

Brian Fitzgerald · John Gilchrist *Editors*

# Copyright Perspectives

Past, Present and Prospect



Springer

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# Foreword: The Future of Copyright<sup>1</sup>

I am delighted to have the opportunity to participate in this Conference. I commend the Faculty of Law of the Queensland University of Technology (QUT) and the principal organizers of the Conference, Professor Brian Fitzgerald and Ben Atkinson, for taking up the gauntlet thrown down by the digital society.

Few issues in intellectual property or, if I may suggest, cultural policy are as important as the consequences of the revolutionary structural change introduced by digital technology and the Internet. Recently, as the number of people in the world with access to the Internet passes two billion,<sup>2</sup> support for addressing the consequences of this fundamental change has come from the highest levels. Both President Sarkozy of France and President Medvedev of the Russian Federation have called for the G20 to consider the issue. In his speech at Davos earlier this year, President Medvedev stated that “the old principles of intellectual property regulation are not working anymore, particularly when it comes to the Internet”. That, he stated, “is fraught with the collapse of the entire intellectual property rights system”.

Digital technology and the Internet have created the most powerful instrument for the democratization of knowledge since the invention of moveable type for printing. They have introduced perfect fidelity and near zero-marginal costs in the reproduction of cultural works and an unprecedented capacity to distribute those works around the globe at instantaneous speeds and, again, near zero-marginal costs.

The enticing promise of universal access to cultural works has come with a process of creative destruction that has shaken the foundations of the business models of our pre-digital creative industries. Underlying this process of change is a fundamental question for society. It is the central question of copyright policy. How can society make cultural works available to the widest possible public at

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<sup>1</sup> Address to Future Directions in Copyright Law Conference, February 25, 2011, Sydney.

<sup>2</sup> International Telecommunication Union, *The World in 2010: ICT facts and figures*.

affordable prices while, at the same time, assuring a dignified economic existence to creators and performers and the business associates that help them to navigate the economic system? It is a question that implies a series of balances: between availability, on the one hand, and control of the distribution of works as a means of extracting value, on the other hand; between consumers and producers; between the interests of society and those of the individual creator; and between the short-term gratification of immediate consumption and the long-term process of providing economic incentives that reward creativity and foster a dynamic culture.

Digital technology and the Internet have had, and will continue to have, a radical impact on those balances. They have given a technological advantage to one side of the balance, the side of free availability, the consumer, social enjoyment and short-term gratification. History shows that it is an impossible task to reverse technological advantage and the change that it produces. Rather than resist it, we need to accept the inevitability of technological change and to seek an intelligent engagement with it. There is, in any case, no other choice—either the copyright system adapts to the natural advantage that has evolved or it will perish.

Adaptation in this instance requires, in my view, activism. I am firmly of the view that a passive and reactive approach to copyright and the digital revolution entails the major risk that policy outcomes will be determined by a Darwinian process of the survival of the fittest business model. The fittest business model may turn out to be the one that achieves or respects the right social balances in cultural policy. It may also, however, turn out not to respect those balances. The balances should not, in other words, be left to the chances of technological possibility and business evolution. They should, rather, be established through a conscious policy response.

There are, I believe, three main principles that should guide us in the development of a successful policy response.

The first of those is neutrality to technology and to the business models developed in response to technology. The purpose of copyright is not to influence technological possibilities for creative expression or the business models built on those technological possibilities. Nor is its purpose to preserve business models established under obsolete or moribund technologies. Its purpose is, I believe, to work with any and all technologies for the production and distribution of cultural works, and to extract some value from the cultural exchanges made possible by those technologies to return to creators and performers and the business associates engaged by them to facilitate the cultural exchanges through the use of the technologies. Copyright should be about promoting cultural dynamism, not preserving or promoting vested business interests.

A second principle is comprehensiveness and coherence in the policy response. I do not think that there is any single magical answer. Rather, an adequate response is more likely to come from a combination of law, infrastructure, cultural change, institutional collaboration and better business models. Let me take each of those elements and comment on them briefly.

Law was for many decades, if not centuries, considered to be the way to make copyright policy. It must still be the final arbiter, but we know that it is a rather rigid and limited instrument in the digital environment. In that environment, the volume of traffic, the international or multi-jurisdictional nature of so many relationships and transactions and the loose regulation of the Domain Name System, which permits a large degree of anonymity, all make law a mere shadow of itself in the physical world, a weakened force. Its institutions and their reach are trapped in a territorial cage, whereas economic and technological behaviour burst out of that cage some time ago. In consequence, the culture of the Internet is such that platforms influence behaviour as much as, if not more than, law.

Recognizing the limitation of law, and its inability to provide a comprehensive answer, should not mean that we abandon it. There are many important legal questions to be addressed. Among them, I believe that the question of—and here I use, or misuse, advisedly a term from civil law—the responsibility of intermediaries is paramount. The position of intermediaries is key. They are at once, service providers to, as well as partners, competitors and even clones of creators, performers and their business associates; hence the difficulty that we have in coming to a clear position on the role of intermediaries.

As I have hinted, I believe that infrastructure is as important a part of the solution as law. Let us dare to say that the infrastructure of the world of collective management is out-dated. It represents a world of separate territories and a world where right-holders expressed themselves in different media, not the multi-jurisdictional world of the Internet or the convergence of expression in digital technology. This is not to say that collective management or collecting societies are no longer needed. But they need to re-shape and to evolve. We need a global infrastructure that permits simple, global licensing, one that makes the task of licensing cultural works legally on the Internet as easy as it is to obtain such works there illegally. Time does not permit me to go into detail here, but I would like to repeat two messages from recent conferences. First, I believe that an international music registry—a global repertoire database—would be a very valuable and needed step in the direction of establishing the infrastructure for global licensing. And, secondly, in order to be successful, future global infrastructure must work with the existing collecting societies and not seek to replace them. It should provide a means of linking them into a global system, much as the Patent Cooperation Treaty (PCT) links the patent offices of the world, rather than replacing them.

