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Freedom of Expression (R): Overzealous Copyright Bozos and Other Enemies of Creativity (Book Review)

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Book Reviews

Freedom of Expression®: Overzealous Copyright Bozos and other enemies of creativity

Matthew Rimmer[*]

K McLeod, *Freedom of Expression®: Overzealous Copyright Bozos and other Enemies of Creativity* Doubleday, New York, 2005, 384 pages, ISBN 0385513259.

J Griffiths and U Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses* Oxford University Press, Oxford, 2005, 474 pages, ISBN 0199276048.

Traditionally, courts have taken the cautious view that copyright law serves to promote the freedom of expression through both providing an incentive to authors to create new works, and allowing exceptions to encourage the free flow of information.

Famously, in *Harper & Row v Nation Enterprises*, the Supreme Court of the United States considered the proper relationship between intellectual property and freedom of expression in the context of a copyright suit involving President Ford's hitherto unpublished memoirs.[1] For the majority, Justice Sandra Day O'Connor opined:

> In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas ... In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright. Whether verbatim copying from a public figure's manuscript in a given case is or is not fair must be judged according to the traditional equities of fair use.[2]

O'Connor J took the view that copyright law has provided adequate protection for freedom of speech concerns through such internal doctrines as the distinction between ideas and expression, and the operation of the defence of fair use. She stressed that there was no need for the copyright legislation to be subject to special oversight under the First Amendment.

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1 *Harper & Row v Nation Enterprises* 471 US 539 (1985).

2 Ibid.

Of late, there has been a spate of popular and academic books decrying that copyright law has a detrimental impact upon freedom of expression. Most notably, in *Free Culture*, Lawrence Lessig has tilted at the comforting, consoling fiction of the Supreme Court of the United States in *Harper & Row* that 'copyright is an engine of free expression'.[3] He complains:

> Now that technology enables us to rebuild the library of Alexandria, the law gets in the way. And it doesn't get in the way for any useful copyright purpose, for the purpose of copyright is to enable the commercial market that spreads culture. No, we are talking about culture after it has lived its commercial life. In this context, copyright is serving no purpose at all related to the spread of knowledge. In this context, copyright is not an engine of free expression. Copyright is a brake.[4]

Lessig is suspicious of the utility of the defence of fair use, and other internal copyright doctrines, in safeguarding the freedom of expression. He objects: 'Fair use in America simply means the right to hire a lawyer to defend your right to create.'[5] Lessig has maintained that the judiciary should read down the congressional power to make laws 'to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries'. He has also called for intellectual property laws to be subject to greater oversight under the First Amendment. However, the Supreme Court of the United States has rebuffed the claims of Lessig that the Sonny Bono Copyright Term Extension Act 1998 (US) was unconstitutional.[6]

This review essay considers a number of exemplars of the recent genre of publishing on intellectual property and freedom of expression. First, it examines the popular screed, *Freedom of Expression®: Overzealous Copyright Bozos and other Enemies of Creativity*, by Kembrew McLeod, a music critic and a Professor of Cultural Studies from the University of Iowa.[7] Second, it evaluates the rather more stately collection from Oxford University Press, *Copyright and Free Speech: Comparative and International Analyses*, edited by Jonathan Griffiths and Uma Suthersanen.[8] Despite the superficial differences in style and tone, the two books bear close comparison. The texts are certainly testimony to a growing anxiety that the dramatic expansion of intellectual property rights is curtailing freedom of expression.

Freedom of Expression®

In *Freedom of Expression*®, Kembrew McLeod complains about the incursions by copyright law into the freedom of political speech and artistic expression:

> When companies try to use intellectual property laws to censor speech they don't like, they are abusing the reason why these laws exist in the first place. Copyright

3 L Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, Penguin, New York, 2004.

4 Ibid, at p 227.

5 Ibid, at p 187.

6 *Eldred v Ashcroft* 537 US 186 (2003).

