

# Copyright Thoughts

## Introduction

This document started as a series of responses to certain aspects of the request for comment by the Ministry of Business, Innovation and Employment to its paper on a review of the Copyright Act.

From the outset it was never my intention to comment upon the full paper. That would be a significant undertaking for an individual, could result in a submission that would be as long and probably longer than the paper itself and would lose impact by failing to focus upon some key aspects of digital technologies and their impact upon copyright law and theory.

However, it became clear that some consideration should be given to wider issue of the applicability of “traditional” copyright principles in the digital paradigm. I therefore prepared a general overview of copyright theory and a critique of the “traditional model”. My reason for this was that I was concerned that the MBIE approach seemed to be “corseted” by the present legislation and the theory that underpins it.

The first part of this paper addresses my suggestion for a new model for copyright law. The second part identifies some of the questions posed in the MBIE paper along with my responses.

## Part 1 - A New Model for Copyright

The major theme of my book “Collisions in the Digital Paradigm – Law and Rule making in the Internet Age” was that the digital paradigm introduces challenges to our assumptions about the applicability of laws or rules based on the properties of earlier technologies. One decision I made in putting the book together was to avoid any discussion about copyright law. That aspect of the impact of the digital paradigm is very significant and which has been the subject of academic discussion for many years. I preferred to address other issues which may have been overlooked as the discussion about the digital paradigm and intellectual property has a tendency to overshadow other issues.

Yet the title to the book developed from a paper I presented to the Australian Digital Alliance Forum in 2013. In that paper I sketched what I considered to be some of the issues and challenges posed by the digital paradigm to copyright theory. Some of the ideas expressed in that paper were the genesis for the theoretical development that followed in “Collisions” which was published in 2017.

My ADA paper was the subject of a blog post in March 2013 which may be found [here](#). This discussion will draw upon and develop some of the themes of that earlier work. But the context for the present discussion lies in the Ministry of Business Innovation and Employment Issues Paper for the review of the Copyright Act (1994). I intend to make submissions on some aspects of that Issues Paper and operate within the constrained corset that the paper adopted.

This discussion is more wide-ranging than that. It challenges the current model and basis of copyright law. In essence I argue that the principles of intellectual property law, while purporting to be technology neutral, are not. That those principles have developed as communications technologies have developed from the printing press onwards and that in fact copyright law and principles have been tweaked and moulded as new communications technologies have become available. That we have reached the stage that those principles are no longer relevant to the digital paradigm, the properties of which collide with those upon which earlier copyright rules have been based. Finally, that we may either develop a new basis for copyright law based upon communications principles and the freedom of expression, or alternatively develop a novel statutory regime that merges the medium with the message and dispenses with the idea\expression dichotomy that has pervaded copyright law for so long.

### **Digital Technology Properties**

Digital technologies challenge many of our preconceptions about how information is communicated and most of copyright law – at its most basic level – involves the communication of information and how this is controlled by copyright owners.

To understand the nature of the challenge, it is necessary to briefly sketch the topic of information qualities. These qualities have been developed to distinguish digital information from that of the pre-digital era. Information qualities sit below the content layer and involve a consideration of the medium of communication. In this way, McLuhan's aphorism "The Medium is the Message" comes into sharp focus.

It would be wrong to say that the qualities of digital information are completely novel. Some are present in the pre-Digital Paradigm but as new technologies have become available these qualities have been enhanced. For example the quality of dissemination that Elizabeth Eisenstein argued was one of those that characterised and differentiated print technology from those of the scribal culture is present in the Digital Paradigm but to an extent unimagined in the print paradigm, limited as it was by the physical nature of copies.<sup>1</sup>

Along with the quality of exponential dissemination, two other qualities of digital information technologies - information persistence and information searchability\retrievability – especially highlight the paradigmatic difference that online information presents to the earlier Kinetic Paradigm.

Information persistence recognises that once information reaches the Internet it is very difficult to remove. It spreads through the network of computers that comprise the Internet and may be retained by any one of them. It has been described as the phenomenon of "the document that does not die". Although information may be difficult to locate on the Internet, information persistence means that it will be available somewhere, if only in an archive. The fact that

---

<sup>1</sup> For a full discussion of the qualities of digital information see David Harvey *Collisions in the Digital Paradigm: Law and Rulemaking in the Internet Age* (Hart Publishing, Oxford, 2017) at Ch 2 and especially p 22 et seq. In developing a taxonomy of qualities each is broadly classified as environmental, technical and user associated.

information is persistent means that it can be located by the digital equivalent of an archaeological dig – except that the trowel and spade are replaced by a search engine, which brings us to the searchability\retrievability quality.

