *The Demidenko File*. Melbourne: *Penguin Books*, 1996.

Julius, A. *T.S Eliot, Anti-Semitism, and the Literary Form*. Cambridge, New York: Cambridge University Press, 1995.

Julius, A. 'Crack The Lawyer's Voice', *Times Literary Supplement*, 29 November 1996, p. 8.

Julius, A. 'A New Definition for the Rights of Writers', *The Sydney Morning Herald*, 13 March 1997, p. 13.

Julius, A. 'Introduction', in Freeman, M. and Lewis, A. (eds) *Law and Literature: Current Legal Issues Volume 2*. Oxford, New York: Oxford University Press, 1999, p. xi.

Julius, A. 'Art Crimes', in Freeman, M. and Lewis, A. (eds) *Law and Literature: Current Legal Issues Volume 2*. Oxford, New York: Oxford University Press, 1999, p. 499.

Kaplicer, B. 'Rap Music and De Minimis Copying: Applying the Ringgold and Sandoval Approach to Digital Samples', *Cardozo Arts and Entertainment Law Journal*, 2000, Vol. 18 (1), p. 227.

Katzenberger, P. 'Protection of the Author as the Weaker Party to a Contract under International Copyright Contract Law', *International Copyright Contract Law*, 1988, Vol. 19, p. 733.

Kelman, S. 'The Information Superhighway' in *Trans-Sumatran Highway And Other Poems*. Canberra: Polonius Press, 1995, p. 44.

Kenyon, A. 'Defamation, Artistic Criticism and Fair Comment', *Sydney Law Review*, 1996, Vol. 18, p. 152.

Kernan, A. *The Death of Literature*. New Haven: Yale University Press, 1990.

Keyzer, P. 'The Protection of Digital Samples under Australian Intellectual Property Law', *Australian Intellectual Property Journal*, 1993, Vol. 4, p. 127.

Kiernan, B. 'Whose Play is it Anyway?', *The Sydney Morning Herald*, 6 July 1996, p. 33.

Kiernan, B. *David Williamson: A Writer's Career*. Sydney: Currency Press, Revised Edition, 1996.

King, S. 'Quiet Pillage: The Case for Free Noise', *Artlines: A Bulletin on Art and Law in the Digital Age*, 1997, Issue 2 (4), p. 1.

Knabb, K. (ed.) *The Situationist International Anthology*. Los Angeles: Bureau of Public Secrets, 1981.

Knowlson, J. *Damned to Fame: The Life of Samuel Beckett*. London: Bloomsbury, 1996.

Kohler, A. 'Anarchic Heart Ticks in New Economy', *The Australian Financial Review*, 16 May 2000.

Kohler, A. 'Record Companies Losing to the Net', *The Australian Financial Review*, 3 August 2000.

Korn, A. 'Renaming that Tune: Audio Collage, Parody and Fair Use', *Golden Gate University Law Review*, 1992, Vol. 22, p. 321.

Kosky, B. 'Kosky's Cure', *The Sydney Morning Herald*, 11 November 1996, p. 13.

Kretschmer, M., Klimis, G. and Wallis, R. 'The Changing Location of Intellectual Property Rights in Music: A Study of Music Publishers, Collecting Societies and Media Conglomerates', *Prometheus*, 1999, Vol. 17 (2), p. 163.

Kukoyi, A. 'The Significance of an Indigenous-Owned Recording and Publishing Company in Australia', in Bloustein, G. (ed.) *Musical Visions: Selected Conference Proceedings from the 6th National Australian/ New Zealand IAPSM Conference and the Inaugural Arnhem Land Performance Conference*. Kent Town: Wakefield Press, 1999, p. 77.

Kumar, J. 'Media Enforcer Launches Attack on Music Piracy', Webnoize, 13 June 2000.

Kundera, M. *The Book of Laughter and Forgetting*. New York: Penguin Books, 1979.

Kurlantick, L. 'Harmonization of Copyright Protection', *European Intellectual Property Review*, 1994, Vol. 16 (11), p. 463.

Kushner, T. *Angels in America Part Two: Perestroika*. New York: Theatre Communications Group Ltd, 1994.

Langton, M. *Well I Heard It on the Radio and I Saw It on the Television: An Essay for the Australian Film Commission on the Politics and Aesthetics of Filmmaking by and about Aboriginal People and Things*. Sydney: Australian Film Commission, 1993.

Lapworth, J. *Trips, Traps and Tea Parties: Australia's Adventures in Treaty Making*. Honours Thesis, Faculty of Law, The Australian National University, 1997.

Lash, S. *Sociology of Postmodernism*. London and New York: Routledge, 1990.

Lawrence, R. and Welsh, K. 'Temptation and Exploitation: Apple House Music, the Copyright Loophole, and Legal Bootlegging', *Perfect Beat*, 1996, Vol. 2 (4), p. 43.

Lawson, V. 'Freeman Casts Heretic Critic as "Fit for Flaying"', *The Sydney Morning Herald*, 5 April 1996, p. 13

Lawson, V. 'Board Games: The Battle for the STC', *The Sydney Morning Herald*, 31 March 1999, p. 17.

Lawson, V. 'Backstage at Sydney Theatre Company Is Full of Real-Life Drama', *The Sydney Morning Herald*, 30 January, 1999, p. 3.

Lawson, V. 'Exit Producer, Snarling at Critics', *The Sydney Morning Herald*, 29 March, 1999, p. 3.

Lawson, V. 'Page's Long Rite of Passage', *The Sydney Morning Herald*, 29 November 1999.

Lehr, P. 'The Fair-Use Doctrine before and after 'Pretty Woman's' Unworkable Framework: The Adjustable Tool for Censoring Distasteful Parody', *Florida Law Review*, 1994, Vol. 46, p. 443.

Leiboff, M. 'Actors, Directors and Others and Writers: Copyright Protection for Non-Writer Contributors in Group-Devised Theatre', *Arts and Entertainment Law Review*, October 1993, p. 13.

Leong, H. 'Photographic Essay: An Australian', in Barnes, J. (ed.) *Asian and Pacific Inscriptions: Identities, Ethnicities, Nationalities. Meridian*, 1995, Vol. 14 (2), p. 111.

Lessig, L. 'The Law of the Horse: What Cyberlaw Might Teach', *Harvard Law Review*, 1999, Vol. 113, p. 413.

Lessig, L. *Code and other Laws of Cyberspace.* New York, NY: Basic Books, 1999.

Leval, P. 'Toward A Fair Use Standard', *Harvard Law Review*, 1990, Vol. 103, p. 1005.

Leval, P. 'Campbell v Acuff-Rose: Justice Souter's Rescue of Fair Use', *Cardozo Arts and Entertainment Law Journal*, 1994, Vol. 13, p. 19.

Lingard, B. 'Interview with Tim Johnson', *Eyeline*, 1987, Vol. 2, p. 10.

Lingard, B. 'A Kind of History Painting', *Tension*, 1989, Vol. 19, p. 39.

Litman, J. 'The Public Domain', *Emory Law Journal*, 1990, Vol. 39 (4), p. 965.

Little, J. ''Deadly' Work: Reading the Short Fiction of Archie Weller', *Australian Literary Studies*, 1993, Vol. 16 (2), p. 190.

Little, J. 'An Interview with Archie Weller', *Australian Literary Studies*, 1993, Vol. 16 (2), p. 200.

Lippard, L. *Mixed Blessings: New Art in a Multicultural America.* New York: Pantheon Books, 1990.

LoPuck, L. and Weyrauch, W. 'A Theory of Legal Strategy', *Duke Law Journal*, 2000, Vol. 46, p. 1405.

Loughlan, P. *Intellectual Property: Creative and Marketing Rights*. North Ryde, N.S.W.: LBC Information Services, 1998.

Loughlan, P. 'Moral Rights (A View from the Town Square)', *Media and Arts Law Review*, 2000, Vol. 5 (1), p. 1.

Love, C. 'Digital Hollywood Speech', http://www.holemusic.com

Lovegrave, M. *Michael Hutchence*. Sydney: Allen and Unwin, 1999.