7 K McLeod, *Freedom of Expression®: Overzealous Copyright Bozos and other Enemies of Creativity*, Doubleday, New York, 2005.

8 J Griffiths and U Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses*, Oxford University Press, Oxford, 2005.

> was designed to, as the US Constitution puts it, 'promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries'. Copyright exists — and the US Supreme Court has consistently repeated this — as a means to promote the dissemination of creative expression, not suppress it. The overzealous copyright bozos who try to use the law as a censorious weapon mock the idea of democracy, and they step on creativity. As culture increasingly becomes fenced off and privatised, it becomes all the more important for us to be able to comment on the images, ideas, and words that saturate us on a daily basis — without worrying about an expensive, though meritless, lawsuit. The right to express one's views is what makes these 'copy fights' first and foremost a free speech issue. Unfortunately, many intellectual property owners and lawyers see copyright only as an economic issue.[9]

McLeod objects to the Digital Millennium Copyright Act 1998 (US), calling the legislation well-intended, but ultimately misguided: 'It's a bad law because it has failed to prevent unauthorised duplication of copyrighted goods — surfed the Internet lately? — and has only succeeded in curtailing freedoms, criminalising legitimate research, and arresting the development of worthwhile software'.[10] He is also appalled by the Sonny Bono Copyright Term Extension Act 1998 (US), claiming 'we are allowing much of our cultural history to be locked up and decay only to benefit the very few, which is why some have sarcastically referred to this law as the Mickey Mouse Protection Act'.[11]

McLeod displays a puckish sensibility. At heart, he is a wicked pixie. He is fond of japes, stunts, and hoaxes. In 1998, McLeod obtained a trademark from the United States Patent and Trademark Office in respect of the phrase 'freedom of expression', as an ironic comment to demonstrate how the American culture had become commodified and privately owned.[12] He sought to publicise this event through a media prank. McLeod hired a lawyer to write a cease-and-desist letter to a colleague who was complicit in the joke:

> Your company has been using the mark Freedom of Expression. Such use creates a likelihood of confusion in the market and also creates substantial risk of harm to the reputation and goodwill of our client. This letter, therefore, constitutes formal notice of your infringement of our client's trademark rights and a demand that you refrain from all further use of freedom of expression.[13]

Dealing with reporters, McLeod observed poker-faced: 'I didn't go to the trouble, expense, and the time of trademarking freedom of expression® just to have someone else come along and think they can use it whenever they want'.[14] His stooge responded that McLeod was an 'opportunist'. This staged dispute was reported, with great earnestness, by the *Hampshire Gazette*. This incident has echoes of the controversy in Australia over a Melbourne patent attorney, John Keough, obtaining innovation patent for a wheel — a 'circular transportation device'.[15]

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9 McLeod, above n 7, at p 8–9.
10 Ibid, at p 4.
11 Ibid, at p 8.
12 Ibid, at p 118–122.
13 Ibid, at p 120.
14 Ibid, at p 120.
15 N Cochrane, 'Melbourne Man Patents The Wheel', *The Age* (Melbourne), 2 July 2001.

In chapter one, McLeod considers battles over traditional music, such as folk music, blues and jazz — focusing upon Woody Guthrie's 'This Land is Your Land', the Hill Sisters' 'Happy Birthday to You' and Muddy Waters' 'Feel Like Goin' Home'. He also draws some tenuous links to the debate over gene patents. His discussion of intellectual property and biotechnology is largely generic and unoriginal.

In chapter two, McLeod explores issues concerning copyright law and digital sampling. He provides a brief history of rap, and hip-hop — covering the Beastie Boys, Public Enemy, 2 Live Crew, and MC Hammer.[16]

McLeod describes how copyright law has had a chilling impact upon the artistic practice of sampling. One memorable example deals with British band, The Verve. The group sampled an orchestration on their song 'Bittersweet Symphony' from The Rolling Stone's 'The Last Time'.[17] Before the release of the album, the band entered into a licensing agreement to use the sample with 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 100% 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 those from the use of the song in Nike and Vauxhall advertising. 'Bittersweet Symphony' was nominated for a Grammy and Mick Jagger and Keith Richards were named as the nominees, not The Verve.