Beyond law and infrastructure, we have culture, and the Internet has, as we know, developed its own culture, one that has seen a political party, the Pirate Party, emerge to contest elections on the basis of the abolition or radical reform of intellectual property, in general, and copyright, in particular. The platform of the Pirate Party proclaims that “[t]he monopoly for the copyright holder to exploit an aesthetic work commercially should be limited to five years after publication. A five

years copyright term for commercial use is more than enough. Non-commercial use should be free from day one.”

The Pirate Party may be an extreme expression, but the sentiment of distaste or disrespect for intellectual property on the Internet that it voices is widespread. Look at the incidence of illegal down-loading of music. We may argue about the right methodology to use to measure that phenomenon, but we are all certain that the practice has reached alarming dimensions.

In order to effect a change in attitude, I believe that we need to re-formulate the question that most people see or hear about copyright and the Internet. People do not respond to being called pirates. Indeed, some, as we have seen, even make a pride of it. They would respond, I believe, to a challenge to sharing responsibility for cultural policy. We need to speak less in terms of piracy and more in terms of the threat to the financial viability of culture in the twenty-first century, because it is this which is at risk if we do not have an effective, properly balanced copyright policy.

The fourth element in a comprehensive and coherent design is institutional collaboration. This is a very delicate area, where any action may have a disproportionate influence on the battle for the hearts and minds of the public on the question of appropriate copyright policy. It is also a somewhat incoherent area, with different national approaches, some emphasizing action against offending consumers and others targeting intermediaries; some plurilateral approaches in the Anti-Counterfeiting Trade Agreement (ACTA); and some practical, industry actions or codes of self-regulation.

I believe that we need greater coherence if we are to make progress in this area. We need to define sensibly what objectives we share, starting in a modest manner. But we are very limited by the unwillingness of some countries to entertain any international discussion or action in this area.

The final element of a comprehensive and coherent design is better business models. This is undoubtedly happening now. But the story is not over and, for the future, we should constantly remind ourselves that the history of the confrontation of our classical copyright world with the digital environment has been more a sorry tale of Luddite resistance than an example of intelligent engagement.

Let me move to my final suggested guiding principle for a successful response to the digital challenge. I believe that we need more simplicity in copyright. Copyright is complicated and complex, reflecting the successive waves of technological development in the media of creative expression from printing through to digital technology, and the business responses to those different media. We risk losing our audience and public support if we cannot make understanding of the system more accessible. Future generations are clearly going to regard many of the works, rights and business agents that we talk about as cute artefacts of cultural history, much as the vinyl record has become in a very short space of time. The digital work is going

to change dimensions. We see that happening with user generated content. We see it happening also with 3D printing or additive manufacturing, where the digital file is the manufacturing technology and factory. This is the realm of the blue sky, and I hope that this Conference can start to develop the tools for exploring that sky.

Francis Gurry  
World Intellectual Property Organization (WIPO)



# Preface

This book is a collection of papers on copyright law from wide and diverse perspectives.

It is designed to appeal beyond professionals in the copyright world to a wider interested audience. The papers have been selected to stimulate and inform.

The title of the collection itself illustrates the breadth of its survey. There are short and lengthy papers, some historical, many focusing on current issues, some with a policy and philosophical orientation and some with a more technical bent.

The collection contains perspectives which have not hitherto been the subject of much literature discussion. One paper discusses an Islamic perspective on intellectual property—that is, a perspective from one of the world’s most significant legal systems—which has had little English language coverage. Other papers reflect the growing international voice of developing countries in debates over the future of copyright and intellectual property.

The collection canvasses current issues of controversy over the law and practice of copyright, such as

- the liability of internet service providers for infringement of copyright by its customers,
- the increasing use of the resources of the state via the criminal law as a vehicle to enforce copyright, rather than the resources of copyright owners, and the social impact of that change,
- questions raised by the digital age and internet publication, and
- the rapid growth in the practice of open content licensing.

While some of the chapters in this collection relate specifically to the law in Australia, the issues raised in most chapters pose questions presently faced by the vast majority of countries of the world.

The chapters in this collection are authored by distinguished professionals including Dr Francis Gurry, Director General of the World Intellectual Property Organization, Justice Emmett of the New South Wales Court of Appeal, Prof Ian Hargreaves from Cardiff University and Prof Brian Fitzgerald from the Australian

Catholic University. Prof Hargreaves, who led a review of intellectual property for the UK Government, published as *Digital Opportunity: A Review of Intellectual Property and Growth* in 2011, reflects on the future directions of copyright law reform in the afterword. Prof Hargreaves mentions the trend towards open access, the need for the improved licensing of material and the insufficient regard in general to the interests of users of copyright material in a digital context.

The Editors would like to thank Benedict Atkinson and Kunle Ola for their foundation work in developing this collection. The Editors also wish to thank the ARC Centre of Excellence for Creative Industries and Innovation (CCI) for their funding support of a number of the papers in this collection and the collection as a whole.

We hope you will be stimulated, provoked and stirred into further thinking about the future of copyright by reading the papers in this book.