Lowenstein, W. 'Not All That Bloody Hard', *Blast*, 1998, Vol. 36, p. 4.

Ludlow, P. *High Noon on the Electronic Frontier: Conceptual Issues in Cyberspace*. Cambridge: MIT Press, 1996.

Luhrmann, B. and Pearce, C. *Strictly Ballroom*. Sydney: Currency Press, 1992.

Lundy, K. 'Second Reading of the *Copyright Amendment (Digital Agenda) Bill* 2000', Senate, Hansard, 17 August 2000, p. 15329.

Lury, C. *Cultural Rights: Technology, Legality and Personality*. Routledge: London and New York, 1993.

Lusetich, R. 'US Judgment Silences Bootleg Music Net Site', *The Australian*, 14 February 2001, p. 3.

Macmillan, F. 'Copyright, Culture and Private Power', *Prometheus*, 1998, Vol. 16 (3), p. 305.

Maddox, G. 'Taking Shine to Hollywood', *The Sydney Morning Herald*, 11 October 1999, p. 15.

Madison, M. 'Complexity and Copyright in Contradiction', *Cardozo Arts and Entertainment Law Journal*, 2000, Vol. 18, p. 125.

Magaznik, M. 'Court Grants Injunction over Changing Landscape', *The Age*, 28 September 1991, p. 3.

Magowan, F. 'Shine: Musical Narratives and Narrative Scores', in Coyle, R. (ed.) *Screen Scores: Studies in Contemporary Australian Film Music*. Sydney: Australian Film and Television School, p. 106.

Mahrer, M. *Urban Clan*. Music Art Films/Ronin Films, 1997.

Malcolm, J. *The Silent Woman: Syvlia Plath and Ted Hughes*. London: Pan MacMillan, 1994.

Mann, C. 'Who Will Own Your Next Good Idea?', *The Atlantic Monthly*, September 1998.

Manne, R. *The Culture of Forgetting: Helen Demidenko and the Holocaust*. Melbourne: The Text Publishing Company, 1996.

Mara, S. 'The Film Script as Blueprint: Collaboration and Moral Rights', *Media International Australia Incorporating Culture and Policy*, 1999, Vol. 93, p. 145.

Marriner, C. 'Chaos Promises to Pay 15% as Royalties', *The Sydney Morning Herald*, 11 August 2000.

Marsh, J. 'You Fella Snake, Dr Sykes? Prove It', *The Sydney Morning Herald*, 17 October 1998, p. 17.

Martin, A. 'Making a Bad Script Worse: The Curse of the Scriptwriting Manual', *Australian Book Review*, April 1999, p. 23.

Martin, B. 'Interrogating Intellectual Property', *Prometheus*, 2000, Vol. 18 (1), p. 93.

Martin, L. 'Writers Plan to Picket', *The Sydney Morning Herald*, 3 June 1998, p. 19.

Martin, L. 'Shine Investors Win $2m in British Court Battle', *The Sydney Morning Herald*, 7 July 1998, p. 11.

Martinson, J. 'Freenet Takes Music Copyright Battle to US', *The Guardian*, 1 August 2000.

Marzorati, G. 'Art in the (Re)making', *Artnews*, 1983, p. 91.

Mason, A. 'The User's Perspective on Issues Arising in Proposals for the Reform of the Law of Copyright', *Sydney Law Review*, 1997, Vol. 19, p. 65.

Masten, J. 'Beaumont and/or Fletcher: Collaboration and the Interpretation of Renaissance Drama', *Cardozo Arts and Entertainment Law Journal*, 1992, Vol. 10, p. 625.

Mathewson, C. 'Band Hails Bid to Shut Down Pirate Website', *The Courier-Mail*, 29 July 2000.

Matthews, B. 'My Demidenko Story', *The Age*, 3 October 1995, p. 13.

McCallum, J. 'Liveliness Burned at the Stage', *The Australian*, 1 April 1996, p. 3.

McCandless, D. 'Warez Wars', *Wired*, April 1997, Vol. 5 (4).

McCarthy, J. 'The Human Persona as Commercial Property: The Right of Publicity', *Australian Intellectual Property Journal*, 1996, Vol. 7, p. 20.

McCaughey, P. *Fred Williams 1927-1982*. Sydney: Murdoch Books, 1996.

McCooey, D. 'Thirteen Ways', *The Australian's Review of Books*, 1998, Vol. 3 (5), p. 14.

McCullagh, A. 'MP3 in Australia – Copyright Digital Agenda', Internet Industry Association, 8 June 2000, http://www.iia.net.au

McCulloch, S. 'Authentic Forgery: The Faking of Aboriginal Art', *The Weekend Australian*, 7-8 October 1995, Review, p. 1-2.

McCulloch, S. 'Too Many Dots', *The Weekend Australian*, 21-22 September 1996, Review, p. 5.

McCulloch, S. 'Devil TV and Other Black Arts', *The Weekend Australian*, 21-22 February 1998.

McDonald, I. *Protecting Indigenous Intellectual Property*. Sydney: Australia Copyright Council, 1997.

McDonald, J. *Jeffrey Smart: Paintings Of The '70s And '80s.* Sydney: Craftsman House, 1995.

McDonald, K. 'Everything Old Is New Again: The Revival of the Common Law Misdemeanour of Publishing a Blasphemous Libel', *Telemedia*, 1998, Vol. 1 (8), p. 142.

McDonald, R. *Mr Darwin's Shooter*. Sydney: Knopf, 1998.

McDonald, W. 'Tricky Business: Whites on Black Territory', *Australian Author*, 1997, Vol. 29 (1), p. 11.

McFarlane, I. *The Encyclopaedia of Australian Rock and Pop*. Sydney: Allen and Unwin, 1999.

McGillick, P. 'Heresy', *Meanjin*, 1996, Vol. 55 (2), p. 258.

McKenna, T. 'Where Digital Music Technology and Law Collide: Contemporary Issues of Digital Sampling, Appropriation and Copyright Law', *The Journal of Information, Law, and Technology*, 2000, Vol. 1, p. 1, http://elj.warwick.ac.uk/jilt.

McKeough, J. *Intellectual Property: Commentary and Materials*. Sydney: The Law Book Company Limited, 1992.

McKeough, J. and Stewart, A. *Intellectual Property Law in Australia Second Edition*. Sydney: Butterworths, 1997.

McKeough, J. and Stewart, A. 'Intellectual Property and the Dreaming' in Johnson, E., Hinton, M., and Rigney, D. (eds) *Indigenous Australians and the Law*. Sydney: Cavendish Publishing, 1994.

McLean, I. *White Aborigines*. Cambridge: Cambridge University Press, 1998.

McLean, I. 'Gordon Bennett's Home Decor: The Joker in the Pack', *Law/Text/Culture*, 1998, Vol. 4 (1), p. 286.

McLean, I. and Bennett, G. *The Art of Gordon Bennett*. Sydney: Craftsman House, 1996.

McLean, W. 'All's Not Fair in Art and War: A Look at the Fair Use Defense after *Rogers* v *Koons*', *Brooklyn Law Review*, 1993, Vol. 59, p. 372.

McMillan, A. *Strict Rules*. Sydney: Hodder And Staughton, 1988

McMullan, J. 'Personality Rights in Australia', *Australian Intellectual Property Journal*, 1997, Vol. 8, p. 87.

Mead, M. *Coming of Age in Samoa*. New York: American Museum of Natural History, 1928, republished 1973.

Media, Entertainment and Arts Alliance. 'Performers Need Protection', *The Alliance*, March 1993, p. 13.

Media, Entertainment and Arts Alliance. 'Actress Leads Rights Protest', *The Alliance*, September-December 1993.

Media, Entertainment and Arts Alliance. 'Performers Copyright Law Dragging the Chain', *The Alliance*, Autumn 1994, p. 19.

Media, Entertainment and Arts Alliance. 'The Struggle for Copyright Continues', *The Alliance*, Spring 1994, p. 6.

Media, Entertainment and Arts Alliance. 'Protecting Performers' Rights', *The Alliance*, December 1997, p. 2.