In chapter three, McLeod turns his attention to 'illegal art'. He charts the artistic movements of Dadaism, Situationism, Pop Art, and Post-modernism. He considers such well-known controversies as Roger Koons' *String of Puppies*,[18] Negativland's appropriation of U2,[19] and artistic mutilations of Barbie.

In the case of *Mattel Inc v Walking Mountain Productions*, the toy doll manufacturer Mattel sought to prohibit a Utah photographer called Thomas Forsythe from producing and selling a series of 78 photographs entitled 'Food Chain Barbie'.[20] The work had strong social and political overtones.[21] The artist said that he chose to parody Barbie in his photographs because he wanted to challenge the beauty myth and the objectification of women.[22] He observed: 'Barbie is the most enduring of those products that feed on the

16 *Campbell v Acuff-Rose Music, Inc* 510 US 569 (1994).

17 R Carnachan, 'Sampling and the Music Industry: A Discussion of the Implications of Copyright Law' (1999) 8(4) *Te Mata Koi: Auckland University Law Review* 1033.

18 *Rogers v Koons*, 960 F 2d 301 (2nd Cir 1992).

19 Negativland, *Fair Use: The Story of the Letter U and the Number 2*, Seeland, Concord CA, 1995.

20 *Mattel Inc v Walking Mountain Productions*, 353 F 3d 792 (2004).

21 Thomas Forsythe maintains a website, which contains a selection of the Food Chain Barbie series: www.creativefreedomdefense.org/fc_1.htm.

22 For a feminist analysis of Barbie, see J Urla and A Swedlund, 'The Anthropometry Of Barbie: Unsettling Ideals Of The Feminine Body in Popular Culture', in J Terry and J Urla (eds), *Deviant Bodies: Critical Perspectives On Difference In Science And Popular Culture*,

insecurities of our beauty and perfection-obsessed consumer culture.'[23]

The company Mattel argued that the photographs infringed its copyrights, trade marks, and trade dress.[24] It was concerned that the artistic works would erode the brand of Barbie by wrongfully sexualising its blonde paragon of womanhood. However, Pregerson J held that the use of the manufacturer's copyrighted doll in parodic photographs constituted a fair use of copyright works. He observed:

> The public benefit in allowing artistic creativity and social criticism to flourish is great. The fair use exception recognises this important limitation on the rights of the owners of copyrights. No doubt, Mattel would be less likely to grant a license to an artist that intends to create art that criticises and reflects negatively on Barbie's image. It is not in the public's interest to allow Mattel complete control over the kinds of artistic works that use Barbie as a reference for criticism and comment.[25]

The judge concluded that the use of manufacturer's 'Barbie' mark and trade dress did not amount to trade mark infringement or dilution.

In chapter four, McLeod turns his attention to trade mark law, brand protection, internet domain names, and publicity rights. He hails the 'No Logo' movement, culture-jammers, *Adbusters*, and other iconoclasts who seek to subvert the message of advertisers and cultural icons.

In chapter five, McLeod goes off at a tangent, and considers more generally the privatisation of public space, culture, education, and democracy. Most striking is his discussion of litigation over copyright law in the context of electronic voting.

In 2003, students from Swarthmore College published thousands of internal documents from a company called Diebold Inc, detailing security flaws and software problems in its electronic voting machines.[26] In response, Diebold Inc sent out cease-and-desist letters to internet service providers, citing copyright violations under the Digital Millennium Copyright Act 1998 (US), and demanded that the documents be taken down. The Electronic Frontier Foundation intervened in the dispute, filing a lawsuit to protect the e-voting activists' First Amendment rights. Wendy Seltzer observed: 'Diebold's blanket cease-and-desist notices are a blatant abuse of copyright law. Publication of the Diebold documents is clear fair use because of their direct relevance to the debate over the accuracy of electronic voting machines.'[27] In the end, the company gave up trying to protect its copyrighted documents.