Searchability\retrievability falls within the classification of user associated qualities, although there is a technical aspect to it as well. The technical aspect lies within the makeup of digital information. That information is in digital format which means that it can be searched. This is in startling contrast to information in documentary form which must be read – what is referred to as manual review – to retrieve relevant information.

Electronic discovery demonstrates the way in which the machine itself provides an answer to a machine-based problem. In litigation, huge volumes of digital information require analysis to determine the files or materials that are relevant to the case in question. To print out what often amounts to tens of thousands of pages, which then would have to be manually reviewed, is seen as disproportionate in terms of time and cost. Software tools are thus deployed in e-discovery exercises, built upon the premise of quality of searchability of digital information.

But for the purposes of an examination of the challenges digital technologies pose for copyright law, the quality of exponential dissemination is most significant. And at the root of this quality is a reality that digital technologies do not work without copying. Copying is essential for digital technologies. In its struggle to come to terms with this reality copyright law has recognized a need to make an exception for the copying that is necessary to allow technologies to operate by the transient copying contained in s. 43A of the Copyright Act 1994.

Section 43A represents a compromise necessary to allow digital technologies to work without extending the copying reality of digital technologies to overwhelm the protections provided in the legislation. In some respects section 43A is representative of the rather hodge-podge way that copyright has been allowed to develop over the centuries. Much of that development has taken place against a background of technological change that has introduced new communications technologies with their own novel wrinkles to the way information is communicated.

Let me sketch some of these developments. The first technological driver for copyright law in the first place was the printing press. Without becoming embroiled in the argument about whether the licensing arrangements put in place by the Stationers Company and following that by the Restoration Licensing strictures, the challenge to existing values presented by the printing press was revolutionary. Prior to printing, copying was recognized as necessary for the dissemination of information. It was not controlled other than by whether or not the possessor of an exemplar was prepared to allow it to be transcribed either by an individual or in a scriptorium. The printing press challenged these assumptions about the dissemination of texts leading to a recognition that there had to be some control over the authorization of copying. The Statute of Anne placed that control in the hands of the author.

Subsequent new communications technologies such as radio, photography, cinema and television have introduced new forms of protection for authors and content creators and in each case the developments have been incremental, building on existing principles. Many copyright theorists have suggested that copyright principles are technologically neutral. At their most fundamental level – who controls copying and the limited term of copyright protection – this is correct. The reality is that the different rights that have been introduced as a result of new technologies – the performance right, the communication right, the broadcast right and the like – are a form of legislative recognition of these new technologies. They are anything but technologically neutral

Another aspect of the development of copyright law has been the way in which content creation and distribution has been in the hands of large business conglomerates. The broadcast of content by radio and television, the making and distribution of movies, the printing of books, the pressing of phonograph records or CDs has all involved considerable capital investment that is beyond the means of individuals to emulate.

Essentially conglomerates or monolithic organisations could feel relatively comfortable about their control and dissemination of their content. The first real challenge to capital intensive complacency came in the form of the photocopier – a cheap, available and accessible means to copy printed works. Although the photocopier was a product of analog technologies, and was just another type of printing press, it was the first alarm bell for print based copyright. It was one of the first examples of the empowerment of individuals to access information other than through established commercial outlets.<sup>2</sup> With the onset of the digital revolution more and more means have become available for individuals to create their own content or to copy that of others.

The conglomerates and the copyright corporates recognise that the power balance has shifted as a result of the new technologies to the point where everyone is able to copy.

Yet the legal battles that have been waged recently reflect what happened in the early days of copyright - the litigation is at the urging of the corporate and conglomerates and authors don't really seem to feature at all. Examples may be found in the cases of *A & M Records v Napster*<sup>3</sup>; *Recording Industry Association of America v Diamond Multi Media*<sup>4</sup>; *Universal City Studios v Reimerdes and Corley*<sup>5</sup>; *MGM Studios v Grokster*<sup>6</sup>; *Sony Computer Entertainment v Edmunds*<sup>7</sup>;

---

<sup>2</sup> Although they could manually transcribe a book should they want to, although that would amount to copyright infringement.

<sup>3</sup> 239 F.3d 1004 (2001).

<sup>4</sup> 180 F.3d 1072 (9th Cir. 1999).