Media, Entertainment and Arts Alliance. 'Copyright – It's Only the Beginning', *The Alliance*, Autumn 1998.

Megalogenis, G. 'Turn On, Log In, Download', *The Australian*, 14 August 2000, p. 11.

Merryman, J.H. 'The Refrigerator of Bernard Buffet', *The Hastings Law Journal*, 1976, Vol. 27, p. 1023.

Michaels, E. *Bad Aboriginal Art: Tradition, Media, and Technological Horizons*. Sydney: Allen and Unwin, 1994.

Miller, D. 'Collective Ownership in Spiritually Sensitive Works: Milpurrurru v Indofurn Pty Ltd', *Australian Intellectual Property Journal*, 1995, Vol. 6, p. 206.

Millner, J. 'Living the Red Desert: Fiona Foley Interview', *Real Time*, 2000, Vol. 35, p. 34.

Minh-ha, T. *Woman, Native, Other: Writing Postcoloniality and Feminism*. Bloomington: Indiana University Press, 1989.

Mitchell, T. *Popular Music and Local Identity: Rock, Pop, and Rap in Europe and Oceania*. London and New York: Leicester University Press, 1996.

Moon, C. 'Moral Rights for Cinematographers', Senate Legal and Constitutional Legislation Committee, 4 August 1997.

Moorditj Consortium. *Moorditj: Australian Indigenous Cultural Expressions*. Canberra: Australia on CD, 1998.

Morgan, J. 'What the Critics Say', *The Sydney Morning Herald*, 13 June 1998, p. 8.

Morgan, R. *The Demon Lover: On the Sexuality of Terrorism*. New York: Norton, 1989.

Morgan, R. 'Dear Helen, Just Give Me Back My Words', *The Sydney Morning Herald*, 23 March 1996, p. 11.

Morison, J. and Bell, C. (eds) *Tall Stories?: Reading Law and Literature*. Aldershot: Dartmouth Publishing Company, 1996.

Morris, C. 'Movieworld and Dreamworld: The Dreaming', *Culture and Policy*, 1996, Vol. 7 (3), p. 69.

Morris, M. 'Tooth and Claw: Tales of Survival and Crocodile Dundee', *Art & Text*, 1987, Vol. 25, p. 36.

Morrow, B. 'Originality: "Primary, Initial, First"', *Alternative Law Journal*, 1995, Vol. 20 (4), p. 162.

Moss, D. 'Score: An Interview with David Hirschfelder', *Cinema Papers*, 1997, No. 122, p. 18.

Mudrooroo. 'Being Published from the Fringe', *Australian Author*, 1994, Vol. 26 (3), p. 15.

Mudrooroo. *The Indigenous Literature of Australia.* Melbourne: Hyland House, 1997.

Mudrooroo. 'Tell Them You're Indian' in Cowlishaw, G. and Morris, B. (eds) *Race Matters: Indigenous Australians and 'Our' Society* . Canberra: Aboriginal Studies Press, 1997, p. 259.

Murray, L. 'The Noblesse Trap: The Ills and Possibilities of Arts Patronage', in Coleman, P. *Double Take: Six Incorrect Essays.* Melbourne: Mandarin, 1996, p. 63.

Murray, N. *Sing for Me,* Countryman. Sydney: Sceptre, 1993.

National Indigenous Arts Advocacy Association, http://www.niaaa.com.au/index.html

Neale, M. *Yiribana: An Introduction to the Aboriginal and Torres Strait Islander Collection of the Art Gallery of New South Wales.* Sydney: The Art Gallery of New South Wales, 1994.

Needham, K. 'Music Magpies Mob Napster's Site on the Last Day of Free Hits', *The Sydney Morning Herald,* 29 July 2000.

Negativland. *Fair Use: The Story of the Letter U and the Number 2.* Concord: Seeland, 1995.

Negativland. 'Do We Really Have to Sue the RIAA?', 17 August 1998, http://www.negativland.com/riaa/dowesue.html

Netanel, N.W. 'Copyright and a Democratic Civil Society', *Yale Law Journal,* Vol. 106 (2), p. 283.

Neuenschwander, J. *Oral History and the Law.* Denton, Texas: Oral History Association, 1985; revised edition, Albuquerque, N.M.: Oral History Association, 1993.

Nevin, R. 'Opening Address', in *Performers and the Law*, Arts Law Centre of Australia. Sydney: Walsh Bay, 1986.

Newton, G. and Moffatt, T. *Fever Pitch.* Sydney: Piper Press, 1995.

Ng, C. 'When Imitation is not the Sincerest Form of Flattery: Fair Dealing and Fair Use for the Purpose of Criticism in Canada and the United States', *Intellectual Property Journal*, 1998, Vol. 12, p. 183.

Nicholas, L. *The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War.* New York: Alfred A. Knopf, 1994.

Nicholls, C. *From Appreciation to Appropriation: Indigenous Influences and Images in Australian Visual Art.* Adelaide: Flinders University Art Museum Gallery, 2000.

Nicoll, F. 'The Art of Reconciliation: Art, Aboriginality and the State', *Meanjin*, 1993, Vol. 52 (4), p. 705.

O'Brien, C. 'Protecting Secret-Sacred Designs – Indigenous Culture and Intellectual Property Law', *Media and Arts Law Review*, 1997, Vol. 2, p. 57.

O'Keefe, P. 'First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples: The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples', *International Journal Of Cultural Property*, 1995, Vol. 4 (2), p. 382.

O'Keefe, P. 'The Bellagio Declaration: Cultural Agency/Cultural Authority: Politics and Poetics of Intellectual Property in the Post-Colonial Era', *International Journal of Cultural Property*, 1995, Vol. 4 (2), p. 388.

Olsson, J. 'Rights in a Fine Art Photography: Through a Lens Darkly', *Texas Law Review*, 1992, Vol. 70, p. 1489.

Oman, R. and others. 'Copyright Office Hearings on the Droit de Suite', *Columbia-VLA Journal Of The Law And The Arts*, 1992, Vol. 16, p. 185.

Onus, L. 'Copyright and Issues of Appropriation', *Artlink*, 1990, Vol. 10, p. 38.

Page, D., Page, S., and Beall, C. 'Bridging Three Worlds', in Bloustein, G. (ed.) *Musical Visions: Selected Conference Proceedings from the 6th National Australian/New Zealand IAPSM Conference and the Inaugural Arnhem Land Performance Conference.* Kent Town: Wakefield Press, 1999, p. 104.

Page, S. *Fish.* Sydney: Music Arts Dance Films Pty Ltd, 1998.

Parker, C. *Just Lawyers.* Oxford: Oxford University Press, 1999.

Parkin, A. and Patience, A. (eds) *The Bannon Decade: The Politics of Restraint.* Sydney: Allen and Unwin, 1992.

Parloff, R. 'Newbies vs. Netwits', *American Lawyer*, 2000, Vol. 22 (9), p. 17.

Pask, A. 'Cultural Appropriation and the Law: An Analysis of the Legal Regimes Concerning Culture', *Intellectual Property Journal*, 1993, Vol. 8, p. 57.

Patry, W. and Perlmutter, S. 'Fair Use Misconstrued: Profits, Presumptions, and Parody', *Cardozo Arts and Entertainment Law Journal*, 1993, Vol. 11, p. 667.

Pellicano, V. 'Dance and Copyright: Pas de Deux or Pas de Disaster?', *Media and Arts Law Review*, 1997, Vol. 2, p. 116.

Perks, R. and Thomson, A. (eds) *The Oral History Reader.* London: Routledge, 1998.

Perlmutter, S. 'Resale Royalties for Artists: An Analysis of the Register of Copyrights Report', *Columbia – VLA Journal of the Law and the Arts*, 1992, Vol. 16, p. 395.

Pettigrew, K. 'Portrait of a Commodities Broker as Thieving Artist: Parody, Fair Use and Contemporary Art', *Arts and Entertainment Law Review*, 1993, Vol. 2, p. 1.

Pierce, P. *Australian Melodramas: Thomas Keneally's Fiction*. Brisbane: University of Queensland Press, 1995.