McLeod seeks to make sense of this controversy over the electronic voting machines:

Indiana University Press, Bloomington, 1995, at p 277–314. For a wider discussion of myths of femininity, see M Warner, *From The Beast To The Blonde: On Fairy Tales And Their Tellers*, Chatto and Windus, London, 1994.

23 *Mattel Inc*, above n 20 at 796.

24 Naomi Klein notes that the company boasts that it has 'as many as 100 different [trademark] investigations going on at any time throughout the world', a feat that she finds 'almost comically aggressive': N Klein, *No Logo: Taking Aim At Brand Bullies*, Flamingo, London, 2000, at p 181.

25 *Mattel Inc*, above n 20 at 806.

26 *Online Policy Group et al v Diebold Inc*, 337 F Supp 2d 1195 (2004).

27 http://www.eff.org/legal/ISP_liability/OPG_v_Diebold/.

> In so many instances of overzealous copyright bozoism, the law is not on the side of those who try to apply it improperly. Many times, all it takes is an individual to call a company's bluff or an organisation such as the Electronic Frontier Foundation to counter attacks on free speech. In fact, many of these censorious uses of copyright law have had a boomerang effect. In making frivolous claims on its copyrights, Diebold succeeded only in setting a precedent that opened up *more* possibilities for Freedom of Expression® online. This event demonstrated to activists and ordinary people that they need not be afraid of threats that are based on unfounded assertions of intellectual property rights. Or, at least, they should be less fearful.[28]

McLeod is concerned about the ramifications of private electronic voting, with third parties unable to check the reliability of proprietary software because of a combination of patent, copyright, and trade secrets protection. He concludes that society and democracy is better served by open source voting systems — in which anyone can examine the software code, and check its security.

In chapter six, McLeod explores the 'digital future and the analog past'. He charts the uses and abuses of the Digital Millennium Copyright Act 1998 (US) — in particular, the invocation of the broad new economic rights for copyright owners, the 'notice and take down' measures, technological protection measures, and contract law. The author also explores such developments as peer to peer networks and open source software.

Freedom of Expression® is certainly a lively read. There are, though, admittedly weaknesses to the book. McLeod devotes too much of the text to disputes over copyright law and musical works. His discussion of other copyrightable subject matter is too sparse and intermittent, by comparison. McLeod can be prone to being a little superficial in his analysis of controversies over intellectual property rights and the public domain. His work can be quite selective and fragmented — lacking a proper comprehensive overview of the topic. McLeod lacks a little originality at times. His work follows very much in the tradition of Lawrence Lessig's *Free Culture*, Naomi Klein's *No Logo* and Siva Vaidhyanathan's *The Anarchist in the Library*.[29] McLeod is also prone to analysing intellectual property and freedom of speech in light of United States law and practice. He notes that 'Draconian DMCA-like laws are spreading around the globe like digital wildfire'.[30] Yet, there is little meaningful comparative analysis of other legal systems — such as Australia, the European Union, India, China, or South Africa. More could have been made of the efforts of the United States Trade Representative to export some of the harshest aspects of United States law to other jurisdictions through the device of bilateral and regional trade agreements.

Yet, this book is certainly written with verve and wit. McLeod is like one of the music store attendants out of Nick Hornby's classic *High-Fidelity* — an obsessive cataloguer of culture, sometimes a little nerdish, but nonetheless passionate in defending the principles of freedom of speech and artistic expression. *Freedom of Expression*® will no doubt reach a wide audience. The

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28 McLeod, above n 7, at p 244.