27 December 2014

John Gilchrist  
Brian Fitzgerald

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# Chapter 1

## Address of Victor Hugo to the International Literary Congress

Benedict Atkinson

### 1.1 Paris

#### 1.1.1 Wednesday 17 June 1878

What makes this year so wonderful, so memorable, is that above the noise and clamour, to our astonishment, brooking no controversy, we hear the voice of civilization. This is a defining year. What should be done is being done. The old order is giving way to the new. Progress takes the place of war. Opposition is crumbling. Threats rumble around us but the friendship of nations makes us smile.

The achievements of 1878 will prove indestructible. They aren't temporary. We feel purpose in everything. This marvellous year announces, through the Paris

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Victor Hugo (1802–1885), one of France's greatest poets and writers, author of *The Hunchback of Notre Dame* and *Les Misérables*, addressed the International Literary Congress in 1878 to rapturous acclaim. The Congress adopted resolutions including the principle of perpetual copyright, and called on the French Government to host an international conference to establish a convention to regulate use of literary property. The French Government did not respond but the call for a convention was a decisive step towards agreement of the Berne Convention. Hugo believed that literary property ought to extinguish on the author's death (with publishers entitled to publish the author's works post mortem subject to paying small royalties to direct heirs). He considered that authors' rights must not be allowed to restrict the public domain. He thought, however, that the grant of literary property assisted development of the public domain. This speech is only in part directly concerned with the question of literary property. In total, it is a triumphant statement of Hugo's belief in principles of freedom and emancipation, and his love of France. It is also a tender reflection on the feelings of the outcast and exile. Hugo lived in exile from France between 1852 and 1870.

*Translation copyright Mary Atkinson and Ben Atkinson*

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Exhibition,<sup>1</sup> unity of industry; in the centenary of Voltaire, philosophical unity; and in this Congress gathered today, literary unity. A vast federation of labour in all its forms. An awe-inspiring realization of human brotherhood, founded on the peasant and working man, and governed by thinkers.

Industry looks for what is useful, philosophy for what is true, and literature for the beautiful. This is the triple purpose of all human effort, the useful, the truthful and the beautiful; and the triumph of this sublime effort, gentlemen, is civilization among peoples and peace among men.

You have gathered from all points in the civilized world to bear witness to this triumph. Yours are the elevated minds universally admired and respected, the talents everywhere recognised, the generous voices, yours the souls labouring for progress. You struggle for peace. You are men of fame and influence. You are ambassadors for the human spirit in this great city of Paris. We welcome you, authors, orators, poets, philosophers, thinkers, fighters. France salutes you.

Together, we are fellow citizens of a universal city. Together, hand in hand, let us reiterate our unity and allegiance. Together, let us enter the serene and noble realm of the absolute, which is justice, and of the ideal, which is truth. You are not here out of self-interest or necessity. You have come here to benefit others.

What is literature? It is the march of the human spirit. What is civilisation? It is an eternal discovery accompanying every step along the way, hence the term progress. We might say that progress and civilization are identical. People are judged by their literature. An army of two million men lives and dies, the *Illiad* remains. Xerxes' army lacks an epic and Xerxes vanishes, yet Greece, so small in size, is made immortal by Aeschylus. Rome is merely a town but through Tacitus, Lucretius, Virgil, Horace, and Juvenal, Rome becomes the world. If you mention Spain, Cervantes springs to mind. Speak of Italy and we think of Dante, of England, and behold, Shakespeare stands before us. France herself has her moments of genius, where the splendor of Paris is distilled in the sharp wit of a Voltaire.

Gentlemen you have a noble mission. You are a sort of literary parliament. You have the power to inspire laws, if not to enforce them. Speak justly, speak truth, and if by some mischance, no one listens, well, you will prove legislation wrong.

You are going to create a foundation for literary property. This is what is right, and you are going to embody it in law. I assure you that your suggestions and advice will be taken into account. You will persuade legislators seeking to confine the writer that literature has no boundaries. Literature is the mind leading humanity. Literary property is open to everyone. Royal decrees denied and still deny literary property. And why? For purposes of enslavement. The writer who owns his work is the writer who is free. Deny ownership and you deny him independence.

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<sup>1</sup> The Universal Exposition of Paris, or World Fair, held in Paris May–November 1878, marked France's recovery from the trauma of invasion and defeat by the Prussian army in 1871. For Hugo, who suffered during the siege of Paris in 1870, when starvation threatened the population, the year 1878 could be seen as a turning point, one involving renunciation of war.

At least that's what is hoped. Hence the peculiar sophism that would be puerile if it were not so pernicious: thought belongs to everyone, thus it can't be owned. Therefore, literary property cannot exist. First of all, this is a strange confusion of the ability to think, which is general, with thoughts themselves, which are personal. Thoughts are the self. Next, thought, an abstraction, is confused with the material, that is, books. A writer's thoughts, as such, evade all attempts at capture. They fly from heart to heart. They have the power and gift of *virum volitare per ora* [spreading like wildfire].

But books are distinct from thought. Books are tangible and easily seized. So easily that they sometimes are seized. As a product of the printing press, the book belongs to industry, and, in all its manifestations, is central to a vast commercial process. It is bought and sold. It is property. It has material value. It is the author's contribution to national wealth, and, of course, from every standpoint, is the least controversial type of property.

This hallowed property is daily violated by tyrannical governments, which seize control of publication, hoping thereby to control the author. Hence the system of official patronage, which takes everything and gives next to nothing in return. Dispossession and subjugation of the author follow. First they steal from the him, then they try to profit from him. A useless endeavour all the same. The writer eludes them. He is impoverished but free. Who could buy the peerless conscience of a Rabelais, Moliere, or a Pascal? The attempt is made, however, and the result is dismal.

