

University of New South Wales

University of New South Wales Faculty of Law Research Series

Year 2007

Paper 59

Can A Public-Minded Copyright Deliver A More Democratic Internet?

Kathy Bowrey*

*University of New South Wales

This working paper is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

<http://law.bepress.com/unswwps-flrps/art59>

Copyright ©2007 by the author.

Can A Public-Minded Copyright Deliver A More Democratic Internet?

Kathy Bowrey

Abstract

In much of the literature about the Internet and digital communications, there is the presumption that a natural association exists between the Internet and democracy. By access to the Internet and its information flows, new possibilities arise. New forms of identity, self-discovery, collective discussion, and engagement become possible; the communications medium facilitates exchanges of ideas and information that influence all other areas of life. But if we move beyond the rhetoric of the Internet's potential for empowerment, is it possible to analyse the Internet itself in terms of its democratic credentials? More specifically, what are the sites of activity where others determine the potentialities, political and otherwise, of ordinary citizens? If the volume of pages in books and law journals is any guide, intellectual property law (IP), and copyright in particular, is the major site for governance of citizens and the Internet.

This commentary explores the notion of copyright law as the new constitutional law of cyberspace. The case for a public-minded copyright law is explored historically and in realpolitik terms, but the conclusion is that the chance for copyright playing a constructive formal regulatory role across the globe is exceedingly weak.

“Can a public-minded copyright deliver a more democratic Internet?”

Kathy Bowrey

(2007) 56 *University of New Brunswick Law Journal* 26

In much of the literature about the Internet and digital communications, there is the presumption that a natural association exists between the Internet and democracy. The Internet is assumed to be an empowering institution because of the American idealism and altruism of its “founding fathers”, computer programmers who linked their technical objective of facilitating access to endless streams of information and people to broader politics of liberation.¹ Liberation and a democratic philosophy are assumed to be inherent in Internet design because of its freedom from centralized management and control. The sentiment is well summed-up in the oft-quoted observation of John Gilmore, a founder of the Electronic Frontier Foundation (EFF), that “the Net interprets censorship as damage and routes around it.”²

There are probably as many debates about “freedom” and the meaning of “free access” in relation to the Internet as there are about the nature of “democracy” itself. However, the two share a discourse on the importance of a robust civil society and presumptions about freedom of communication. What the Internet empowers can be described as democratic in the sense suggested by Sheldon Wolin:

In my understanding, democracy is a project concerned with the political potentialities of ordinary citizens, that is, with their possibilities for becoming political beings through the self-discovery of common concerns and of modes of action for realising them.³

By access to the Internet and its information flows, new possibilities arise. New forms of identity, self-discovery, collective discussion, and engagement become possible; the communications medium facilitates exchanges of ideas and information that influence all other areas of life. To the extent that Internet transactions are unmediated and uncensored, the hope is that all kinds of social relations--global, local, and personal--are suitably engaged and invigorated. Whilst all these relations may not be ordinarily characterized as political in nature, there are political elements in the constitution of all interactions that allow people to come together and pursue common desires.

But if we move beyond the rhetoric of the Internet’s potential for empowerment, is it possible to analyse the Internet itself in terms of its democratic credentials? More specifically, what are the sites of activity where others determine the potentialities, political and otherwise, of ordinary citizens?

¹ See Barry Leiner et al, “A brief history of the Internet” in (ed) Internet Society, *All about the Internet* at <<http://www.isoc.org/Internet/history/brief.shtml>>.

² See John Gilmore, “Things I've Said (That People Sometimes Remember)” at <<http://www.toad.com/gnu/>>.

³ Sheldon Wolin, “Fugitive Democracy” in (ed) Seyla Benhabib, *Democracy and Difference. Contesting the Boundaries of the Political*, (Princeton, New Jersey: Princeton University Press, 1996) at 31.