Pitt, H. 'From the World Stage to a Cultural Desert', *The Sydney Morning Herald*, 15 August 1996, p. 8.

Plant, S. *Zeroes + Ones: Digital Women and the New Technoculture*. New York: Doubleday, 1997.

Podger, M. 'N©! Interview with Negativland', *Voiceworks*, 1999, Vol. 39, p. 14.

Posner, R. *Law and Literature: A Misunderstood Relation*. Cambridge and London: Harvard University Press, 1988.

Potter, M. 'Archiving the Evanescent: Dance Collections and Australia', *Voices*, Vol. 3 (3), 1993, p. 105.

Potter, M. *A Passion for Dance*. Canberra: National Library of Australia, 1997.

Potter, M. 'Feet to the Earth: Interview with Stephen Page', in *A Passion for Dance*. Canberra: National Library of Australia, 1997, p. 102.

Practical Anarchy Online. 'An Interview with Alice Nutter', 1998, http://www.infoshop.org/PA/texts/chumba.html

Prince. '4 Love of Music', http://npgonlineltd.com

Prowda, J. 'Parody and Fair Use in Copyright Law: Setting a Fairer Standard in *Campbell* v *Acuff-Rose Music, Inc.*', *Communications and the Law*, 1995, Vol. 17 (3), p. 53.

Puri, K. 'Copyright Protection for Australian Aborigines in the Light of Mabo' in Stephenson, M.A. and Ratnapala, S. (eds) *Mabo: A Judicial Revolution*, St Lucia: University of Queensland Press, p. 157.

Pybus, C. 'Helen Darville Aka Helen Demidenko – Update', *Australian Humanities Review*, February 1997, http://www.lib.latrobe.edu.au/AHR/copyright.html.

Pyne, C. 'Second Reading of the *Copyright Amendment (Digital Agenda) Bill* 2000', House of Representatives, Hansard, 27 June 2000, p. 18347.

Rankin, S. and Purcell, L. *Box the Pony*. Sydney: Hodder Headline, 1999.

Raymond, E. *The Cathedral and the Bazaar: Musings on Linux and Open Source by an Accidental Revolutionary*. Cambridge, Mass.: O'Reilly and Associates, 1999.

Recording Industry Association of America. 'Motion for Preliminary Injunction', 12 June 2000, p. 13.

Reece, D. 'Beyond MP3', MP3.com, 16 February 1999.

Reynolds, H. *Aboriginal Sovereignty: Reflections on Race, State and Nation.* Sydney: Allen and Unwin, 1996.

Ricketson, S. *The Law of Intellectual Property*. Sydney: Law Book Company, 1984.

Ricketson, S. *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*. London: Kluwer, 1987.

Ricketson, S. 'Moral Rights and the Droit de Suite: International Obligations and Australian Obligations', *Entertainment Law Review*, 1990, Vol. 3, p. 78

Ricketson, S. *Intellectual Property: Cases, Materials and Commentary*. Sydney: Butterworths, 1994.

Ricketson, S. *The Law of Intellectual Property: Copyright, Designs and Confidential Information*. Sydney: Law Book Company, 1999.

Ricketson, S. 'Simplifying Copyright Law: Proposals from Down Under', *European Intellectual Property Review*, 1999, Vol. 21 (11), p. 537.

Ricketson, S. and Richardson, B. *Intellectual Property: Cases, Materials, and Commentary*. Sydney: Butterworths, 1998.

Ridgeway, A. 'Second Reading of the *Copyright Amendment (Moral Rights) Bill* 1999', Senate, Hansard, 7 December 2000, p. 21062.

Riemer, A. *Inside Outside*. Sydney: Angus and Robertson, 1992.

Riemer, A. *The Habsburg Cafe*. Sydney: Angus and Robertson, 1993.

Riemer, A. *America with Subtitles*. Melbourne: Minerva, 1995.

Riemer, A. *The Demidenko Debate*. Sydney: Allen and Unwin Pty Ltd, 1996.

Riemer, A. *Sandstone Gothic: Confessions of an Accidental Academic*. Sydney: Allen and Unwin Pty Ltd, 1998.

Riley, M. 'Napster Users Must Pay, Orders Court', *The Age*, 14 February 2001.

Riley, M., Zuel, B., and Donovan, P. 'Caught in the Net: Free Music in its Death Throes after Court Pulls Plug', *The Sydney Morning Herald*, 14 February 2001, p. 2.

Rimmer, M. *'Every Artist Is a Cannibal/Every Poet Is a Thief': Copyright Law and Post-Modernism*. Honours Thesis, Faculty of Law, The Australian National University, 1997.

Rimmer, M. 'Four Stories about Copyright Law and Appropriation Art', *Media and Arts Law Review*, 1998, Vol. 3 (4), p. 180.

Rimmer, M. 'The Demidenko Affair: Copyright Law, Plagiarism and Ridicule', *Media and Arts Law Review*, 2000, Vol. 5 (3), p. 159.

Ritchie, D. *Doing Oral History*. New York: Twayne Publishers, 1995.

Rivers, T. 'Norowzian Revisited', *European Intellectual Property Review*, 2000, Vol. 22 (9), p. 389.

Robb, J. 'Moral Rights Legislation: Will It Make Any Difference?' *Australia Art Monthly*, 1995, Vol. 83, p. 24.

Roberts, R. 'A Passion for Ideas: Black Stage', *Australasian Drama Studies*, 1998, Vol. 32, p. 3.

Rogow, B. 'The Art of Making Law from Other People's Art', *Cardozo Arts and Entertainment Law Journal*, 1996, Vol. 14, p. 127.

Roht-Arriaza, N. 'Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities', in Ziff, B. and Rao, P. (eds) *Borrowed Power: Essays on Cultural Appropriation*. New Brunswick (NJ): Rutgers University Press, 1997, p. 255.

Romei, S. 'Music-Swapping Monster in Record Demand', *The Australian*, 31 July 2000, p. 36.

Romney, J. (ed.) 'Protect the Parodist', *The Arts Law Centre Newsletter*, 1995, Vol. 9, p. 1.

Rorty, R. *Contingency, Irony and Solidarity*. Cambridge: Cambridge University Press, 1989.

Rose, Margaret. *Parody: Ancient, Modern, and Post-modern*. Cambridge: Cambridge University Press, 1993.

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

Rose, Mark. *Authors and Owners: The Invention of Copyright*. Cambridge: Harvard University Press, 1993.

Rose, Mark. 'The Author as Proprietor: *Donaldson* v *Becket* and the Genealogy of Modern Authorship', in Sherman, B. and Strowel, A. *Of Authors and Origins*. Oxford: Clarendon Press, 1994, p. 23.

Rothnie, W. 'The Future of Fair Dealing?' in Saunders, D. and Sherman, B. (eds) *From Berne to Geneva: Recent Developments in International Copyright and Neighbouring Rights*. Brisbane: Australian Key Centre for Cultural and Media Policy, 1997.

Roush, W. 'Napster, Gnutella, and Freenet: Publishing in a Post-Copyright University', EbookNet, Friday, 2 June 2000.

Rugha, V. 'Ownership of Interviews: A Theory for Protection of Quotations', *Nebraska Law Review*, 1988, Vol. 67, p. 675.

Rushdie, S. *Midnight's Children*. London: Picador, 1981.

Rushkoff, D. 'Warning: Digital Ahead', *The Age*, 13 June 2000.

Ryan, C. 'Crow-Eaters Forced to Eat Crow', *The Sydney Morning Herald*, 12 February 1992, p. 8.

Ryle, G. and Maley, N. 'Art Row Over, But Debate Goes On', *The Adelaide Advertiser*, 4 October 1991, p. 3.

Sadler, S. *The Situationist City*. Cambridge, Massachusetts: The MIT Press, 1998.

Said, E. *Culture and Imperialism*. London: Vintage, 1993.

Salokannel, M. 'Film Authorship in the Changing Audio-visual Environment', in Sherman, B. and Strowel, A. (eds) *Of Authors and Origins: Essays on Copyright Law*. Oxford: Clarendon Press, 1994, p. 57.