<sup>5</sup> 273 F. 3d 429 - Court of Appeals, 2nd Circuit 2001.

<sup>6</sup> 545 U.S. 913 (2005).

<sup>7</sup> [2002] 55 IPR 429 (Ch).

*Sony v Bal<sup>8</sup>; Sony Music Entertainment Australia Ltd v University of Tasmania<sup>9</sup>; Sony v Stevens.<sup>10</sup>*

In some cases the responses of the conglomerates has been to try and shut down the technology altogether – resist technological change by banning the technology, thus further emphasising the association of copyright with technology. This is an example of vested interest complacency and the failure to understand the view of McLuhan about rear view mirror thinking - by the time you recognise the problem caused by a new technology it is generally too late. Examples may be found in the Betamax case - *Sony Corporation of America v Universal City Studios*<sup>11</sup> and in the English case about twin reel cassette tape recorders - *CBS Songs v Amstrad*.<sup>12</sup>

Every copyright statute has in it provisions about infringement. However, those infringement remedies really can only be sought if it is economically feasible to do so. In today's digital environment the costs of litigation are too high to pursue individual infringers so copyright conglomerates have managed to obtain an additional infringement remedy – graduated response regimes to deal with file sharing. Let's be clear about a few things. The first is that copyright owners would have preferred a "guilt by accusation" system with a reverse onus on the alleged infringer. It is just another way of saying that everyone who has a computer or who downloads or has a file locker in the Cloud is a pirate. That was made clear in the original s. 92A debacle in New Zealand The second thing is that a graduated response regime is economically beneficial for copyright owners. In New Zealand complaints of infringement must be accompanied by a \$25.00 fee – a little less than instructing a silk and instituting High Court infringement proceedings. Let us be under no illusion about this. The only ones who benefit from the graduated response regime are copyright owners and the cost savings are significant.

The illustration above and the comments about the New Zealand graduated response regime provided in section 122A et seq of the Copyright Act demonstrate another challenge that digital technologies pose to established copyright theory. The copying properties of digital technologies can be deployed by any person who has a computer. An Internet connection adds to the magnitude of the problem. No longer is it necessary to have the capital intensive production facilities that characterised broadcasting, movies, radio or records and CDs. Copying and distribution can take place with a minimal outlay and effort and a few open source tools obtained on the Internet.

This challenge demonstrates the obsolete nature of current copyright thinking. Although copyright owners go to great lengths to perpetuate the existing model, in essence this is rather like trying to turn back the tide. Indeed, copyright owners should emulate Cnut who, rather than trying to turn back the tide, demonstrated to his fawning courtiers that he could not.

---

<sup>8</sup> [2004] EWHC 1738 (Ch).

<sup>9</sup> (2003) 129 FCR 472.

<sup>10</sup> (2005) HCA 58.

<sup>11</sup> 464 U.S. 417, 455, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984).

<sup>12</sup> [1987] 3 All ER 151.

Trying to fit the challenges of new digital technologies into the corset of obsolete copyright theory can result in unintended consequences.

As I have already stated, one of the problems that copyright theory faces is that we are now in a new information paradigm – a paradigm that is as different from the print and analogue as printing was from the scribal culture. New copying technologies and digital systems challenge existing copyright thinking because digital technologies work on a premise that is so fundamental that it strikes right at the heart of copyright and that is that copying is necessary for digital technologies to work they can't function without copying.

It was this reality that prompted Charles Clark to comment "the answer to the machine is in the machine."<sup>13</sup>

Essentially what Clark was saying was the fundamental problems created by digital technologies have a solution within the technology itself. Content owners could take control the copying that was necessary to make digital technologies work. Thus developed what Kirby J referred to as para-copyright<sup>14</sup> – the development of technological protection measures (TPMs) and the legal protection of technological protection measures, which meant that attempts at circumvention or the provision of means of circumvention of TPMs were considered on a par with copyright infringement itself.

One of the unintended consequences of TPMs may be seen in the cases of *Sony v Edmunds* and *Sony v Ball* in England. These decisions opened the door to copyright by contract. Content owners could impose technological protection measures which could be circumvented if the approved equipment was used. In addition owners could impose standard terms and conditions of sale and could write their own copyright contract that went far and away beyond the careful balance that had been achieved in legislation. The copyright owners' dream in *Miller v Taylor* was finally becoming a reality.