Monarchy is a terrible succubus on the vital forces of a nation. Historians endow kings with titles like 'father of the nation' or 'fathers of the arts and letters'. However, in the baleful machinery of monarchy, anything goes: as acknowledged by the sycophant Dangeau on the one hand, and Vaubant, strict and severe, on the other. For example, in the so-called Great Century,<sup>2</sup> the way kings behaved, these fathers of the nation and fathers of the arts and letters, led to these two grim facts: people going hungry and Corneille going shoeless. What an appalling end to the 'Great Reign'!<sup>3</sup>

This is what happens, whether the burden falls upon the public or the author, when property born of labour is appropriated. Gentlemen, let us return to the principle: respect for property. Let us insist on literary property while at the same time fostering the public domain. Let us go further. Let us broaden our scope. The law should give publishers the right to publish any book after an author's death, provided they pay a small fee to his direct heirs, not more than 5 or 10 % of net profit. This very simple system, reconciling with the author's undeniable right to property, the equally undeniable rights of the public domain, was pointed out during the Commission of 1836 by the person addressing you now.

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<sup>2</sup> 'Le Grand Siècle', broadly the seventeenth century, referring usually to the reign of Louis XIV (1643–1715).

<sup>3</sup> Of Louis XIV.

The development of this proposal may be traced in the Commission minutes published by the Ministry of the Interior. Let's not forget the twofold principle: a book, as such, belongs to the author, but the ideas in the book belong—without exaggeration—to all mankind. All minds have equal claim to them. If one of these two rights, that of the author, or that of humanity, had to be sacrificed, it would of course be the right of the author, because we are solely concerned with the public interest, and I declare that the public must take precedence. But, as I have just said, such a sacrifice is not necessary.

Light! Always light! Light everywhere! Everything needs light! Light is in books! Throw open the book and let it do its work! Whoever wants to cultivate, to animate, to refine, to soften, to soothe—encourage the spread of books! Teach, show, demonstrate, multiply schools. Schools are the shining lights of civilization!

You look after your towns. You want to be safe in your homes. The perils of dark unlit streets perturb you. Think of something even more perturbing—allowing darkness to overwhelm the human mind. Intellect is like a thoroughfare. People come and go, wayfarers with good or bad intentions. Some may be treacherous. A bad idea is like a thief cloaked in darkness. The soul has its enemies. Let's spread daylight everywhere. Don't let darkness fill the corners of the human mind, the places where superstition and error may flourish, and where lies lurk in wait. In the twilight of ignorance, evil roams about.

You may ponder the need for street lighting, but think, especially think, about bringing light to the mind. For this, we need light incalculable. France has been busy spreading light for 300 years. Gentlemen, allow me a filial word, one you hold in your hearts, as I do. Nothing prevails against the soul of France. France *is* the public interest. France is the light of nations. People cry out for enlightenment! Where there is enlightenment, there is France they say! It's amazing that anyone could be against France. Yet, even so, France has enemies. These are the enemies of civilisation, of books of freedom of thought, enemies of emancipation, of accountability, of deliverance. The servants of dogma who want to enslave humanity forever. They're wasting their time! The past is past. Nations don't return to their vomit. Blindness comes to an end. Ignorance and error will not endure.

Do your worst you men of the past! We don't fear you. Go ahead, we watch with interest. Try your best. Insult the spirit of 1789. Overthrow Paris! Declare your hatred of freedom of conscience, freedom of the press, and of the courts, your hatred of civil law, of revolution and tolerance, your hatred of science, of all progress. Don't flag! Keep dreaming! You have as much hope of creating a suitable program for France, as you do of extinguishing the sun.

I do not want to end on a sour note. Let us return to the serene realm of thought. We began by supporting peace and harmony. Let's go on doing so proudly and calmly. I've said elsewhere, and I repeat, all human wisdom is contained in these two words: conciliation and reconciliation. Conciliating men and reconciling ideas. Gentlemen, today we are among fellow philosophers. Let us profit from the occasion. Don't be embarrassed. Speak out for truth. Here is one truth, and a terrible one: humanity suffers from a sickness, hatred. Hatred is the mother of war, frightful daughter of an iniquitous mother.

Give back, blow for blow. Hatred for hatred! War for war! Do you know the meaning of Christ's words, love one another? Universal disarmament, healing of mankind. True redemption is this, that we love one another. An enemy is more easily disarmed by offering him your hand rather than your fist. The advice of Jesus is a divine command. It is good and we accept it. We are for Christ! The writer is at one with the apostle. He who thinks with him who loves. Ah, let us proclaim civilization. No and no again! We want nothing to do with barbarians making war, nor with savages who murder and kill. We want nothing to do with war, pitting nation against nation, and man against man. All killing is not only horrific but senseless.

Brandishing the sword is absurd and the dagger imbecilic. We are warriors of the mind and our duty is to prevent physical conflict. Our purpose is always to throw ourselves between two armies, the spiritual and the material. The right to life is indisputable. We make no distinction between the great and the humble, between kings and men. It is through being merciful that we make peace. When the dread bell tolls, we beg kings to spare the lives of their people, and we beg republics to spare the lives of emperors.

It a beautiful day for the outcast when he implores a nation to pardon a prince or tries to obtain the grace of exile for an emperor.<sup>4</sup>

Yes, to conciliate and reconcile. Such is our mission oh philosophers. To my brothers in science, poetry and the arts, let us acknowledge the all-civilising power of thought. At every step that humanity takes towards peace, let us feel the deep joy of truth grow within us. Proudly embrace useful labour. Truth is one indivisible ray of light with one synonym only, justice. The light of truth is the light of reason.