29 Lessig, above n 3; Klein, above n 24; and S Vaidhyanathan, *Anarchist in the Library: How the Clash Between Freedom and Control is Hacking the Real World and Crashing the System*, Basic Books, New York, 2004.

30 McLeod, above n 7, at p 5.

book is not only published by Doubleday, but it has also been released for free on the web, under a Creative Commons licence.

Copyright and Free Speech

In *Copyright and Free Speech*, a range of academics and lawyers consider the ambivalent relationship between copyright law and freedom of speech. The editors, Jonathan Griffiths and Uma Suthersanen, observe:

> Copyright allows right-holders to restrict access to a wide range of forms of expression, including works of literature, paintings, and music. At the same time, it serves as an 'engine of free expression' by providing shelter for independent creation. It has the potential both to promote and to restrict free speech.[31]

The papers are largely derived from a symposium held at the law firm Clifford Chance LLP and organised by Queen Mary, University of London in 2003. This book largely focuses upon the relationship between copyright law and freedom of speech along the geographical axes of North America, Great Britain, Western and Eastern Europe, and Australia.

A number of writers consider the unsuccessful constitutional challenges launched against the validity of the Sonny Bono Copyright Term Extension Act 1998 (US). In particular, much attention is paid to the majority decision by the United States Supreme Court in *Eldred v Ashcroft*, which held that the copyright term extension was within the scope of the Congressional power to make laws in respect to intellectual property and consistent with the First Amendment scheme.[32] In an elegant paper, Neil Weinstock Netanel is critical that Ginsburg J of the majority mischaracterises the First Amendment values that copyright's continuing expansion lays bare. He nonetheless remains optimistic about the scope for copyright law to be read in light of constitutional concerns:

> The judicial immunisation of traditional copyright from First Amendment scrutiny is a peculiar and pernicious anomaly. In *Eldred*, the Supreme Court largely perpetuated that anomaly, at least with respect to imposing external First Amendment constraints on traditional copyright. Nevertheless, *Eldred* leaves open considerable room for First Amendment intervention in copyright law . . . Today's palsied safety valves too often intolerably exacerbate the dangers of self-censorship. Following the Supreme Court's suggestion, courts should reinvigorate copyright's safeguards in light of First Amendment strictures. Among other possible applications, they should mandate greater leeway for critical uses of copyrighted works. They should also require that copyright holders bear the burden of disproving the elements of fair use and should award damages, rather than injunctive relief, where the user raises a colourable, but unsuccessful claim of fair use.[33]

However, such optimism seems misplaced. Current constitutional challenges against the copyright term extension have floundered. In *Kahle v Gonzales* (formerly *Kahle v Ashcroft*), the District Court dismissed a complaint by two archives who sought a declaratory judgment that copyright restrictions on

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31 Griffiths and Suthersanen, above n 8, at p 1.

32 *Eldred v Ashcroft*, 537 US 186 (2003).

33 N Weinstock Netanel, 'Copyright and the First Amendment: What *Eldred* Misses and Portends', in Griffiths and Suthersanen, above n 8, at p 151.

orphaned works — works whose copyright has not expired but which are no longer available — violate the United States Constitution.[34] In *Golan v Gonzales* (formerly *Golan v Ashcroft*), a Colorado conductor sought to have the Sonny Bono Copyright Term Extension Act 1998 (US) and the Uruguay Round Agreements Act 1994 (US) declared unconstitutional.[35] In *Luck's Music Library v Gonzales*, the Court of Appeals rejected a constitutional challenge by sellers of public-domain foreign music and motion pictures against the Uruguay Round Agreements Act 1994 (US) provision, restoring copyright protection to certain foreign works.[36] This series of constitutional challenges to the copyright term extension in the United States seem to be doomed to failure.