Para-copyright protections actually challenge the developing concepts of fair use and any other concepts that may develop in the digital environment. TPMs can lock up content far beyond the copyright term. They are indiscriminate in their prevention of copying and although they may claim to have a focus on copy protection many TPMs are in fact used for access protection as well which is something of an anomaly in the global world – an anomaly perpetuated by the regionalisation of content via Netflix, Hulu, Amazon Music and iTunes.

Clark's adage about the answer lying in the machine runs up against a problem. Machines don't operate on their own. Machines are meant to be servants of people and challenging Clark is McLuhan's concept of technology induced behavioural change based on another adage - first we shape our tools and

---

<sup>13</sup> Charles Clark 'The Answer to the Machine is in the Machine', in: P. Bernt Hugenholtz (ed.), *The Future of copyright in a digital environment : proceedings of the Royal Academy Colloquium organized by the Royal Netherlands Academy of Sciences (KNAW) and the Institute for Information Law ; (Amsterdam, 6-7 July 1995)*, (Kluwer Law International, The Hague, 1996).

<sup>14</sup> *Sony v Stevens*

thereafter our tools shape us.<sup>15</sup> And the digital tools that have developed and are developing have already begun that shaping process.

### **We Shape Our Tools.....**

Marc Prensky, an educationalist who wrote in the early 2000s identified “digital natives” as those who have spent their entire lives surrounded by and using computers, video games, digital music players, video cams, cell phones and all the other tools and toys of the digital age. Digital natives, said Prensky, are native speakers of the digital language of computers video games and the internet. But I’m not one of those. As a digital immigrant I speak with a different accent from that of the digital native. I have adapted to the new environment but I retain to a certain degree my accent that is my foot in the past. I know how things were. That “accent” can be seen in such things as preferring a book with pages to a Kindle or an iPad, turning to the internet for information *second* rather than *first*, or even reading the manual for a programme rather than assuming that the programme itself will teach me how to use it. The digital language is a new language for me and a language learned later in life goes to a different part of the brain.

And that’s one of the interesting things that new technologies do for us. They change us. Sometimes we can recognise the changes that they make but there are other changes that are more difficult to recognise. They operate at a subconscious level.<sup>16</sup>

It may be surprising to know that learning to read is not something that comes naturally to people. It isn’t like speech - our primary means of communication. When you learn how to read what happens in the brain is that your neural pathways change. And once they have changed they have changed forever. Learning to write involves similar changes and what happens with both of those activities is that a remarkable amount of processing of information takes place and it all happens at a subconscious level.

You see writing is a code. It’s a code for information that is initially conceived as an oral expression and is then rendered into phonetic alphabetically form and when it is read it is reprocessed so that it has meaning. But in the way in which we read and we write we realise Marshall McLuhan’s comment that “We shape our tools and thereafter our tools shape us.”<sup>17</sup> And the use of new technologies is clearly just that – both behaviourally and physiologically.

---

<sup>15</sup> Marshall McLuhan *Understanding Media: The Extensions of Man* (Sphere Books, London, 1967).

<sup>16</sup> For a pessimistic view of the “rewiring” effect see Nicholas Carr “Is Google Making Us Stupid” *The Atlantic* July/August 2008 available on-line at <http://www.theatlantic.com/magazine/archive/2008/07/is-google-making-us-stupid/306868/> (last accessed 17 January 2013) and for a detailed approach see Nicholas Carr *The Shallows: How the Internet is changing the way we think, read and remember* (Atlantic Books, London, 2010).

<sup>17</sup> Above n. 18.

## Bringing it all back home.....<sup>18</sup>

Let me summarise the argument so far.

- a) There are qualities that underlie the medium of communication of information
- b) Those qualities dictate and influence behaviour and the development of social and cultural practices
- c) The printing press – the first information technology – was an agent for a paradigm shift in relationships, behaviours and activities surrounding information. Many of our assumptions about information in general are grounded in the print paradigm e.g. stereotypes, “black letter law”, upper and lower case etc.
- d) The printing press and the print paradigm was the basis for the development of concepts of copyright and was the specific target for the Statute of Anne.
- e) The qualities of digital information systems are paradigmatically different from those of the print paradigm
- f) These qualities are fundamentally altering our behaviours and values about and our uses, expectations and relationships with, information

And the question that follows from this is whether or not a system of rules that were based upon and derived from the values that flowed from the print paradigm have any relevance in the digital paradigm. The law loses credibility if it does not accord with the underlying values of a community – the consent of the governed. To maintain a system of rules that run counter to community values is oppression.

