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# On the shoulders of giants

**Michael Naphali** tallies the high cost of overly restrictive copyright laws

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Powerful corporations are today the driving force behind copyright laws of dubious virtue which skilfully sidestep copyright's true objectives. Increasingly, observers regard these laws as causing irreversible damage to our culture and its common store of knowledge: the public domain. Dubbed "paracopyright", these laws threaten to transform intellectual property's noble ideals - the protection and encouragement of creativity - into a monopoly, benefiting few but corporate owners.

The federal government is alive to these tensions, recently announcing an inquiry into whether Australia should have US-style "fair use" exceptions to copyright infringement.

Many have come to share the concern of Britain's esteemed copyright judge Hugh Laddie, who has warned of copyright's "awesome width".<sup>1</sup> In a 2004 speech the US Federal Reserve chairman Alan Greenspan, commenting on the intellectual property policy mix, asked: "Are we striking the right balance?"<sup>2</sup> In June, *The Economist* revisited its concerns on corporate copyright abuse and renewed its call for reform: "A first, useful step would be a drastic reduction of copyright back to its original terms 14 years, renewable once."<sup>3</sup>

Broadly held concerns have created a backlash against copyright law, including the fast-growing US "copyfight" movement. Donna Wentworth, of the Corante organisation ([www.corante.com](http://www.corante.com)), describes the "copyfight" as: "The battle to keep intellectual property tethered to its purpose, understanding that when [intellectual property] rights are pushed too far, they can end up doing exactly the opposite of what they're intended to do."

Experts in Australia hold similar concerns. "The ground of public debate [has] shifted in favour of the rights proponents," says Melbourne University's Sam Ricketson, "and the arguments about the role of incentives, the place of fairness, access and public benefit are ignored."<sup>4</sup>

Isaac Newton's famous words about "standing on the shoulders of giants" are often quoted in support of the proposition that no idea is born in a vacuum. Our stock of intellectual capital grows by encouraging people to build upon

earlier ideas.

With the so-called "war against piracy" yielding little but hollow victories, the entertainment industry's policy of pursuing mass litigation is having tragic side-effects, such as discouraging the fearless sharing of ideas.

For Ricketson, the piracy debate has suffered from misinformation. Unable to defend itself, the public domain has been jeopardised because owners' claims "are invariably wound up in the emotive plea that to refuse recognition [of their 'rights'] will be tantamount to condoning 'theft' and 'piracy'", he says.

The public domain functions by assuming that ideas, just by existing, are a communal asset. But working against this is a trend towards ideas being turned into commercial property, lost to their authors, creators and the community.

Miriam Nisbet, counsel for the American Library Association, suggests an even more alarming prospect: "You'll get to the point where you say, 'Well, I guess that 25 ¢ isn't too much to pay for this sentence,' and then there's no hope and no going back." <sup>5</sup>

This new kind of "permissions" culture affords copyright law a gatekeeper function over the free flow of information which it was never intended to have. Increasingly, the only way to get on the giant's shoulders could be to pay.

From the 16th century on, copyright was designed to encourage works to be placed in the public domain, initially protecting the author (or "publisher") with a limited 14-year monopoly. Over time, that period has been greatly extended, with no obvious dividend for our society.

Profitable copyright industries are, in that sense, an incidental byproduct of copyright law. To many, it comes as little surprise that broad copyright laws have encouraged owners to view their vast windfall profits as a commercial birthright.

This position is increasingly hard to reconcile when one person's innovator is another person's pirate.

Consider these copyright sleights-of-hand. Fans might be familiar with the fuss made about the extent to which the style of rock band Oasis has been "influenced" by the Beatles and The Jam. By the same token, should Brahms be accused of undisguised piracy for his opus 56a, Variations on a Theme by Haydn?

Similarly, US copyright scholar Melville Nimmer suggests West Side Story would infringe Shakespeare's rights had he been able to copyright Romeo and Juliet.<sup>6</sup> And Quentin Tarantino boasts of how his career has built on the work of his heroes. For example, Pulp Fiction copied Band of Outsiders and Reservoir Dogs copied A Clockwork Orange.

Is this piracy or creativity? U2's Bono acknowledges the debt artists owe to those who went before them in *The Fly*: "Every artist is a cannibal every poet is a thief. All kill their inspiration and sing about the grief."

How, too, should we explain rap music, by definition a cross-pollinating remix culture from which the global music industry has made huge profits?

Strictly speaking, copying our favourite music, we're told, is illegal. So should we destroy our iPods in solidarity against "piracy"? Or, as some have seriously argued, should Apple be liable for having invented a technology which could "induce" copyright infringement? This logic could make the entire internet illegal, lest its use infringe copyright.