Samudrala, R. 'The Future of Music: I've Seen the Future and It Will Be a Battle between the Cathedral and the Bazaar', MP3.com, 12 April 1998, http://www.mp3.com.

Samuelson, P. and Opsahl, K. 'Licensing Information in the Global Information Market: Freedom of Contract Meets Public Policy', *European Intellectual Property Review*, 1999, Vol. 21 (8), p. 386.

Sanjek, D. '"Don't Have to DJ No More": Sampling and the "Autonomous" Creator', *Cardozo Arts and Entertainment Law Journal*, 1992, Vol. 10, p. 607.

Sarat, A. 'Imagining the Law of the Father: Loss, Dread, and Mourning in *The Sweet Hereafter*', *Law and Society Review*, 2000, Vol. 34 (1), p. 1.

Sardi, J. and Hicks, S. *Shine: The Screenplay*. London: Bloomsbury Publishing, 1997.

Saunders, D. *Legal Decisions and Cultural Theory*. Griffith University: Institute for Cultural Policy Studies, 1989.

Saunders, D. 'Dropping the Subject: An Argument for a Positive History of Authorship and the Law of Copyright', in Sherman, B. and Strowel, A. (eds) *Of Authors and Origins: Essays on Copyright Law*. Oxford: Clarendon Press, 1994, p. 93.

Saunders, D. and Sherman, B. 'From Berne to Geneva: A Road Map' in Saunders, D. and Sherman, B. (eds) *From Berne to Geneva: Recent Developments in International Copyright and Neighbouring Rights*. Brisbane: Australian Key Centre for Cultural and Media Policy, 1997.

Schiller, H. *Culture, Inc.: The Corporate Takeover of Public Expression*. New York and Oxford: Oxford University Press, 1989.

Schooner, S. 'Obscene Parody: The Judicial Exception to Fair Use Analysis', *The Journal of Arts Management and Law*, 1984, Vol. 14 (3), p. 69.

Schulze, M. 'The Death of Daubism? The Case against the Introduction of Moral Rights', *Artlines*, 1997, Vol. 2 (4), p. 4.

Schulze, M. 'Daubism Hits Sydney', Media Release, November 1997.

Schwartz, H. *The Culture of the Copy: Striking Likenesses, Unreasonable Facsimiles*. New York: Zone Books, 1996.

Senate Legal and Constitutional Legislation Committee. *Copyright Amendment Bill No.1*. Canberra: Parliament House, 1997.

Senczuk, J. 'Heretic Row: Designer Chips In', *The Sydney Morning Herald*, 4 April 1996, p. 15.

Sercombe, B. 'Second Reading of the *Copyright Amendment (Digital Agenda) Bill* 2000', House of Representatives, Hansard, 27 June 2000, p. 18370.

Settlemyer, C. 'Between Thought and Possession: Artists' "Moral Rights" and Public Access to Creative Works', *The Georgetown Law Journal*, 1993, Vol. 81, p. 2291.

Sexton, J. 'Signs Say Label Has Late Message', *The Australian*, 5 July 2000, p. 14.

Sexton, J., Strickland, K. and Lim, A. 'Funding Devil Now in the Detail', *The Australian*, Friday, 12 May 2000, p. 11.

Shamir, R. *Managing Legal Uncertainty*. Durham: Duke University Press, 1995.

Sharpe, T. '(Per)versions of Law in Literature', in Freeman, M. and Lewis, A. (eds) *Law and Literature: Current Legal Issues Volume 2*. Oxford, New York: Oxford University Press, 1999, p. 91.

Shedden, I. 'Whole World's Dancing to the Rhythm of MP3', *The Australian*, 14 August 2000, p. 11.

Sherman, B. 'Patent Law in a Time of Change: Non-Obviousness and Biotechnology', *Oxford Journal of Legal Studies*, 1990, Vol. 10 (2), p. 278.

Sherman, B. 'From the Non-original to the Ab-original: A History', in Sherman, B. and Strowel, A. (eds) *Of Authors and Origins: Essays on Copyright Law*. Oxford: Clarendon Press, 1994, p. 111.

Sherman, B. 'Appropriating the Postmodern: Copyright and the Challenge of the New', *Social and Legal Studies*, 1995, Vol. 4, p. 31.

Sherman, B. 'Remembering and Forgetting: The Birth of Modern Copyright Law', *Intellectual Property Journal*, 1995, Vol. 10, p. 1.

Sherman, B. and Bently, L. *Performers' Rights: Options for Reform.* Canberra: Australian Government, October 1995.

Sherman, B. and Bently, L. *The Making of Modern Intellectual Property Law: The British Experience 1760-1911.* Cambridge: Cambridge University Press, 1999.

Sherman, B. and Strowel, A. (eds) *Of Authors and Origins: Essays on Copyright Law.* Oxford: Clarendon Press, 1994.

Shulman, S. *Owning the Future.* Boston: Houghton Mifflin, 1999.

Simondson, H. *Performing Arts Media Library: From Live Performance to the Digital Stage.* Melbourne: Cinemedia, 1999.

Simpson, S. *The Visual Artist and the Law.* Sydney: The Law Book Company Limited, 1989.

Simpson, S. *Review of Australian Collecting Societies.* Canberra: The Minister for Communications and the Arts and the Minister for Justice, 1996.

Slashdot. 'Lars Speaks', Slashdot, 26 May 2000.

Slattery, L. 'Our Multicultural Cringe', *The Australian*, 13 September 1995, p. 17.

Slattery, L. 'Robert Hughes' Critical Face Turns a Reddish Hue on Landscape', *The Australian*, 6 November 1998, p. 1.

Slattery, L. ''Unconscious Cannibal' Says Sorry', *The Weekend Australian*, 7-8 November 1998, p. 3.

Slattery, L. ''Cannibal' Eats His Own Words', *The Weekend Australian*, 7-8 November 1998, p. 28.

Sloop, J. and Herman, A. 'Negativland, Out-law Judgments, and the Politics of Cyberspace' in Swiss, T., Sloop, J. and Herman, A. *Mapping The Beat: Popular Music and Contemporary Theory*. Oxford: Blackwell Publishers Ltd, 1998, p. 291.

Smee, S. 'Multiple Exposure', *The Sydney Morning Herald*, Spectrum, 9 May 1998, p. 3.

Smith, B. and Smith, T. *Australian Painting 1788-1990*. Oxford University Press: Oxford, 1991.

Smith, M. 'The Limits of Copyright: Property, Parody, and the Public Domain', *Duke Law Journal*, 1993, Vol. 42, p. 1233.

Smith, R. 'The Appeal Brief', Transcripts from the Rent Case, http://dramaturgy.net/rent

Smith, T. 'Nothing if not Abnormal', *The Independent Monthly*, 28 April 1992, p. 28.

Sowden, T. 'Limits to Film Copyright', *Media and Arts Law Review*, 1998, Vol. 3, p. 223.

Spencer, B. *How to Conceive of a Girl*. Sydney: Vintage, 1996.

Spencer, B. 'I'd Like To Have Permission To Be Post-Modern, But I'm Not Sure Who To Ask', *Jacket*, Number 1, http://www.jacket.zip.com.au/jacket01/spencer.

Sproull, R. 'Jet's Brush with Bannon Fame Draws Artistic Ire', *The Australian*, 27 September 1991, p. 3.

Squires, T. 'Strictly Baz', *The Sydney Morning Herald*, 27 June 1992, p. 33.

Staff Reporter. 'Controversial Painting Centre of Legal Wrangle', *The Adelaide Advertiser*, 28 September 1991, p. 2.

Staff Reporter. 'Stalwart of Sydney Theatre', *The Sydney Morning Herald*, 21 June 1993, p. 20.

Staff Reporter. 'Walong Leaves Bangarra', *Dance Australia*, February/ March 1996, Vol. 82, p. 9.

Staff Reporter. 'Disharmony over Soundtrack', *The Sydney Morning Herald*, 19 February 1997, p. 3.

Staff Reporter. 'Artists to Win Rights', *The Sydney Morning Herald*, 10 December 1999, p. 15.