If the volume of pages in books and law journals is any guide, intellectual property law (IP), and copyright in particular, is the major site for governance of citizens and the Internet.⁴ The push for stronger IP laws emerged in the mid-to-late 1990s. Intellectual property became the focus of law and globalization debates and a site of major revision. The much heralded Internet freedoms, which facilitated fast connections and easy transfer of digital information at low cost, were targeted as a significant economic and cultural *problem*. The sentiment is well reflected in the claim by Time Warner CEO Richard Parsons that peer-to-peer technology

“...isn’t just about a bunch of kids stealing music. It’s about an assault on everything that constitutes the cultural expression of our society. If we fail to protect and preserve our intellectual property system, the culture will atrophy. And corporations won’t be the only ones hurt. Artists will have no incentive to create. Worst case scenario: The country will end up in a sort of cultural Dark Ages.”⁵

Another common claim was that digital technology led to “convergence” of media and markets. The global information economy thus required “harmonization” of copyright laws. The implication was that simplified, generalized minimum standards would lead to “one size fits all” copyright across the globe. Substantial reform was effected by five levels of law-making.

Firstly, new international agreements were enacted such as the 1994 World Trade Organization (WTO) *Trade Related Aspects of Intellectual Property Agreement* (TRIPS) and the 1996 *World Intellectual Property Organization Copyright Treaty* (WCT)⁶. Previously, copyright had not been considered part of the WTO’s remit. These agreements created new international obligations and minimum standards for protection of owner rights globally. Secondly, at national level, many countries, including the USA, Canada, Australia, and the United Kingdom, enacted new digital copyright laws. These laws generally restricted users’ rights to take advantage of the Internet’s potential to freely access and exchange material online. Thirdly, owners developed more advanced technological means of tracking and restricting use of digital material to facilitate broader enforcement of their newly won rights. Fourthly, strategic litigation highlighted the areas that may require future legislative attention, and served to discourage investment in, and deployment of, sharing technologies. Finally, bilateral trade agreements incorporated new IP chapters, adding more dimensions to owner protections and justifying further domestic law reform.

In all these areas, user freedoms were given short shrift, with users generally characterized as “pirates” and seen as wrongly encouraged in their wanton behaviour by anarchists--opportunistic, legally savvy

⁴ ICANN has also featured, but not now to the extent that it did in the 1990s. Privacy and anti- terrorism laws also feature.

⁵ Quoted in Jessica Litman, *Digital Copyright: Protecting Intellectual Property Rights on the Internet* (Amherst: Prometheus, 2001) at 151.

⁶ World Trade Organization TRIPS Gateway, <http://www.wto.org/english/tratop_e/trips_e/trips_e.htm>; WIPO Copyright Treaty at <<http://www.wipo.int/treaties/en/ip/wct/>>

radical technology makers.⁷ By micromanaging Internet usage and creating new and serious obligations affecting technology makers and access providers, these initiatives constituted a severe attack on the earlier promise of free communications and technological liberation.

Copyright maximalization--strong owner rights permitting micromanagement of others' engagement with digitised content with a view to profit extraction--undermines the lives, self discoveries, and possibilities of engagement with people across the globe and within territorial boundaries. Much copyright critique has been preoccupied with responding to this limited economic vision of digital law reforms, seen to undermine the broader potential of the "information society".

As Pamela Samuelson argues,

... a new public-regarding politics of intellectual property must have a positive agenda of its own. It cannot just oppose whatever legislative initiatives the major content industry organizations support (although it almost certainly will need to do this as well). It should be grounded on the realization that information is not only or mainly a commodity; it is also a critically important resource and input to learning, culture, competition, innovation, and democratic discourse. Intellectual property must find a home in a broader-based information policy, and be a servant, not a master, of the information society.⁸

In 2001, the Conference on the Public Domain heralded the beginning of international IP academic activism around these issues.⁹ Since that time, the attention of many researchers has focussed on formulating a more positive public ambition for this body of law.¹⁰ This global copyright commentary has come to link analyses of the role of copyright with conjecture about the future democratic possibilities of the Internet and society. Copyright is often written about as if it is, or could be, a kind of constitutional law for the Internet. Were copyright to appropriately balance the private rights of owners to control access to information against the public interest of creators, consumers, and the public-at-large to gain access, then the foundations for a democratic Internet and society (at least in regard to the so-called western liberal democracies) would be more secure.