A number of the authors also consider the constitutional issues raised by the Digital Millennium Copyright Act 1998 (US). In a polemic, Raymond Nimmer denies that the legislation stifles political speech or artistic expression. He has little sympathy for the deployment of constitutional law and First Amendment concerns to challenge the legitimacy of copyright law policy. In a footnote, Nimmer complains:

> The rights-restrictors arguments constantly mutate. In effect, they support a policy in search of a means of implementation. Whether discussing copyright term extension, the DMCA, software protection, contract law, First Amendment, fair use, or any other issue, the premise remains constant. One writer commented that, in this view, in a conflict between copyright and any other social value, the 'other' value prevails.[37]

In response, Netanel observes that 'the "paracopyright" provided for under the DMCA expands content provider control significantly beyond that which has traditionally obtained under the Copyright Act'.[38] He wonders whether such provisions would survive First Amendment scrutiny.

A number of the writers comment upon the impact of recent case law in the United Kingdom dealing with the intersection of copyright law and human rights law. In *Ashdown v Telegraph Group*, the Court of Appeals considered a matter of copyright infringement involving a newspaper using unauthorised quotations from the unpublished diaries of a prominent political leader.[39] It examined whether the Human Rights Act 1998 (UK) affected the protection afforded to copyright owners by the Copyright, Designs and Patents Act 1988 (UK). The Court of Appeals observed:

> We have reached the conclusion that rare circumstances can arise where the right of freedom of expression will come into conflict with the protection afforded by the Copyright Act, notwithstanding the express exceptions to be found in the Act. In these circumstances, we consider that the court is bound, in so far as it is able, to apply the Act in a manner that accommodates the right of freedom of expression. This will make it necessary for the court to look closely at the facts of individual

34 *Kahle v Ashcroft*, 72 USPQ2d 1888 (2004).
35 *Golan v Ashcroft*, 310 FSupp2d 1215 (2004); and *Golan v Gonzales*, 74 USPQ2d 1808 (2005).
36 *Luck's Music Library v Gonzales*, 407 F3d 1262 (2005).
37 R T Nimmer, 'First Amendment Speech and the Digital Millennium Copyright Act: A Proper Marriage', in Griffiths and Suthersanen, above n 8, at pp 360–1.
38 Netanel, above n 33, at p 145.
39 *Ashdown v Telegraph Group* [2002] Ch 149.

> cases (as indeed it must whenever a 'fair dealing' defence is raised). We do not foresee this leading to a flood of litigation.[40]

Gerald Dworkin comments that the express introduction of freedom of expression issues into the copyright equation has not created much consternation: 'It is a reserve power to be used by defendants in copyright infringement cases almost as a last resort and the courts will need to a lot of persuasion to depart from the Copyright Act (including the public interest defence)'.[41] Kevin Garnett comments that, in practice, the decision might encourage judges to interpret the defence of fair dealing in a more expansive fashion.[42]

Robert Burrell and James Stellios consider the operation of copyright law in light of the implied freedom of political communication in Australia. The joint authors focus especially upon the classic class of *Commonwealth v Fairfax*, in which the federal government successfully relied upon copyright law to prevent the publication of secret Australian foreign affairs documents in a book and a newspaper.[43] The pair noted that such a case would have attracted in contemporary times the protection of the implied freedom of political communication, as 'the disclosure of the material related directly to the system of representative government established by the Constitution'.[44]

Burrell and Stellios also speculate upon the 'children overboard' story from 2001 in which the Australian federal government claimed in the general election that illegal immigrants had thrown their children overboard from a boat intercepted by the navy. Subsequent photographs had revealed that this statement was a falsehood — the navy was in fact rescuing passengers from a sinking vessel. Burrell and Stellios argue that, although the defence of fair dealing might not have applied, the pictures could have been published safely under the implied freedom of political communication.