Stallabrass, J. *High Art Lite: British Art in the 1990's*. London: Verso, 1999.

Stals, G. 'Copyright and Competition Policy in the Post-Hilmer Environment', *Media and Arts Law Review*, 1997, Vol. 2, p. 77.

Stephens, T. 'Williamson Agrees to Disagree over Heretical Treatment of His Play', *The Sydney Morning Herald*, 30 March 1996, p. 7.

Stevenson, A. and Hubble, A. 'Great White Hoax', *The Daily Telegraph*, 13 March 1997, pp. 1 and 8.

Stratton, J. 'I Don't Like It: Pauline Pantsdown and the Politics of the Inauthentic', *Perfect Beat*, Vol. 4 (4), p. 3.

Sundaram, R. 'The Bazaar and the City: History and the Contemporary in Urban Electronic Culture', Architecture and Globalisation Conference, Bauhaus University, Weimar, October 1999.

Sutherland, J. 'Representations of Indigenous Peoples' Knowledge and Practice in Modern International Law and Politics', *Australian Journal of Human Rights*, 1995, Vol. 2 (1), p. 39.

Sutherland, J. 'Intellectual and Cultural Property Rights and Bio-Prospecting: Recent Developments', *Development Bulletin*, 1995, Vol. 34, p. 36.

Sutherland, J. 'TRIPS, Cultural Politics and Law Reform', National Intellectual Property Teachers' Workshop. Canberra: The Australian National University, 1998.

Sutherland, J. 'Musical Chairs on the Net', *The Canberra Times*, 8 June 2000.

Sykes, J. 'The Night the Earth Moved', *The Sydney Morning Herald*, 31 October 1997, p. 17.

Sykes, J. 'Haunting Images of Aboriginal Australia', *The Sydney Morning Herald*, 21 September 2000, p. 13.

Taylor, C. 'New Role for Dyer', *The Australian*, 4 October 1999.

Tehan, M. 'To Be or Not To Be (Property) Anglo-Australian Law and The Search for Protection of Indigenous Cultural Heritage', *University of Tasmania Law Review*, 1996, Vol. 15 (2), p. 267.

Thomas, B. *Cross Examination of Law and Literature: Cooper, Hawthorne, Stower and Melville*. Cambridge: Cambridge University Press, 1987.

Thomas, B. 'E Business Intelligence: A New View of the New Economy', *International Conference on Electronic Commerce and Intellectual Property*, September 14-16, 1999.

Thornburg, E. 'Going Private: Technology, Due Process, and Internet Dispute Resolution', *University of California at Davis Law Review*, December 2000 (forthcoming).

Throsby, D. and Thompson, B. *But What Do You Do for a Living? A New Economic Study of Australian Artists*. Sydney: Australia Council, 1994.

Tillers, I. 'Locality Fails', *Art & Text*, 1982, Vol. 6, p. 51.

Tillers, I. 'Fear of Texture', *Art & Text*, 1983, Vol. 10, p. 8.

Tillers, I. 'In Perpetual Mourning', *Art & Text*, 1984, Vol. 11, p. 22

Tillers, I. *Imants Tillers: Works 1978-1988*. London: Institute of Contemporary Art, 1988.

Tillers, I. 'Imants Tillers as a Site of Conflict', *Art and Australia*, 1990, Vol. 27 (3), p. 422.

Tillers, I. *Diaspora in Context*. Sydney: Museum of Contemporary Art, 1995.

Tillers, I. *Nature Speaks*. Sydney: Sherman Galleries, 1999.

Toole, J. '*Campbell* v *Acuff-Rose Music Inc.*: The Rap on Remedies', *Indiana Law Review*, 1995, Vol. 29 (2), p. 467.

Tooth, G. 'Home Movies in the Global Marketplace', Background Briefing, Radio National, Australian Broadcasting Corporation, 8 August 1998.

Torres, P. 'Interested in Writing about Indigenous Australians?', *Australian Author*, 1994, Vol. 26 (3), p. 24.

Tovey, N. 'Discussion'. *Managing Rights – Indigenous Culture in the Digital Domain*, Brisbane: Arts Queensland, 21 September 1998.

Traynor, I. 'Russia's Pirate Kings of E-Commerce', *The Guardian*, 1 July 2000.

Trioli, V. 'Colossal Triumph a Matter of Taste', *The Age*, 20 June 1997, p. 8.

Tsilokas, C. *Loaded*. Vintage: Sydney, 1995.

Turner, B. 'Bangarra Breakdown', *The Sydney Morning Herald*, Tuesday, 6 February 1996, p. 17.

Turner, J. 'Child's Play', *World Art*, 1997, Vol. 12 (3), p. 24.

Turner, J. and Williams, P. (eds) *The Happy Couple: Law and Literature*. Sydney: Federation Press, 1994.

Valenti, J. 'If You Can't Protect what You Own – You Don't Own Anything', the House Subcommittee on Courts and Intellectual Property on *WIPO Copyright Treaties Implementation Act* and the *Online Copyright Liability Limitation Act*, 16 September 1997.

Valenti, J. 'Deposition for Napster case', Recording Industry Association of America, 6 September 2000, http://www.riaa.org/Legal.cfm.

Van Caenegem, W. 'Copyright, Communication and New Technologies', *Federal Law Review*, 1995, Vol. 23 (2), p. 322.

Van Hecke, B. 'But Seriously, Folks: Toward a Coherent Standard of Parody as Fair Use', *Minnesota Law Review*, 1992, Vol. 77, p. 465.

Vaver, D. 'Authors' Moral Rights and the Copyright Law Reform Committee's Report: W(h)ither Such Rights Now', *Monash University Law Review*, 1988, Vol. 14, p. 284.

Vaver, D. 'Intellectual Property Today: Of Myths and Paradoxes', *Canadian Bar Review*, 1990, Vol. 69, p. 98.

Vaver, D. 'Some Agnostic Observations on Intellectual Property', *Intellectual Property Journal*, 1991, Vol. 6, p. 125.

Vaver, D. 'Rejuvenating Copyright', *Canadian Bar Review*, 1996, Vol. 75, p. 69.

Vaver, D. 'Copyright in Europe: The Good, the Bad and the Harmonised', *Australian Intellectual Property Journal*, 1999, Vol. 10, p. 185.

Vaver, D. 'Copyright in Canada: The New Millennium', *Intellectual Property Journal*, 1997, Vol. 12, p. 117.

Vaver, D. 'Moral Rights Yesterday, Today, and Tomorrow', *International Journal of Information Technology and Law*, 1999, Vol. 7, p. 270.

Vaver, D. *Copyright Law*. Toronto: Irwin Law Inc., 2000.

Waite, G. 'Reputation v Free Speech', *Australian Author*, 1994, Vol. 26 (2), p. 31.

Wallace, S. *Auteur or Author? Moral Rights and the Film Industry*. Arts Law Centre of Australia, 1994.

Wang, E. '(Re)productive Rights: Copyright and the Postmodern Artist', *Columbia – VLA Journal of Law and the Arts*, 1990, Vol. 14, p. 261.

Ward, I. *Law and Literature: Possibilities and Perspectives.* Cambridge: Cambridge University Press, 1995.

Ward, P. 'The Colour Tillers', *The Australian*, 6-7 September 1986, p. 9.

Wark, M. *The Virtual Republic: Australia's Cultural Wars of the '90s.* Sydney: Allen and Unwin, 1998.

Wark, M. *Celebrities, Culture and Cyberspace: The Light on the Hill in a Postmodern World.* Pluto Press Australia, 1999.

Waterlow, N. 'The Art of the Original: With Reference to Benjamin, Berger, Tillers and Burn', *Art and Australia*, 1996, Vol. 33 (3), p. 291.

Waters, C. 'To Daub or Not To Daub', *Art Monthly Australia*, 1998, Vol. 108, p. 25.

Wayner, P. *Free For All: How Linux and the Free Software Movement Undercut the High-Tech Titans.* New York: Harper Business, 2000.