This commentary explores the notion of copyright law as the new constitutional law of cyberspace. The case for a public-minded copyright law is explored historically and in realpolitik terms, but the

⁷ See Kathy Bowrey, "Chapter 6: Telling Tales. Digital Piracy and the Law" in *Law and Internet Cultures*, (Cambridge: Cambridge University Press, 2005).

⁸ Pamela Samuelson "Mapping The Digital Public Domain: Threats And Opportunities" 66 *Law & Contemp. Probs.* 147 (Winter/Spring 2003) at 170-1.

⁹ The conference was held at Duke Law School, 9-11 November, 2001. The events and proceedings can be found at <<http://www.law.duke.edu/pd/>>.

¹⁰ See for example, The Adelphi Charter, <<http://www.adelphicharter.org/>>; Consumer Project on Technology A2K Initiative, <<http://www.cptech.org/a2k/>>; Creative Commons, <<http://creativecommons.org/>>; iCommons, <<http://www.icommons.org/>>; The Yale A2K Initiative, <<http://research.yale.edu/isp/eventsa2k.html>>; Unlocking IP Research Project, <<http://www.cyberlawcentre.org/unlocking-ip/project.html>>.

conclusion is that the chance for copyright playing a constructive formal regulatory role across the globe is exceedingly weak.

Is copyright the same across the globe?

Historically, there have been differences in the rights recognized by states, reflecting different cultural and legal responses to technological innovation. Whilst ostensibly similar in character, exclusive rights were conferred to some depending upon the classification of copyright subject-matter, which is another way of saying that the rights were, to varying degrees, technologically and culturally specific.¹¹ Even amongst western nations with similar economies, different national emphases were accommodated; the French celebration of photography, cinematography, and its comparatively generous film rights are an example.¹² However, in the 1990s, piracy was identified as a generic problem affecting all ‘digital technology’. Piracy mandated essentially the same legal response to “digitisation”, regardless of the nature of the technology, the uses made of it, the domestic history, and local circumstance.

Accordingly, significant differences in the history and development of rights and treatment--between northern and southern countries, western and Asian legal systems, Commonwealth and continental regimes in particular--were set aside, so that trade opportunities of the "digital economy" could be expanded for all. The “one size” we were all moving towards was primarily an American standard, reflecting that country’s strength in the information economy and its comparative influence in world trade relations.¹³ This trend was further accentuated in bilateral and multilateral free trade agreements, notwithstanding the regional and national anomalies that also crept in with these negotiations.¹⁴ Consequently, owner protections have advanced everywhere and digital freedoms have been formally and symbolically curtailed.

American critics of these developments all too frequently refer to the USA Constitution for inspiration: “The Congress shall have the power ... to promote the progress of science and the useful arts, by securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries.”¹⁵ They argue that the public policy objectives of copyright have been discounted in the

¹¹ See Kathy Bowrey, “Fertile Ground: Law, Innovation, and Creative Technologies”, (ed) Fiona Macmillan, Uma Suthersanen & Martha Woodmansee, *New Directions in Copyright Law: Volume 4* (Cheltenham, UK: Edward Elgar, forthcoming).

¹² Anne Barron, “The Legal Properties of Film” (2004) 67(2) MLR 177; Pascal Kamina, *Film Copyright in the European Union*, (Cambridge, UK; New York: Cambridge University Press, 2002).

¹³ Christopher Arup,, “TRIPs: Across the Global Field of Intellectual Property”, (2004) 26(1) E.I.P.R. 7; Peter Drahos with John Braithwaite, *Information Feudalism: Who owns the knowledge economy?*, (New York : New Press, 2003); Peter M Gerhart, “Why Lawmaking for Global Intellectual Property is Unbalanced”, (2000) 22(7) E.I.P.R. 309; Christopher May & Susan Sell, *Intellectual Property Rights : A Critical History*, (Boulder, Colorado: Lynne Rienner Publishers, 2005).