There is only one way to be truthful, honest and reasonable. The *Iliad* shines with the same clarity as the *Philosophical Dictionary*. This pure beam spans the centuries, straight as an arrow, and as unsullied as the dawn. This ray overcomes the darkness of conflict and hatred. This is the miracle of literature. Nothing is more beautiful. Might, bewildered and confounded by right, war arrested by reason, this, oh Voltaire, is to tame violence with wisdom, this, oh Homer, is Achilles tangled in the hair of Minerva.

Now that I'm about to finish, allow me one wish, a wish intended not for one heart but all hearts.

Gentlemen, there was a Roman famous for one fixed idea: 'Carthage must be destroyed.' I too am obsessed by one thought and it is this. Hatred must be destroyed. If literature has a purpose, it is that. *Humaniores Litterae*, gentleman. The destruction of hatred is best achieved through forgiveness. Ah that this marvelous year should not end before lasting peace is declared. That it should not end before wisdom and friendship reign and wars, foreign and civil, cease. This is our souls' deepest desire.

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<sup>4</sup> A tireless advocate against capital punishment, in 1867 Hugo, then in exile in Guernsey, asked Benito Juarez, President of Mexico to spare the life of the deposed Emperor Maximilian I, sentenced to death after civil war. Juarez refused requests for clemency.

At this hour, when France is showing her hospitality to the world, may she also show her clemency. Let us crown France with clemency. All celebrations are fraternal. Any celebration that does not offer forgiveness is not a celebration. Amnesty is cause for public rejoicing. May this sound the closing note for these solemn and admirable proceedings, the World Exhibition. Reconciliation! Reconciliation!

Of course it's wonderful to see here the marvels of human effort, industry and labour, the masterpieces jostling with each other. But even more wonderful is the sight of the exile hovering on the horizon whose homeland opens its arms to embrace him.<sup>5</sup>

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<sup>5</sup> Presumably Hugo referred to himself. He returned from exile in 1870.

# Chapter 2

## Limitless Information

Benedict Atkinson and Brian Fitzgerald

### 2.1 Aaron Swartz

In the past three decades, since the ascendancy of the United States in the process of determining international copyright policy and rules, considerable bitterness has entered debate about copyright. Many individuals have objected to the attitude of the United States government to copyright legal infraction around the world. Many Americans have also protested at their government's vehement attitude to real or alleged copyright infringements of US citizens.

Anger swelled at the government's prosecution (2011–2013) of Aaron Swartz. Aaron Swartz was a programmer of prodigious ability, 'a kid genius',<sup>1</sup> and later advocate for public freedom from corporate or government oppression.<sup>2</sup> On 11 January 2013, he hanged himself in his Brooklyn apartment, aged 26.

Between September 2010 and January 2011, Swartz logged into the Massachusetts Institute of Technology's digital network to download millions of public

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<sup>1</sup> Lessig blog 12 January 2013, <http://lessig.tumblr.com>.

<sup>2</sup> Swartz became involved, aged 15, in the coding of Creative Commons. He was later known as a contributor to development of RSS and Reddit software. He advocated for open access in the *Guerilla Open Access Manual* (2008) and in 2010 he helped to found Demand Progress, an internet advocacy organisation dedicated to 'win[ning] progressive policy changes for ordinary people . . . '.

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domain academic articles from the JSTOR digital library. He connected remotely and by direct wire link. Download volumes exceeded guest user privileges and conventional download limits. In early January 2011, MIT recorded him entering and leaving a network wiring closet where he attached concealed a laptop for download. Notified by MIT, police arrested him.

Once Swartz supplied to JSTOR the hard drive cache of files downloaded, JSTOR declared itself uninterested in pursuing legal action against him. The US Attorney for Massachusetts, however, prosecuted under computer and wire fraud legislation. A 2011 Massachusetts Grand Jury indictment alleged six violations, increased in 2012 by nine felony counts.

After issuing of the first indictment, the US Attorney said in a press release that Swartz, ‘faces up to 35 years in prison . . . restitution, forfeiture and fine of up to \$1 million.’ Before his death, her office offered Swartz a plea bargain of conviction and 6 months in a low security prison.

The tragic circumstances of his death did not obscure recognition of Swartz’s talents and public contributions, and he swiftly became fixed in public memory as a quintessential figure, young, bold, expressing in his life his ideals about freedom, universality and the liberating use of technology. Among members of bisecting circles of people concerned by restriction of information access and political freedom, his death caused palpable public grief and anger. Some blamed the Justice Department for precipitating suicide by pursuing pre-trial tactics of intimidation and aggression.

Debate over the Justice Department’s conduct<sup>3</sup> essayed the proposition that many or most prosecutors try to secure plea bargains by suggesting the likelihood of lengthy sentences for a convicted felon. By implication, the Justice Department acted towards Swartz as it does to most individuals accused of crimes. Even allowing a neutral attitude on the part of prosecutors, two questions linger: why was Swartz indicted for criminal offences, and what does his treatment suggest about broader government attitudes to future information regulation?

Prosecutors charged Swartz, under the wires and computer fraud legislation, for engaging (in substance) in fraudulent property appropriation. Conceptually, the authors of Swartz’s indictment document hardly distinguish between abstract and tangible property. What matters above all is the crime of theft. The indictment states twice that Swartz acted to ‘steal’ from JSTOR. ‘Property’ is defined twice, once as ‘real or personal’ and a second time as JSTOR’s collected articles. Choice of legislation to frame charges precluded consideration of the differing policies informing legal treatment of non-excludable and excludable property. Such consideration, had it occurred, must have led to focus on harm caused, and invited consideration of intent.