Recently, the High Court of Australia has made some cryptic comments on the inter-relationship between intellectual property and freedom of expression. In *Grain Pool of Western Australia v Commonwealth*, Kirby J observes in the marginalia:

> The protection of intellectual property rights must be afforded in a constitutional setting which upholds other values of public good in a representative democracy. In the United States the relevant head of constitutional power has been viewed as containing in-built limitations many of which are derived from the competing constitutional object of public access to information. In Australia the constitutional setting is different but the existence of competing constitutional objectives, express and implied, is undoubted.[45]

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40 Ibid.

41 G Dworkin, 'Copyright, the Public Interest, and Freedom of Speech: A UK Copyright Lawyer's Perspective', in Griffiths and Suthersanen, above n 8, at p 168.

42 K Garnett, 'The Impact of the Human Rights Act 1998 on UK Copyright Law', in Griffiths and Suthersanen, above n 8, at pp 207–9.

43 *Commonwealth v Fairfax* (1980) 147 CLR 39.

44 R Burrell and J Stellios, 'Copyright and Freedom of Political Communication in Australia', in Griffiths and Suthersanen, above n 8, p 278.

45 *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479.

Brian Fitzgerald has lauded this statement as a 'landmark footnote'.[46] He speculates upon the implications of this gnomic statement: 'This reasoning suggests that doctrines such as copyright misuse, which has emerged in the United States in the context of the new technologies, may have relevance in Australia. It also opens up a space for arguments concerning the balancing of copyright, fair dealing and free speech, as well as arguments relating to the constitutional power to enact database rights'.[47]

In a piece on Canada, Ysolde Gendreau considers copyright law in light of the Canadian Charter of Rights and Freedoms, as well as the Quebec Charter of Human Rights and Freedoms.[48] She examines a number of Canadian authorities on the conflict between copyright law and freedom of expression.

Most notably, in the 'Michelin Man' case, an industrial union conducted an organising campaign at Michelin Canada's plants in Nova Scotia, distributing leaflets, which featured a parody of the Michelin Tire Man.[49] First, Teitelbaum J held that the defendants had reproduced a substantial part of Michelin's design on their union campaign posters and leaflets. He explicitly rejected the decision of the United States Supreme Court in *Campbell v Acuff-Rose Music* refusing to accept that parody was protected as fair dealing in Canada.[50] Second, Teitelbaum J found that the plaintiff failed to prove that the good-will of its trade-marks had been depreciated by the defendants' activities and that the leaflets and posters will deleteriously affect Michelin's reputation as a manufacturer, its specific role in the marketplace. Third, Teitelbaum J found that the defendant's freedom of expression under the Charter of Human Rights had not been infringed. He said: 'The threshold for prohibiting forms of expression is not so high that use of another's private property is a permissible form of expression'.

Gendreau comments: 'The relative failure of the federal Charter to influence the interpretation of the Copyright Act may be due to the fact that courts consider that the Act already internalises the values protected by the Charter'.[51] Nonetheless, she holds out hope that the situation may be different in relation to the Quebec Charter of Human Rights and Freedoms, especially in relation to the right to privacy, and the right to one's likeness.

In their piece upon civil law on copyright law and freedom of expression, Alain Strowel and François Tulkens politely demur from the statement of Lawrence Lessig:

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46 B Fitzgerald, 'Case Comment: *Grain Pool Of WA v The Commonwealth*: Australian Constitutional Limits Of Intellectual Property Rights' (2001) 23(2) *European Intellectual Property Review* 103.

47 Ibid.

48 Y Gendreau, 'Canadian Copyright Law and its Charters', in Griffiths and Suthersanen, above n 8, p 245.

49 *Cie generale des etablissements Michelin/ Michelin v National Automobile, Aerospace, Transportation And General Workers Union Of Canada* ('the Michelin Man Case') (1996) 71 CPR (3d) 348.

50 *Campbell v Acuff-Rose Music, Inc*, 510 US 569 (1994).