For the copyfight movement's key figure, Stanford University's Lawrence Lessig ([www.lessig.org](http://www.lessig.org)), our examples show the need for a copyright reality check. In his view they are expressions of our natural and well-established "free culture".

"Free culture does not mean 'free' as in 'free beer', but 'free' as in 'free speech', 'free markets', 'free trade', 'free enterprise', 'free will' and 'free elections'," Lessig observes in his 2004 book *Free Culture*.<sup>7</sup>

Understandably, Lessig's book has shaken America's copyright community, as legal and policy mandarins awaken to the disastrous effect of overly broad copyright laws.

Importantly though, Lessig and like-minded others do not question the need for copyright laws. But they do strongly question the merits of laws that protect vast commercial gains at society's expense. In this sense, our free culture opposes the "permissions" culture.

Copyfighters take issue with the confusing signals that copyright laws send to the community. Our culture asks creative people to share their works freely, yet stoops to dub them pirates if they dare to create anew.

To prove the point, they highlight the many increases in the term of copyright. The faintly Orwellian sounding "harmonisation" process of our free-trade agreement with the US delivered Australia a copyright term of 70 years after an author's death. The FTA locks Australia into US copyright law, including its highly controversial Digital Millennium Copyright Act. Some have labelled another instalment of US copyright law the "Mickey Mouse Preservation Act", because only Disney's bottom line seemed to benefit.

Many are sceptical about the merits of the intellectual property chapter of the FTA, including Federal Court judge Ron Sackville. "The benefit to Australians of the extension of copyright mandated by the FTA is not readily apparent," Sackville told a recent conference.<sup>8</sup>

So what is the solution? A return to a proper balance. Piracy is a problem, no doubt. But piracy will never be meaningfully addressed while the community

watches laws being passed which sanction the intellectual plunder of our public domain. How do you encourage respect for laws that appear unfair and hypocritical?

Frustrated copyfighters query why a largely futile legal crusade against "piracy" is being sustained when sensible alternatives exist. A relatively simple way to compensate those harmed by file-sharing is to implement any one of the several licence or levy models that exist. Some models are based on those used successfully for decades by the radio and cable television industries.

Another step in the right direction would be for the federal government's "fair use" inquiry to ensure the removal of laws that criminalise citizens who copy music for non-commercial purposes. Wide support exists for this long overdue reform, including from leading copyright collection agency Screenrights.<sup>9</sup>

Copyright owners respond that the calls made by copyfighters and The Economist are either radical or unworkable. A sad reality is that but for the scale of abuse by copyright owners, such suggestions may never have been necessary.

When copyright comes to stand not only for the right to own and sell creative works, but also to regulate their use, then we should all feel a little worried for the future of our culture. Copyright laws have significantly overreached. Reform is vital to ensure that people take the risks necessary for the creative process, and continue to climb upon the shoulders of giants.

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## NOTES

1 Hugh Laddie, 'Copyright: Over- Strength, Over- Regulated, Over- Rated?', European Intellectual Property Review, Volume 5, 1996.

2 Alan Greenspan, 'Remarks by Chairman Alan Greenspan Intellectual Property Rights', speech at Stanford Institute for Economic Policy Research economic summit, February 27, 2004.

3 'Rip. Mix. Burn.', The Economist, June 30, 2005.

4 Sam Ricketson and Chris Creswell, Intellectual Property and E-commerce The Law of Intellectual Property: Copyright, Designs and Confidential Information, Lawbook Co online service, para 1.85 'Proprietarian' Arguments, 2005.

5 From Robert Boynton, 'The Tyranny of Copyright', The New York Times, January 25, 2004.

6 From David Bollier, Brand Name Bullies ( [www.brandnamebullies.com](http://www.brandnamebullies.com)).

7 In the interests of practising what he preaches, Lessig insisted that his publisher make his book simultaneously available in its entirety as a free download. Although selling well as a hardback book, Free Culture is available to download freely from more than 40 websites and in 10 languages ([www.free-culture.cc/remixes/](http://www.free-culture.cc/remixes/)).

8 Ron Sackville, 'Monopoly versus freedom of ideas: The expansion of intellectual property', Australian

Intellectual Property Journal, Volume 16, 2005.

9 See Screenright's submission to the Fair Use inquiry,  
[www.screen.org/submissions/ScreenrightsFairUseSu4BE09.pdf](http://www.screen.org/submissions/ScreenrightsFairUseSu4BE09.pdf) , 'Introduction', points 5 and 6, page 3.