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<sup>3</sup> A considerable number of Swartz’s friends, including Cory Doctorow and Lawrence Lessig blogged and spoke about the Justice Department’s actions. For a partial defence of the Justice Department’s actions, pointing out that the Attorney and her officers acted consistent with usual departmental prosecutorial practice, see Orin Kerr in Volokh.com 16 January 2013. James Boyle replied to Kerr in <http://Huffingtonpost.com> 18 January 2013.

The focus on theft, or ‘stealing’ lies at the heart of bemusement at prosecutors’ attitude to Swartz. Swartz, apparently, intended a gesture against enclosure of knowledge, even if the putative encloser is a not-for-profit disseminator like JSTOR. He presumably knew that his gesture would not be regarded as morally neutral. A person seeking to download material in a way that contravenes download conditions is aware of transgression: the omission (which may be a wrong) lies in acting without consent. Such a person, however, does not perceive correlation between unauthorised downloading and, for example, hijacking a cash transport van to steal its contents.

The peculiarity in prosecutors’ analysis is that they seemed unable to distinguish between an act directed towards public welfare—Swartz’s mammoth downloading for purpose of public dissemination—and any other act directed towards, or involving, public harm, such as hijacking a cash transport van.

To characterise Aaron Swartz, who intended public benefit, as felonious, to contemplate that his behaviour placed him in a cohort of people who might be bent against public good, is to repudiate an idea of public welfare with which he concerned himself in life. To call Swartz’s downloading theft, punishable by decades of servitude, is to merge ideas about the material and transcendental. Investing academic articles, or any other kind of property, with sacerdotal value, and by extension, treating theft as sacrilege, is to distort reality.

Psychologically, Swartz’s arraignment betrayed a sovereign’s hatred at denial of its sovereignty. This supposition is illustrated by a blog entry in which Swartz unknowingly foretold his own unravelling in the teeth of sovereign power. After his indictment, a trial lawyer Max Kennerly suggested that Swartz read Franz Kafka’s *The Trial*. A few months later, Swartz blogged about the book, ‘I read it and found that it was precisely accurate – every single detail perfectly mirrored my own experience.’<sup>4</sup>

*The Trial* is a story about Josef K, who, arrested on his 30th birthday, for a year experiences waking life as if sojourning in the shadowlands of nightmare. Nothing makes sense. Nothing is explained. Power is unanswerable. The nightmare is inescapable. After fruitlessly trying to discover the reason for his arrest, K submits, on his 31st birthday, to execution.

In another play, Kafka’s protagonist is condemned by his father with the words, ‘I sentence you to death by drowning.’ In Kafka’s *Letter To His Father* (1919), he describes his father as despot, overshadowing his life. In *The Trial*, Kafka makes clear that K is murdered by inimical exercise of power that issues from a single source of authority—its own will. Kafka’s father displays the same monstrous will. He does not propose his son’s execution, but Kafka does not doubt that resistance to his will is a capital offence.

Parallels between the situation of Aaron Swartz and the literature of Kafka need not be laboured. At the same time, the death of Swartz, and his treatment by the

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<sup>4</sup> See Litigation and Trial blog of Max Kennerly, 14 January 2011, and the 2011 *Review of Books* at <http://www.aaronsw.com>.

Justice Department, crystallise years of debate over the content and meaning of copyright policy and law. Aaron Swartz's downloads from JSTOR were intended to demonstrate the moral foolishness of refusing to share information. He acted boldly and found himself dragged, by authority of the United States, into a world of Kafka's devising.

His own country did not say, 'I sentence you to death by drowning.' Inimical power, exercised by the Justice Department, promised, in effect, to punish him for life. At the end of Swartz's review of *The Trial*, he observed, 'K . . . decides to stop fighting the system and just live his life without asking for permission. It goes well . . . for a while.'

If legal rules are permissive, in the sense that they permit humans to express the dignity of their natures, a 'life without asking for permission' is possible. Such a life is what Aaron Swartz appears to have wanted for everyone. The copyright system, as it has evolved to the present, appears to make difficult for its adherents thought of a world 'without asking for permission.'

## 2.2 Purpose

A decade of P2P cases, in which defendants consisted of music and film downloaders, producers of software that facilitated illegal downloading and ISPs that connected subscribers to the internet, shed little light on the question that occurred to internet users delighted by the seemingly miraculous utility of the internet: what is the purpose of copyright?

For more than 40 years preceding the end of the first decade of the twenty-first century, scholars examined the philosophy and economics of copyright, reaching conclusions mostly at odds with the premises adopted by government and judiciary. Non-legal analysis rarely accepted uncritically the favoured assertions of copyright apologists, that copyrights encourage production and dissemination, and the law balances the interests of producer and consumer. As a number of observers noted, these assertions were hypotheses, unvalidated by empirical evidence.

The courts in the P2P decade refrained from examining the question of purpose deeply and ignored derivative questions: Why is unauthorized downloading illegal? Why are copyright proprietors entitled to proscribe unauthorized copying that occurs outside a legally definable market? Do copyrights confer a right of automatic remuneration or a merely a right to negotiate for reward? Has any legislature or court ever settled these and other questions?