Weatherall, K. 'An End to Private Communications in Copyright? The Expansion of Rights to Communicate Works to the Public: Part 1', *European Intellectual Property Review*, 1999, Vol. 21 (7), p. 342.

Weatherall, K. 'An End to Private Communications in Copyright? The Expansion of Rights to Communicate Works to the Public: Part 2', *European Intellectual Property Review*, 1999, Vol. 21 (8), p. 398.

Weir, M. 'Making Sense of Copyright Law Relating to Parody: A Moral Rights Perspective', *Monash University Law Review*, 1992, Vol. 18 (2), p. 194.

Weir, M. 'The Parodist's Nirvana: Droit Moral and Comparative Copyright Law: Part One', *Arts and Entertainment Law Review*, 1994, Vol. 4, p. 49.

Weir, M. 'The Parodist's Nirvana: Droit Moral and Comparative Copyright Law: Part Two', *Arts and Entertainment Law Review*, 1994, Vol. 6, p. 81.

Wells, K. 'The Cosmic Irony of Intellectual Property and Indigenous Authenticity', *Culture and Policy*, 1996, Vol. 7 (3), p. 45.

Werckmeister, O.K. *Citadel Culture*. Chicago: University of Chicago Press, 1991.

Westbury, M. 'Lies, Damned Lies, and Media: An Interview with Helen Darville', *Loud*, 21 October 1997, http://www.loud.org.au/noise.

Westfield, M. 'Alston Fiddles As Net Set Burns', *The Australian*, 19 July 2000, p. 21.

Westwood, M. 'Playwright Damns Heretic Production', *The Weekend Australian*, 30-31 March 1996, p. 1.

Wheatley, N. 'Black and White Writing: The Issues', *Australian Author*, 1994, Vol. 26 (3), p. 20.

White, L.J. *Appropriate Appropriation: An Exploration of the Politics of Cross Cultural Appropriation and the Law*. Bachelor of Art Theory Honours, College of Fine Arts, University of New South Wales, 1995.

Williamson, D. *Dead White Males*. Sydney: Currency Press, 1995.

Williamson, D. *Heretic*. Melbourne: Penguin Books, 1996.

Williamson, D. 'Some Like It Hot... But I Don't', *The Sydney Morning Herald*, 9 April, 1996, p. 13.

Williamson, D. *Third World Blues*. Sydney: Currency Press, 1997.

Willis, A-M. *Illusions of Identity: The Art of Nation*. Sydney: Hale and Iremonger, 1993.

Winslow, A. 'Rapping on a Revolving Door: An Economic Analysis of Parody and *Campbell* v *Acuff-Rose Music, Inc*', *Southern California Law Review*, 1996, Vol. 69, p. 590.

WIPO. *Draft Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*. Geneva: WIPO, 2000.

Wiseman, L. *Copyright in Universities*. Canberra: Higher Education Division, Department of Education, Training and Youth Affairs, 1999.

Wiseman, L. 'The Protection of Indigenous Art and Culture in Australia: The Labels of Authenticity', *European Intellectual Property Review*, 2001, Vol. 22 (1), p. 14.

Wollen, P. and Francis, P. (eds) *On the Passage of a Few People through a Rather Brief Moment in Time: The Situationist International 1957-1972*. Cambridge, Mass: The MIT Press, 1989.

Wood, L.J. 'Copyright Law and Postmodern Artistic Practice: Paradox and Difference', *Media and Arts Law Review*, 1996, Vol. 1, p. 72.

Wood, N. 'Cybersurveillance: Techniques for Monitoring Abuse of Rights', *International Conference on Electronic Commerce and Intellectual Property*, September 14-16, 1999.

Woodmansee, M. *The Author, Art, and the Market: Rereading the History of Aesthetics*. New York: Columbia University Press, 1994.

Woodmansee, M. and Jaszi, P. 'The Law of Texts: Copyright in the Academy', *College English*. 1995, Vol. 57 (7), p. 769.

Woodmansee, M. and Jaszi, P. (eds) *The Construction of Authorship: Textual Appropriation in Law and Literature*. Durham and London: Duke University Press, 1994.

Woods, M. 'Success Breeds "Shine" Lawsuits', *Variety*, 16 March 1998, Vol. 370 (5), p. 18.

Woods, M. and Tartaglione, N. '"Kolya" Suit Joins "Shine" In Pandora Legal Tangles', *Variety*, 13 July 1998, Vol. 371 (9), p. 23.

Wright, S. 'A Feminist Exploration of the Legal Protection of Art', *Canadian Journal of Women and the Law*, 1994, Vol. 7 (1), p. 59.

Wright, S. 'Property, Information and the Ethics of Communication', *Intellectual Property Journal*, 1994, Vol. 9 (1), p. 47.

Wright, S. 'Aboriginal Cultural Heritage in Australia', *University of British Columbia Law Review*, 1995, Vol. 29, p. 45.

Wright, S. 'Borrowed Power: Essays on Cultural Appropriation', *Sydney Law Review*, 1997, Vol. 19 (4), p. 580.

Wyburn, M. *Resale Royalty - A New Right for Artists.* Sydney: The Australian Copyright Council, 1989.

Yanover, G. 'The Precarious Balance: Moral Rights, Parody and Fair Use', *Cardozo Arts and Entertainment Law Journal*, 1996, Vol. 14, p. 79.

Young, A. *Imagining Crime: Textual Outlaws and Criminal Conversations.* London: Sage Publications, 1996.

Ziff, B. and Rao, P. (eds) *Borrowed Power: Essays on Cultural Appropriation.* New Brunswick (NJ): Rutgers University Press, 1997.

Zion, L. 'Short Cuts', *The Age*, 23 December 1999, p. 4.

Zissu, R. 'Fair Use: From *Harper & Row* To *Acuff Rose*', *Journal of the Copyright Society of the USA*, 1994, Vol. 42, p. 7.

Zurbrugg, N. 'Tim Johnson Interviewed', *Art and Australia*, 1991, Vol. 29 (1), p. 44.

PART 3

CASES

AGL Sydney Ltd v *Shortland County Council* (1989) 17 IPR 99.

A & M Records Inc and others v *Napster Inc.* (2000) 114 F. Supp. 2d 896.

A & M Records Inc and others v *Napster Inc.* (unreported, United States Court Of Appeals Ninth Circuit, 12 February 2001).

Australian Broadcasting Corporation v *Hanson* (unreported, Supreme Court of Queensland Court of Appeal, 28 September 1998).

Australian Broadcasting Corporation v *Hanson* (unreported, High Court, special leave to appeal, 24 June 1999).

Bleistein v *Donaldson Lithographing Co* (1903) 188 US 239.

Bulun Bulun and Milpurrurru v *R & T Textiles Pty Ltd* (1998) 41 IPR 513.

Cala Homes (South) Ltd v *Alfred McAlpine Homes (East) Ltd* [1995] FSR 818.

Campbell v *Acuff-Rose Music, Inc.* (1994) 127 L Ed 500.

Campbell v *Koons* (1993) No 91 Civ. 6055 (RO), 1993 WI 97381.

Campomar Sociedad Limited v *Nike International Ltd* (1998) 41 IPR 252.

Childress v *Taylor* (1991) 945 F 2d 500.

Clune v *Collins Angus And Robertson* ('the Whiteley case') (1992) 25 IPR 246.

Crocker v *Papunya Tula Artists* (1985) 5 IPR 426.

Donaldson v *Beckett* (1774) 4 Burr 2408; 98 ER 257.

Dr. Seuss Enterprises v *Penguin Books* (1997) 109 F. Sdd 1394.

Elton John v *Richard Leon James* [1991] FSR 411.

Evans v *F Hulton & Co Ltd* [1923-1928] MCC 51.

Federal Commissioner Of Taxation v *Murray* (1990) 92 ALR 671.

Francis Day And Hunter Ltd v *Bron* [1963] Ch 587.

Fylde Microsystems Ltd v *Key Radio Systems Ltd* (1998) 39 IPR 481.

Galaxy Electronics Pty Ltd v *Sega Enterprises Ltd* (1997) 37 IPR 462.