This does not mean that creators should not have some kind of protection for their creation. It means that we are going to have to find some other form of justification for the protection of intellectual property and the extent of that protection.

There are a number of international conventions – and I don't include IP specific conventions such as Berne, WIPO, TRIPS and the like – that provide for the general protection of intellectual property rights. The Universal Declaration of Human Rights demands protection of the right of

"[e]veryone ... to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author."<sup>19</sup>

---

<sup>18</sup> The title of Bob Dylan's fifth album released 27 March 1965 and released by Columbia.

<sup>19</sup> *Universal Declaration of Human Rights* GA Res 217A, A/810 (1948) art 27.



The 2005 General Comment<sup>20</sup> on the equivalent article in the International Covenant on Economic, Social and Cultural Rights<sup>21</sup> emphasises the link between this right and the proposition that authors should enjoy an adequate standard of living, and that they are entitled to just remuneration. Amongst other things, the document requires us to take seriously the idea that liberty interests can be furthered by participation in functional markets for creative work.

But we must remember that copyright is fundamentally grounded upon expression and we cannot overlook the provisions of Article 19 of the International Covenant on Civil and Political Rights (ICCPR) which explicitly protects the media of expression and information and was intended to include after a rising technologies.<sup>22</sup> Article 19 has come into sharp focus following the report by special rapporteur Frank La Rue who was considering whether or not access to the internet constituted a human right qualifying for protection under Article 19.

Copyright theory needs to recognise and accept that freedom of expression involves not only the imparting of a particular point of view but also the reception of information. And as I have suggested, the Internet facilitates those right and enhances and has had an impact upon the modelling of our information expectations and our consequent information associated behaviours.

A recent case has recognised the freedom of expression in the context of copyright. In *Ashby Donald and others v. France*<sup>23</sup> the European Court of Human Rights clarified that a conviction based on copyright law for illegally reproducing

---

<sup>20</sup> Committee on Economic, Social and Cultural Rights *General Comment No 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author* E/C12/2005 (2005) art 15(1)(c).

<sup>21</sup> International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 19December 1966, entered into force 3 January 1976).

<sup>22</sup> Article 19 reads as follows:

1. Everyone shall have the right to hold opinions without interference;
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) for the respect of the rights or reputations of others;
  - (b) for the protection of national security or if public order or of public health or morals.

<sup>23</sup> ECHR Appl. nr. 36769/08.

or publicly communicating copyright protected material can be regarded as an interference with the right of freedom of expression and information under Article 10 of the European Convention. Such interference must be in accordance with the three conditions enshrined in the second paragraph of Article 10 of the Convention. This means that a conviction or any other judicial decision based on copyright law, restricting a person's or an organisation's freedom of expression, must be pertinently motivated as being necessary in a democratic society, apart from being prescribed by law and pursuing a legitimate aim. The case unambiguously declares Article 10 of the Convention applicable in copyright cases interfering with the right of freedom of expression and information of others, adding an external human rights perspective to the justification of copyright enforcement. However, due to the important wide margin of appreciation available to the national authorities in this particular case, the impact of Article 10 however is very modest and minimal.

I am suggesting that the ICCPR or that a rights based approach should be a starting point to measure the strength and extent of any copyright protection afforded to one who engages in content expression. This approach to copyright is in line with the consequences and development of the new information paradigm. *Ashby Donald v France* gives weight to such an approach. The judgment in this case has confirmed that copyright enforcement, restrictions on the use of copyright protected works and sanctions based on copyright law ultimately can be regarded as interferences with the right of freedom of expression and information. This requires inevitably a balancing test between the rights involved. In terms of predictability of the outcome of such a balancing test, a clear set of criteria needs to be developed.

A rights based approach to copyright has been considered by Graeme Austin and Laurence Helfer<sup>24</sup> and Austin had this to say about the rights based approach:

"Human rights certainly provide compelling reasons for being concerned about the public domain, reasons *that go beyond* getting more stuff more cheaply. Human rights law draws attention to a broader set of values: educational rights, environmental rights, the right to food, an adequate standard of health, indigenous peoples' rights – with which any decent intellectual property system, any decent society, must contend. And human rights lawyers have crafted a powerful lens through which to analyse these issues – these are not just ad hoc distributive justice claims du jour. At the same time, however, human rights laws recognise the importance and the *rights imperatives associated with*

---

<sup>24</sup> Laurence R Helfer and Graeme W Austin *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, New York, 2011).

functioning markets. Hence the recognition in many human rights instruments of the right of property."<sup>25</sup>

Perhaps there should be consideration of a new copyright model that recognises content user rights against a backdrop of the right to receive and impart information and a truly balanced approach to information and expression that recognises that ideas expressed are building blocks for new ideas. Underpinning this must be a recognition on the part of content owners that the properties of new technologies dictate our responses, our behaviours, our values and our ways of thinking. These should not be seen as a threat but an opportunity. It cannot be a one-way street with traffic heading only in the direction dictated by content owners.