Arguments in P2P cases mostly followed conventional lines, complainants alleging harm caused by invasion of proprietary rights and defendants raising the defence of fair use (in the case of direct infringers) or innocent facilitation. Argument did not depart from interpretation of the scope and application of established doctrines, such as fair use, and adjudication, not surprisingly, focused on legal principle, not philosophical or theoretical exegesis.

Yet copyright law in the age of the internet could, from the perspective of internet users, hardly advance meaningfully unless legislature and courts could emancipate themselves from the restrictions of precedent-based legal reasoning. Digital technology called into question the presumptions of copyright law, and internet users, who rejected the validity of laws that constrained access, dissemination and use, increasingly rejected the pecuniary demands of proprietary interests and restrictions on supply of information (see Barlow 1994).

Those users expressed a public voice, a public volition, until now unheard and ignored by government or private interests. In a sense, the internet made copyright politics ‘interactive’, for whatever the law said, or politicians or corporations assumed, the diffuse public of internet users—including by necessity, inventive programmers—showed itself capable of flouting laws and doctrine, and finding new ways of securing access to information. Other users, such as writers of ‘fan fiction’—a new genre involving creative segues from published works—present another challenge to precepts of copyright law, one that courts may not welcome.<sup>5</sup>

The rise of public access corporations confirmed the trend towards public insistence upon the individual right to what might be called freedom of information—or weightless information. As companies such as Google demonstrated, information is super-abundant, and consumers of information endlessly curious and inventive in its uses. The internet is destroying the old idea, which animated the copyright law for 300 years, that information is a scarce commodity to be protected with more and more extensive rights. This old idea persists in government thinking, in the discourse of copyright industries and in social precepts. Its disappearance is by no means inevitable so long as proprietary attitudes hostile to public access and freedoms—in short, the attitude of privatization—dominate society at large.

On the other hand, unless humankind discovers the means of deconstituting individuals and reconstituting them near-instantaneously in a new location—as depicted in science fiction fantasies such as *Star Trek*—it is difficult to imagine

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<sup>5</sup> Although a case involving what could probably be better characterized as an example of derivative fiction, rather than fan fiction, *Salinger v. Colting*, 2010 WL 1729126, 9 (2d Cir. April 30, 2010) demonstrates judicial reluctance to permit creative appropriation of fictional characters and their back-stories. In *Salinger*, the Second Circuit Court of Appeals returned a copyright infringement case to the New York District Court to reconsider its finding of ‘irreparable harm’ (on which basis the district court granted an injunction against publication of a ‘sequel’ to the J.D. Salinger novel *The Catcher in the Rye*). The District Court found that the defendant, Frederick Colting, author of *60 Years Later: Coming Through the Rye*, breached copyright in J.D. Salinger’s novel *The Catcher in the Rye*—and, more controversially, copyright in the character of Holden Caulfield, the protagonist of Salinger’s work. *60 Years Later* imagined Caulfield as a man aged 76 (‘Mr C’), escaped from his nursing home and wandering the streets of New York. In Salinger’s novel, Caulfield is a 17 year old, expelled from school and wandering in New York. The District Court rejected arguments of fair use for the purpose of commentary and criticism (or parody). Though it vacated the lower court’s decision, the appeals court found *60 Years Later* to be substantially similar to Salinger’s novel. The Salinger trust was ‘likely to succeed on the merits of his copyright infringement claim’. On fan fiction, and user-generated content, see Wong (2009), p. 1075.

invention of a more extraordinary mode of communication than digital storage and transmission. This means that the literal wonders of digital communication must invite more and more public participation and create burgeoning counterweight to the privatization impulse. This struggle between public and private will determine the future shape of copyright law and, ultimately, perhaps its existence.

## 2.3 Conclusion

That copyright law might cease to regulate information dissemination seems unlikely. The history of property relations is one of extending control over whatever is controllable. To some, last century's collectivist interregnum foretold abolition of property and emancipation from exactions of power and wealth. However, gulag, famine and murder extinguished belief in a society in which nothing is owned. In the twenty-first century, the regime of private property seems irreducible and illimitable, furnishing means to control the universe itself, should technology allow.

Why this should be so is nothing less than the story of politics, or the contest for sovereignty. Sovereignty is more than power to command. It is also power to possess and exclude, the constituents of ownership. Contest for sovereignty resulted almost invariably—until adoption, in the last 200 or more years, of the principle of equality—in shades of absolutism. Until some modern societies created a sovereignty of many, allocating rights of equality to their members, struggle for sovereign power ended in rule by tyrant or coterie.<sup>6</sup>

Copyright law created another tyranny, that of eternal market sovereignty. Copyright's span is finite. Yet monopolies that outlive populations may as well be called eternal. Since the time of the Stationers' monopoly, advocates repeated one article of belief: creative effort conjures varied and delightful fruit, which is easily plucked without licence, unless forever protected from pilfering. The copyright sovereign demands eternal sovereignty.