George Hensher Ltd v *Restawile Upholstery (Lancs) Ltd* [1975] RPC 31.

Hanson v *Australian Broadcasting Corporation* (unreported, Supreme Court of Queensland, 1 September 1997).

Harman N.V. v *Osborne And Others* [1967] 1 WLR 723.

Hay & Hay Construction Co Ltd v *Sloan* (1957) 12 DLR (2d) 397.

Hogan v *Koala Dundee Pty Ltd* (1988) 12 IPR 508.

Hogan v *Pacific Dunlop* (1988) 12 IPR 225.

Hyperion Records Ltd v *Warner Music (UK) Ltd* (unreported, Chancery Division, 17 May 1991).

Irving v *Penguin Books And Lipstadt* (unreported, Justice Gray, 11 April 2000), http://www.courtservice.govuk/judgments/qb.irving.htm

Katinyeri v *The Commonwealth* (1998) 152 ALR 540.

Kenrick & Co v *Lawrence & Co*(1890) 25 QBD 99.

King v *Milpurrurru* (1996) 66 FCR 474; 136 ALR 327.

Leger v *Reunion des Theatres Lyriques Nationaux* [1955] 6 RIDA 146.

Liebovitz v *Paramount Pictures* (1996) 948 F. Supp. 1214.

Ludlow Music Inc v *Williams* (unreported, Chancery Division, 2 October 2000).

Meskenas v *Capon* (unreported, District Court of New South Wales, 28 September 1993).

Millar v *Kincaid* (1747) 98 ER 210.

Millar v *Taylor* (1769) 4 Burr. 2303; 98 ER 201.

Milpurrurru v *Indofurn Pty Ltd* (1994) 54 FCR 240.

Milpurrurru v *Indofurn Pty Ltd* [1997] 438 FCA (27 May 1997).

Morrison Leahy Music Limited v *Lightbound Limited* (unreported, Chancery Division, 21 March 1991).

Musidor BV v *Tansing* (1994) 29 IPR 203.

NV Philips Gloeilampenfabrieken v *Mirabella International Pty Ltd* (1993) 26 IPR 513.

O'Shaughnessy v *Mirror Newspapers Ltd* (1970) 125 CLR 166.

O'Sullivan v *Management Agency And Music Ltd* [1984] 3 WLR 448.

Pacific Dunlop Ltd v *Hogan* (1989) 14 IPR 398.

Panayiotou v Sony Music Entertainment (UK) Ltd [1994] EMLR 229.

Pandora Investment S.A. v *Momentum Films Pty Ltd* (unreported, High Court of Justice, 30 June 1998).

Pandora Investment S.A. v *Momentum Films Pty Ltd* (unreported, Court of Appeal Civil Division, 17 December 1999).

Phonographic Performance Company Of Australia Limited v *Federation Of Australian Commercial Television Stations* (1998) 40 IPR 225.

Ravenscroft v *Herbert And New English Library Limited* [1980] 7 RPC 193.

Ray v *Classic FM* (1998) 41 IPR 235.

Recording Industry Association of America v *Diamond Multimedia System Inc.* (1999) 180 F. 3d 1072.

Rogers v *Koons* (1992) 960F. 2nd 301.

Salinger v *Random House* (1987) 811 F. 2nd 90.

Schott Musik International GBH & Co And Others v *Colossal Records Of Australia Pty Ltd And Others* (1997) 38 IPR 1.

Schroeder Music Publishing Co Ltd v *Macaulay* [1974] 1 WLR 1308.

Sony Corporation Of America v *University City Studios Inc.* (1984) 78 L Ed 2d 574.

Sony Music Productions Pty Ltd v *Tansing (t/a Apple House Music)* (1993) 27 IPR 640.

Tate v *Thomas* [1921] 1 Ch 503.

Telstra Corporation Ltd v *APRA* (1997) 146 ALR 649.

Thomson v *Larson* (1998) 147 F 3d 195.

Tonson v *Collins* (1760) 96 ER 169.

Twentieth Century Fox Film Corporation v *South Australian Brewing Corporation* (1996) 34 IPR 225.

United Feature Syndicate Inc. v *Koons* (1993) 817 F. Supp. 370.

Yumbulul v *Reserve Bank of Australia* (1991) IPR 481.

Zang Tumb Tuum Records v *Holly Johnson* (unreported, Chancery Division, 10 February 1988).

Zang Tumb Tuum Records v *Holly Johnson* (unreported, Court Of Appeal, 26 July 1989).

PART 4

LEGISLATION

Audio Home Recording Act 1992 (US)

Copyright Act 1968 (Cth)

Copyright Amendment (Digital Agenda) Act 2000 (Cth)

Copyright Amendment (Moral Rights) Act 2000 (Cth)

Trade Practices Act 1974 (Cth)

PART 5

INTERNET SITES

Arts Law Centre of Australia:
http://www.artslaw.asn.au/~artslaw

Attorney General's Department (Commonwealth):
http://www.law.gov.au

Australian Copyright Council
http://www.copyright.org.au

Australia Dance Council
http://sunsite.anu.edu.au/ausdance/artists/companies/bangarra/bangarra.html

Australian Digital Alliance
http://www.digital.org.au

Australian Key Centre for Media and Cultural Policy
http://www.gu.edu.au/centre/cmp/

Australian Legal Information Institute:
http://www.austlii.edu.au

Australian Library and Information Association
http://www.alia.org.au

Australian Mechanical Copyright Owners Society (AMCOS)
http://www.amcos.com.au

Australian Network for Art and Technology
http://www.anat.org.au

Australian Performing Rights Association (APRA)
http://www.apra.com.au

Australian Record Industry Association
http://www.aria.com.au

Australian Society of Authors
http://www.asauthors.org

Australian Writers' Guild
http://www.ozemail.com.au/~awgsyd/

Berkman Centre for Internet and Society at Harvard Law School
http://cyber.law.harvard.edu/online/

Communications Law Centre
http://www.comslaw.org.au/

Copyright Agency Limited (CAL)
http://www.copyright.com.au

Copyright Law Review Committee:
http://www.law.gov.au/clrc/

Department of Communications, Information Technology and the Arts:
http://www.dcita.gov.au

Department of Foreign Affairs and Trade
http://www.dfat.gov.au/

Detritus:
http://www.detritus.net

Electronic Frontiers Australia
http://www.efa.org.au

Electronic Frontier Foundation
http://www.eff.org

Freenet
http://freenet.sourceforge.net/

Gnutella
http://www.gnutella.wego.com

I-Mesh
http://www.imesh.com

Intellectual Property and Competition Review Committee
http://ipcr.gov.au/ipcr/

Internet Industry Association
http://www.iia.net.au

IP Australia
http://www.ipaustralia.gov.au

Limpbizkit
http://www.limpbizkit.com

Media Arts and Entertainment Alliance
http://www.alliance.org.au/

MP3Board
http://www.MP3Board.com

Napster
http://www.napster.com

National Association for Visual Artists
http://www.culture.com.au/nava/

National Indigenous Arts Advocacy Association
http://niaaa.com.au

Negativland:
http://www.negativland.com

Oxford Intellectual Property Research Centre – All St. Peter's College, Oxford
http://www.oiprc.ox.ac.uk/index.html

Performing Arts and Multimedia Library Pilot
http://www.cinemedia.net/PAML

Phonographic Performance Company of Australia (PPCA)
http://www.ppca.com.au/index.html

Public Enemy
http://www.public-enemy.com

Record Industry Association of America (RIAA)
http://www.riaa.org/napster.cfm

Scour Exchange
http://www.scour.com

Screen Network Australia
http://www.sna.net.au

Screenrights
http://www.screen.org

SDMI
http://www.sdmi.org

UCLA Online Institute for Cyberspace Law and Policy – Law University of California Los Angeles
http://www.gseis.ucla.edu/iclp/hp.html

United States Copyright Office:
http://lcweb.loc.gov/copyright

VI$COPY
http://www.viscop.com

World Intellectual Property Organisation:
http://www.wipo.org

World Trade Organisation Intellectual Property Page
http://www.wto.org/wto/intellec/intellec.htm