¹⁴ See for example, Kimberlee Weatherall, “Pretend-y Rights. On the Insanely Complicated new Regime for Performers’ Rights in Australia, and How Australian Performers Lost Out”, (ed) Fiona Macmillan & Kathy Bowrey, *New Directions in Copyright Law*, Volume 3 (Cheltenham, UK: Edward Elgar, 2006).

¹⁵ U.S. Const. art. III, § 8, cl. 8.

current climate, and, whilst it is hard for civil society interests to be heard in global trade forums, domestic challenges to such laws may be possible. Several constitutional challenges to the *Digital Millennium Copyright Act* (DMCA) 1998 have been fought, with leading academics supporting amicus briefs.¹⁶

Though no body blow to the reforms has been dealt, the prevailing view remains that this has to do with the “conservative capture” of the legislature and judiciary. Few cast much doubt on the political potential of American copyright law; the presumption remains that copyright law can be “saved” and returned to its proper public path or allowed to reach its full potential in the USA, and then, perhaps, across the globe.

Similar concerns with the privatization agenda of global copyright have been noted in Australia, the United Kingdom, New Zealand, and Canada. However, there has been very limited constitutional argument in these jurisdictions.

Outside of the USA, the case for a “public-political” agenda for copyright is far weaker. Historically, Anglo common law speaks more to incoherent and multiple justifications for copyright than to a global basis for public-minded copyright.¹⁷ Commonwealth constitutional provisions on intellectual property, where they exist, are generally very spare.

Twentieth century Australian law is dishearteningly weak in its formal recognition of public interests. The public character of copyright finds little clear legal expression, though it does exist. To describe the communicative freedoms copyright entails, one needs to draw attention to the indistinct possibilities that lie beyond the clearer definition of the exclusive rights of owners, and refer to a myriad of precise but conditional “exceptions to infringement”. These entitlements are conferred on special interests or circumstances rather than applying to citizens at large. Thus, to speak for the public, one has to speak of silences and gaps in the law located across various sections of an unwieldy body of legislation that enable access. In Australian copyright, the public interest is only partially formulated. At best, it is expressed as a negative or as residual. It comes to light by reference to the positivity of the owner’s defined interests. As legislation, the constitution, and common law provide no broad basis of conceptualization of public rights, there is little legal fabric that can be seized with fervour-- clearly, emphatically, and without qualification.

What does this mean?

¹⁶ The most notable being *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003).

¹⁷ Brad Sherman & Lionel Bently, *The Making of Modern Intellectual Property Law*, (Cambridge: Cambridge University Press, 1999); Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth Century Britain (1695 -1775)*, (Oxford: Hart Publishing, 2004).

The strategy of defending the democratic Internet by relying on a global copyright, free speech, and innovation tradition is politically and jurisprudentially naïve. In reality, there is not much legal foundation for this “tradition” to build upon outside of the United States. Further, the tenor of the global diplomatic discourse initiated by the USA makes the task much harder for countries to accomplish than has previously been given credit. To the extent that a public-minded copyright law depends on the power of “independent” nation states to constitute the associated Internet freedom, USA trade and legal practice in treaty negotiations is so unsupportive of these politics that it stifles any emergence of pro-public copyright traditions in other jurisdictions, even though academic discourse may popularize a desire for it.

This is not to say that USA maximalization speaks and all obey. Domestic resistance to copyright maximalization continues, but without effective engagement. Whereas in the USA maximalist and free speech agendas for copyright are perceived as distinct and separate strands, in Australian debates these distinctions are overwhelmed by an ill-focused and undefined “anti-American” jurisprudence. It is the undemocratic nature of global copyright negotiations that unleashes this passion. For example, Australia’s signing to USA-style DMCA-plus owner rights in the *Australia-USA Free Trade Agreement* (FTA) (2005) led to legislative consideration of USA-style fair use rights, the purpose being to rejig the domestic copyright balance in line with the USA and to demonstrate Australian government responsiveness to local political discontent.¹⁸ Enacting fair use rights would have led to a clearer domestic articulation of citizen entitlement to access copyrighted works than currently exists. The Federal Attorney General invited submissions on the merit of such a reform.¹⁹ In analyzing the benefits or otherwise of this “alien” approach, Australian legal discourse became preoccupied with critiquing the limitations and problems of American fair use jurisprudence.²⁰ These critiques were not just from owner lobbies (the local chapters for multi-national media owners); it also came from frustrated “activist” academics. It is highly ironic that the case for a democratic Internet and free communications was so readily able to be diverted and politically dissipated through the practices of local democracy in the form of domestic consultations about the substance of proposed law reforms.