51 Gendreau, above n 48, at p 252.

> Free culture can thus coexist with a (robust) copyright law that only applies to that 'tiny fraction'. It is not felt that freedom of expression should be systematically pitted against copyright: commercial production should be distinguished from other domains.
>
> It is also thought that copyright should take into account the apparently conflicting demands of the public to have better access to productions of the human spirit. It is anticipated that ignorance of these legitimate requests based on the right to culture or the reluctance to take them into account, which has in the past been witnessed in relation to claims based on freedom of expression, could produce another backlash against intellectual property. Copyright must not only deal with free speech concerns but also reconcile itself with the right to culture.[52]

Most notably, the Paris Court of Appeal considered a complaint by the oil company Esso that the environmental group Greenpeace had infringed its trademark through using the logo STOP E$$O on its website.[53] The Court of Appeal held that, even if parody is not allowed in trademark law, Greenpeace is nonetheless entitled to exercise the fundamental right of freedom of expression. In this case, there could be no confusion between the trademark of Esso and the Greenpeace slogan STOP E$$O. The Court of Appeal concluded that Greenpeace's activities remained within the limits of freedom of expression and did not violate Esso's trade marks. Strowel and Tulkens conclude: 'It is not completely correct to view this case as a victory for freedom of speech over intellectual property, as the court merely (and correctly) pointed out that there had been no infringement of trade mark law'.[54] They note that this case demonstrated that trade mark law had in part internalised concerns about freedom of speech.

The editors, Jonathan Griffiths and Uma Suthersanen, seek to draw together the themes of this disparate collection of papers:

> While the tension between copyright law and free speech has now undoubtedly been acknowledged, copyright law-makers have not yet fully recognised all the demands of free speech. Perhaps as a result of anxiety about the potentially disruptive effect of human rights thinking on commercial relationships, judges often appear to be primarily concerned to accommodate free speech norms with as little disruption to existing copyright principle as possible. Legislators appear to be entirely untroubled by free speech interests. In this climate, 'facial attempts to force an accommodation between fundamental rights and copyright legislation seem to be doomed to failure'. Many contributors suggest ways in which a more delicate accommodation of free speech interests could be made through use of flexible doctrines such as equity, fairness, and public interest, which are still to be found, under different names, in all the national and international copyright laws considered in this volume.[55]

The editors shy away from the radical stance of Kembrew McLeod who advocates a fundamental reform of copyright law and related rights. Instead

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52 A Strowel and F Tulkens, 'Freedom of Expression and Copyright under Civil Law: Of Balance, Adaptation, and Access', in Griffiths and Suthersanen, above n 8, p 287, at pp 312–13.

53 *Esso v Greenpeace* 4 July 2001 (TGI Paris); 26 February 2003 (Paris Court of Appeal); 30 January 2004 (Paris Court of First Instance).

54 Strowel and Tulkens, above n 52, at p 301.

55 J Griffiths and U Suthersanen, 'Introduction' in Griffiths and Suthersanen, above n 8, at p 7.

they support a melioristic position that copyright law can be reformed and supplemented, so as to better accommodate concerns about freedom of speech and human rights.

This collection is by no means perfect. The book *Copyright and Free Speech* is sometimes repetitious in its focus upon United States and United Kingdom law. The collection does not properly deal with jurisdictions in Africa, the Asia-Pacific, or Latin America. This is a shame — because concerns about freedom of speech and artistic expression are particularly acute in such regions. A few of the essays are a little disappointing. Uma Suthersanen's examination of human rights and international copyright law provides a rather abstract and contingent connection between the two concepts. Mira Sundara Rajan's discussion of the Russian experience is rather staid. Jeremy Phillips' account of databases and human rights law is much too mannered and idiosyncratic for its own good. Finally, the book is a little dear. Perhaps the publisher needs to review its pricing policy — especially given that its immediate competition is willing to release books for free on the internet under Creative Commons licences.

Such caveats aside, the book *Copyright and Free Speech* is a thorough and expansive scholarly collection. It provides a fairly comprehensive treatment of the relationship between copyright law and freedom of expression.