Belief in immutability is characteristic of sovereign power throughout history. Yet even everlasting sovereignties disappear. Some tyrannies may end suddenly, as if expunged by outraged nature. Others vanish slowly, and in part, like Roman monocracy, its traces imprinted in emerging patterns of feudalism. Always,

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<sup>6</sup>In antiquity, political struggle created near universal tyranny, except in Athens and Rome. Citizens of the former city invented plebiscite democracy, permitting a small group of qualified men a right to vote. After a few decades, democracy of the few collapsed into tyranny. In Rome, aristocrats and people shared republican government for centuries, before aristocratic assertion of sovereignty resulted in ruinous civil wars, and finally tyranny of emperors. Feudalism established, in most of the world, control arrangements, conferring on small groups, emperors, kings and lords, control over land and labour. Until partial acceptance of the idea of popular sovereignty, all political systems assumed overlordship of one or a few. Even today, the vesting pattern of property rights suggests that popular sovereignty is unrealised. In all countries, ownership is highly concentrated.

contradiction becomes too much. Gross poverty contradicts gross wealth. Weakness contradicts power. Paraphrasing Marx, sovereignties produce their own gravediggers.<sup>7</sup>

Copyright's gravediggers, say its opponents, are millions of users of digital technology who circumvent, dissent, copy, upload, download, share, flout and jeer. A more accurate statement may be that if law reserves for the sovereign too much power, that sovereign, in this case the copyright system, is like a despot, and the day comes when the despot, refusing to share power, is hunted to terminus, a grave dug by those it declared lawless.

Problems arising from power concentration are not resolved without sharing. Sharing sovereignty, by grant of suffrage and other rights, erases its inimical character. No sovereign shares willingly. On the other hand, nothing commends a tyrant's recalcitrance. A fixed policy of proscription is usually fatal to the proscriber. The Bourbons proscribed and were proscribed. 'They had,' said Talleyrand, expert in accommodation, 'learned nothing, and forgotten nothing.'<sup>8</sup>

Comparison between Bourbons and copyright industries is faint speculation. A more concrete observation is that human freedom, object of the great formative constitutional documents of the United States and France, could become a motif for reform that helps copyright regulation to last. Copyright restricts human freedom to the extent that its prohibitions and punishments, and scope of rights, contradict ordinary expectation of what is legitimate.

In short, if copyright regulation is adapted to offer users freedom, akin to expressive political freedoms guaranteed in rights of free speech, communication and access to information, it may yet endure by consent. Consent may grow, if regulators continue to discuss, for reform purposes, the length of copyright monopoly. Regulation that reduced the central role of permission and control could not fail to win admiration in some quarters.

In 130 years since the Berne Convention, those who determine copyright policy and laws have shown small inclination to reduce scope of laws, once made. Regulation and deregulation alike begin as acts of executive will. The executive, however, proposes laws more prolifically than it seeks their repeal. The young will grow old before they see the light of Halley's Comet, or rejection of copyright precepts.

Thus legal code will enjoin, as before, preservation of sovereignty, not its diffusion. Identifying unlawful actions of tens or hundreds of millions of network users may be thought unfeasible. Crowds camouflage illegal acts. In reality, copyright prohibitions are more enforceable than many realise. Few hackers escape legal consequences if the executive—or industries—will their identification.

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<sup>7</sup> Marx and Engels (1848), Chapter 1.

<sup>8</sup> Observation attributed to Charles Maurice de Talleyrand-Périgord, Minister of Foreign Affairs and Prime Minister of France. It is possible Talleyrand is not author of the saying. He is supposed to have made the statement after accession of Charles X, the last Bourbon, in 1824, or his deposition in 1830.

Those who argue that code will be used to preclude freedoms hitherto available to internet or software users emphasise the power of software writers to disable communications technology. According to internet pessimists, the possibilities offered by network communication will reduce as networks become restricted or controlled by surveillance gateways. Governments, may, for approved security purposes spy on private online activity. User records of network owners or managers may, with growing licence, be interrogated by security agencies, or inquirers investigating copyright infringement. Digital rights management software will circumscribe multifarious use. Laws will prohibit most unremunerated use.

This stygian future is possible if governments, industries, or other actors determined to control information supply, enlarge their sovereignty over supply. Such a future is perhaps growing unlikely, however, for two reasons. The first is that, as the rise of access corporations show, if digital technology creates means for inexhaustible information supply, supply finds demand. The second is that digital technology is agent of metamorphosis and new creation: in the internet's interstices, injunctions of law or programming vanish.

If code is interdiction, it fails. The ganglions of digital creation are too numerous to be uprooted. As well forbid growth of sunflowers and dandelions, bursting in hues of yellow and gold. The argument that code is increasingly restrictive depends on the premise that statutory prohibitions are enforceable and software exclusions effective. Code has power to preclude digital uses. This premise is demonstrably correct, but only in part. Copyright laws are enforced to preclude piracy or unauthorised copying. Software programs prevent use of, or access to, digital material, unless the user complies with contractual terms specified by the supplier.

In due course, however, non-preclusion, dream and nightmare of science fiction may become reality. Non-preclusion means that code cannot preclude. Code is deprived of power to proscribe use or forestall decryption. In theory, software might develop autonomic generative function, that is, autonomous function, outside human control, responsive to voice command, anticipating human wishes, generating its own behaviour, and implementing its own repairs, modifications or improvements.

Autonomic generativity would create individual crypto-life-forms, subservient to human beings, and outside the jurisdiction of regulatory systems intended to govern human behaviour. Science fiction conceptions of machinery developing volition and personhood also posits that autonomic machines or systems must eventually face moral choices. More starkly, they must choose to do good or evil.

A more modest conception debars rational possibility of volition and moral choice, and asserts that while autonomic function is likely to place software systems outside jurisdiction, nothing prevents voluntary code replacing enforceable code, or co-operation substituting effectively for code-protected monopolies and exclusions.

At the very least, a future in which software code is, in function, permissive not restrictive, will more likely pertain than one in which a technology facilitating communicative emancipation is co-opted to limit expressive freedom. Global users of digital technology express support for the principle of non-preclusion by showing preference for what might be called permissive technology, specifically,

communication devices that enable more untrammelled communication and use. Users may as well be revolutionaries rattling palace gates.

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