There had been little space for the assertion of Australian legal identity and IP best interest during the FTA negotiations, where the Australian government preoccupation was with other economic interests. When finally given a restricted and belated invitation to get involved in formulating IP policy, Australian lawyers and academics seized the opportunity to assert local autonomy. They articulated the superiority

¹⁸ For the nature of local discontent see Kathy Bowrey, “Can we afford to think about copyright in a global marketplace?” (ed) Fiona Macmillan, *New Directions in Copyright Law*, Volume 1 (Cheltenham, UK: Edward Elgar, 2005) 51-69.

¹⁹ Australian Government Attorney General’s Department, *Fair Use and Other Copyright Exceptions. An examination of fair use, fair dealing and other exceptions in the Digital Age*, (2005)
<<http://www.ag.gov.au/agd/WWW/agdhome.nsf/AllDocs/E63BC2D5203F2D29CA256FF8001584D7?OpenDocument>>.

²⁰ For an overview see, Kimberlee Weatherall, “Submissions in the Attorney-General’s Fair Use/Fair Dealing Inquiry: I’ve been reading” *Weatherall’s Law: Blogspot*, 10 August, 2005 <http://weatherall.blogspot.com/2005_08_01_weatherall_archive.html#112367201793051437>.

of our domestic IP wisdom and, correspondingly, the benefits of their own legal training and experience. The consequence was a near wholesale rejection of “American style fair use”. What we *saved* was the *Australian legal tradition* of fair dealing rights.²¹ All this means is that the law remains complex, piecemeal, limited, fragmented, and without clear identification or development of Australian copyright’s “public” side.

Resisting the Americanization of our jurisprudence stems from a strong belief in due process, legal accountability, and the entitlement of citizens (and lawyers) in a liberal democracy to determine their best interests. However, the space for such assertion of power and local commonsense during the negotiations was, in reality, very limited. The USA government, with the complicity of the Australian Federal government, set the main terms of the political and legal discourse about copyright reform in Australia. The domestic response effectively contained and neutralized the local resistance to global owner agendas. In this instance, democratic process was a local diversion and a face-saving exercise. The fair use inquiry allowed for a small venting of opinion, which gave a symbolic nod towards the “democratic” health of our legal processes. Arguably, the related and more recent technological protection measure (TPM) inquiry does the same.²² Such processes diffuse local discontent over USA hegemony and legal control, and give the appearance of real domestic political engagement. They exhaust our energies and attention. But all that is on the table is minor tinkering within a woefully inadequate legal framework, where the associated reforms only increase the complexity and impenetrability of the rights ostensibly available to citizens.

Based upon the recent Australian experience, I think it is naïve to entertain the idea that there is potential in constitutional law and in copyright legislation for delivering a more publicly-minded copyright. Whatever possible successes it may have in the USA, publicly-minded copyright cannot be relied upon as a *global force* capable of confronting copyright maximalist agendas for information capitalism. The belief that it is capable of doing so is rooted in modern political rhetoric about the sovereignty of independent nation states and democratic engagement, mistaking those ideals for contemporary political reality. The undemocratic politics and legal processes of globalization, which favour copyright maximalization, cannot be effectively combated in the “democratic” spaces provided within nation states.

A more positive role for civil society

²¹ Attorney-General Philip Ruddock, “Media Release: Major Copyright Reforms Strike Balance”, 14 May 2006; <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2006_Second_Quarter_14_May_2006_-_Major_Copyright_Reforms_Strike_Balace_-_0882006>.

²² See Michael Geist, “Australia A.G. Releases Draft TPM Legislation”, 5 September, 2006, and comment by Matthew Rimmer, <<http://www.michaelgeist.ca/content/view/1410/1/>>.