The reality is that the law will always be behind technology. It will always be dealing with an historical problem. The file sharing legislation in New Zealand is already out of date because one of the critical parts of the legislation is a definition of file sharing that ignores technology such as virtual private networks or magnet links. Dr. Rebecca Giblin has already pointed out the legal inadequacies of some of the file sharing approaches that have been adopted in the United States.<sup>26</sup>

The law - like TPMs - is a very blunt instrument for a very nuanced area. My suggestion is the redevelopment and rethinking of broad principles that are in accord with the new paradigm rather than being anchored in an earlier one.

### **We Can Work it Out<sup>27</sup>**

There are two ways in which Article 19 can be considered in developing a new model for copyright protection. The first is to measure the strength of any copyright rule against the right to receive and impart information and consider whether the rule is a proportionate limitation of the information right. The second approach, which is very similar to the first, is to use Article 19 as a basis

---

<sup>25</sup> Graeme W Austin "Property on the Line: Life on the Frontier Between Copyright and The Public Domain" [2012] 43 VULR 1 at 14.

<sup>26</sup> Rebecca Giblin *Code Wars: 10 Years of P2P Software Litigation* (Edward Elgar Publishing, 2011); Rebecca Giblin, "On the (New) New Zealand Graduated Response Law (and Why It's Unlikely to Achieve Its Aims)" (2012) 62(4) Telecommunications Journal of Australia 54.1-54.14. Available at SSRN: <http://ssrn.com/abstract=2198116> (last accessed 17 January 2013).

<sup>27</sup> "We Can Work it Out" John Lennon and Paul McCartney 1965, released as the B-Side to the single "Day Tripper"

Upon reflection, the lyrics may seem apposite to the current problem:

"Try to see it my way  
Do I have to keep on talking till I can't go on?  
While you see it your way  
Run the risk of knowing that our love may soon be gone"

to determine whether a copyright rule/protection is disproportionate to the amount of interference with the Article 19 right, and such a consideration would take place throughout the development of a rule.

In the second scenario, which is the one that I prefer, the engagement of Article 19 could occur at each of the following levels:

- a) policy formation
- b) legislation
- c) application/interpretation
- d) litigation – for enforcement\infringement

and therefore acts as an umbrella over all aspects of the lifecycle of a copyright rule from basis to enforcement.

Justification may be achieved by weighing competing interests. Any rule that interferes with the Article 19 right must be proportionate and limited only so far as is reasonable and necessary to fulfil the copyright owners' interests. In addition a rights based approach avoids the absolutes that attach to property theory and the metaphors of "theft", "piracy" and "trespass" that arise within that context.

Rather than operate as a default rule with a number of exceptions the copy right would fall within the wider scope of a justifiable but proportionate limitation on the freedom of expression. With this approach, fair use, for example, would not be an exception to the copy right. It would constitute an element of the subsisting/continuing Article 19 right.

The proposal may summarised in the following way:

1. Copyright should not be seen as a property right – either actual or inchoate
2. A copyright owner's rights should not be absolute.
3. Copyright should be seen as an exception to the wider rights of freedom to receive and impart information guaranteed by Art. 19 ICCPR – and, given

copyright does not engage until expression (according to current copyright theory), it must be subject to the supremacy of Article 19.

4. Interference with Article 19 rights requires justification by the “copyright owner”.<sup>28</sup>

5. Once interference with the Art 19 right is justified, any restrictions to the general right and any advantages that accrue for the benefit of the “copyright owner” may be permitted to the extent that they are:

- a) necessary to meet the copyright owners interests and justification and
- b) proportionate in terms of the extent of the interference

6. Concepts such as fair use, protection term, remedies (and their extent) fall within the tests of necessity and proportionality rather than exceptions to a copyright owner’s right.