A more fruitful avenue is to look beyond nation states to global regulation using private technological law--that is, to look to the role of copyright as understood and practiced in civil society and especially in technical communities.²³ As has been much commented on, copyright licensing practices, in particular free software and open source licensing, can play a very productive role in enabling fuller citizen participation and collective engagement. Yochai Benkler puts it this way:

To the extent one values active, engaged individual participation in defining and expressing political values in a polity as central to the democratic enterprise, one should strengthen peer-based models of information production and exchange, even if this requires policies that weaken proprietary production based on a sale of goods model.

... there is an area of overlap between the concerns of democracy--at least a wide range of liberal versions of democracy--and those of autonomy. A widely dispersed system of information production, which produces a wide range of diverse information about and representations of how life can be, serves autonomy in the first dimension just as it serves robust democratic discourse.²⁴

Benkler's work is primarily concerned with the provision of an open communications infrastructure with low technical and financial barriers to entry for programmers and support for the tailoring of technology to suit local circumstances and needs. What remains unclear is why the cause for a democratic Internet should extend from supporting free and open computer programming to a constitutional case for peer-based production and distribution of all copyrighted content. Does a public-minded copyright require a commitment to facilitating open access to content of all kinds?

To presume that it does suggests that the enabling politics secured by free and open software is the same as that for open cultural content. That is, my need for access to open source Apache (the most commonly sourced web server) is essentially the same as my need for free MP3 downloads. To me, it should go without saying that the need to access a web server is far greater. This computer programming founds the communicative possibilities of the network. I cannot engage with others over the Internet without such tools. Thus, politically speaking, it is a far more important technology. Access to my favourite MP3s may improve my mood and sense of wellness. Sharing files might help build my friendly relationship with others (or not). Ripping files, which I use creatively, can build culture and lead to new innovations.²⁵ However, a judgement about the public good of sharing necessitates a decision about the motivations and merits of the uses made. Having access to more, and having more made accessible to me, is not necessarily better for society.

Questions of cultural identity and cultural autonomy are not just about having access to communications, but also about having control. For example, from an indigenous point of view, where there is a history of

²³ See Kathy Bowrey, *Law and Internet Cultures*, above n.8.

²⁴ Yochai Benkler, "Through The Looking Glass: Alice And The Constitutional Foundations Of The Public Domain" 66 *Law & Contemp. Probs.* 173 (Winter/Spring 2003), 182, 187.

²⁵ Lawrence Lessig, *Free Culture. How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, (New York: Penguin, 2004).

exploitation and denial of cultural and political rights, the presumption of the invaders' sense of entitlement to access and appropriate indigenous land, culture, and lore, is a problem still to be redressed, at least in Australia. Pushing for *more access* only papers over the political problems of the political constitution of our settler societies.²⁶

Whether copyright helps or hinders a democratic Internet cannot be decided by idealised assertions of the inherent public good of open access. For copyright to serve a public law function, it needs to be responsive to real communities and their political problems. Here, the public is not all of one kind or in the same situation. Being responsive to historical impediments to communities coming together--problems of being respected, heard, and able to realise common desires--is a higher priority for a democratic Internet than a commitment to open copyright or enabling individual autonomy *per se*. This requires looking beyond questions about the politics of copyright law and the Internet and looking at copyright in relation to the broader state of society and the problems facing disadvantaged groups.

There should be serious doubts about the potential for copyright to play any generalized public good role. In formal legal terms, the constitutions and current democratic processes of nation states are inadequate to advance this end. In global private law terms, there remains tremendous potential for serving democratic and political ends within technical and scientific contexts; however, a more complicated set of questions about the good of access arises beyond these contexts. Good individual and institutional strategic copyright decision making about licensing and access can still be used to empower individuals and communities in ways that do make a difference. But whether a *democratic* good is served by access to knowledge, culture, and innovation depends very much on the context and use of the rights.



²⁶ This is taken up in more detail in Jane Anderson & Kathy Bowrey, 'The cultural politics of the IP Commons' [2006] [AIPLRes 13](#).