7. The following brief examples which are presently implicated in current copyright models may demonstrate the approach:

- a) Access controls that have no copying implications would not be justifiable.*
- b) Copying that is necessary for a technology to operate could not be considered justifiable.*
- c) Format shifting (of any medium) could not be justified in that a royalty had been paid at point of sale.*

### **We want the World.....**

It may well be that it will take an equivalent or parallel 15 years as with the case between 1695 and 1710 for us to develop a new copyright solution. My suggestion is that we must recognise that the values of the digital native regarding information have been moulded by the technologies that are available and that will continue to develop – technologies that make information instantly available; that make circumvention of restrictions easy; that allow for the wide spread distribution of information in digital format that challenges the necessity for regionalisation of content; that is an “information now” environment – we want the world and we want it – now!<sup>29</sup> Perhaps a rights based approach may be a starting point.

---

<sup>28</sup> I use the terms “copyright” and “copyright owner” in this context only because I have not devised a label that aptly fits within the new model and that is not clumsy.

<sup>29</sup> “When the Music’s Over” Jim Morrison, Ray Manzarek, Robby Krieger and John Densmore (The Doors) “Strange Days” The Doors Elektra Records 1967 Track 10.

## Collapsing Property

There is another possibility – another path that may provide protection for the creators of content. It is based upon the *dicta* of the Supreme Court in *Dixon v R* which was further extended by Gilbert J in *Ortmann v US* and which was even further modified by the Court of Appeal in that case. In essence, the proposition is this. As far as digital content is concerned the provisions of the Copyright Act should be amended to recognise that a digital file comprises property in and of itself regardless of the presently artificial separation of content and medium. The medium and the content of a digital file comprise and object which is fused into property.

Dealings in a digital file would be subject to normal contract principles between copyright owner (or distributor) and consumer. Unauthorised dealings in a digital file would render the “infringer” liable to an action for damages or, if there were a commercial element associated with the unauthorised dealing, for criminal liability. This would give meaning to the rubric advanced by copyright owners that copyright infringement is theft, and it would amount to a divergence in streams between copyright theory in non-digital works and those in digital form. I acknowledge that an anomalous position may arise where a work is available in “kinetic” and digital format. But by the same token, despite the difference in treatment of an infringer there would be a higher level of certainty for copyright owners and for consumers when it came to dealing in digital content.

## The Corset of Conventions

It will be clear that the suggestions that I am making involve something of a revolution in copyright theory. One uncomfortable reality involves New Zealand’s adoption of the various Copyright treaties such as Berne, TRIPS, WIPO and more latterly CPTPP. These treaties continue and perpetuate the earlier model of copyright that was based on earlier technologies and business models that were not subject to the properties of digital technologies that have presented us with a new, dynamic and disruptive paradigm.

Whilst it is doubtful that President Donald Trump may have consciously applied the Second Apparition’s advice to Macbeth “be bloody, bold and resolute”<sup>30</sup> his actions in respect of some of the Treaty obligations of the United States such as TPP, NAFTA, the Iran Nuclear Treaty do provide a precedent whereby a nation may decide to opt out of Treaty obligations. If New Zealand were to do that as far as the Copyright Conventions are concerned it should be upon a clearly articulated, principled and transparent basis. Such an approach may well provide a model for other countries to follow.

## Part 2 - Copyright Review Submissions

---

<sup>30</sup> William Shakespeare “Macbeth” Act IV sc 1.

## Do you have any concerns about the implications of the Supreme Court's decision in *Dixon v R*? Please explain

To address this question requires a somewhat detailed explanation. In summary the argument is this.

1. The NZ Supreme Court was incorrect in adopting a "context based" approach to the nature of a digital file as property
2. The approach adopted by the Court was wrong both technologically and legally
3. The "restrictions" on the applicability of the holding in *Dixon* have been ignored by both the High Court and the Court of Appeal in the case of *Ortmann v US*.

It is clear that legislative intervention is required. That intervention must preserve the protection given to copyright owners for expressed ideas but should not provide an added "right" enforceable at criminal law for the means of dissemination. To allow otherwise would mean that a copyright owner would have enhanced protection for expression communicated digitally but would have no protection for an idea expressed in a hard copy book which was stolen. This example highlights the anomaly that may be created.

In *Dixon* the Supreme Court adopted an unusual approach. It decided that it would by-pass an examination of the "orthodox view" that information was not property. The reason for this was that the Crown had approached the argument on the basis that digital files were not information but were property in that they could be owned and dealt with like any other item of personal property.<sup>31</sup>

The Court then went on to suggest that the nature of property depended upon context.<sup>32</sup> The context in *Dixon* was that of the computer crimes provisions of the Crimes Act 1961. This meant that within the context of computer crimes and the dishonest acquisition of property (among other things) a digital file fell within the ambit of "property".<sup>33</sup> Before going on to a more detailed analysis of why the Court reached that conclusion, the Court summarised the reasons why it came to this conclusion. The files were identifiable, had value and were capable of being transferred. It was conceded that although they could not be detected by the unaided senses,<sup>34</sup> it mattered not that they were intangible because the definition in s 2 of the Crimes Act included intangibles within the definition of property.

---

<sup>31</sup> *Dixon* SC, at [23]-[24].

<sup>32</sup> At [25] (citing *Kennon v Spry* [2008] HCA 56, (2008) 238 CLR 366 at [89]: where it was stated that property "is not a term of art with one specific and precise meaning. *It is always necessary to pay close attention to any statutory context in which the term is used*" (emphasis added)).

<sup>33</sup> At [25].

<sup>34</sup> At [25].

The Court then went into more detail, tracing the legislative history of the computer crimes sections of the Crimes Act. It was observed that a proposed definition of property, which did not appear in the legislation as enacted, would have put the position of a digital file beyond question.<sup>35</sup>

The scope of s 249 came under some scrutiny. The proposition was advanced by the Court of Appeal that when one obtained property by dishonestly accessing a computer system, what was comprehended was obtaining goods by a dishonest transaction – for example using false credit card details to obtain goods.<sup>36</sup> The Supreme Court considered that the term “property” in s 249 was wider than that and had a broader construction.<sup>37</sup>

The Court looked at the concept of property within the context of the definition of a computer system which included “stored data” and then went on to consider the offence contained in the provisions of s 250. That offence specifically refers to damaging, deleting, modifying or interfering with or impairing any data or software in any computer system<sup>38</sup> or causes data or software in a computer system to be damaged, deleted modified or otherwise interfered with or impaired.<sup>39</sup>

#### 4. *Software or Data?*

It is difficult to understand why the Supreme Court followed this particular path. Although it is correct that the definition of a computer system includes stored data, there is a specific reference to data and software as the target of damage etc in s 250(2). Furthermore, it should be understood that s 250 deals with the *operation* of a computer system and creates an offence effectively of interfering with the *operation* of a computer system by damaging or interfering with data or software.

The offence recognises that data and software are essential for the operation of a computer system. Section 250 cannot be employed, directly or indirectly either to suggest that data and software are property. The Court incorrectly made the following comment:

---

<sup>35</sup> At [28]-[29].

<sup>36</sup> *Dixon CA*, at [38].

<sup>37</sup> *Dixon SC*, at [34].

<sup>38</sup> Crimes Act 1961, s 250(2)(a).

<sup>39</sup> Crimes Act 1961, s 250(2)(b).



“Accordingly, there is no doubt that Parliament had stored data in mind when these provisions were drafted. Equally, there is no doubt that Parliament had in mind situations where stored data was copied.”<sup>40</sup>

With respect, this is a conclusion that cannot be reached on the basis of the line of reasoning employed. The separate use of the words “data” or “software” in the section would suggest that any implication that “stored data” was included would be redundant<sup>41</sup>. Furthermore, as has been noted, the use of the terms “computer system” in s 250 refers to operation rather than componentry although it may be conceded that the damage to data or software may have implications for the operation of a peripheral such as a pointing device or a display.

It should also be noted that s 250 targets damaging, deleting, modifying or otherwise interfering with data or software that may impair computer operation. No mention is made of copying stored data. Indeed, stored data may be copied without creating any of the problems contemplated by s 250.

The problem is that the Supreme Court relies upon this incorrect premise to discuss the circumstances that are created when stored data is received from a computer when it is copied, leaving the data intact upon the device from which it is copied.<sup>42</sup>

The Court speculated on which offence would be committed if stored data was copied from a target device. It excluded s 250 based on the lack of interference or impairment of the data. It noted that s 252 – which criminalises intentional unauthorised access to a computer system – targets access only. The only section which could apply was s 249

---

<sup>40</sup> *Dixon SC*, at [35].

<sup>41</sup> Software is defined in the Oxford English Dictionary as “The programs and procedures required to enable a computer to perform a specific task, as opposed to the physical components of the system” and “The body of system programs, including compilers and library routines, required for the operation of a particular computer and often provided by the manufacturer, as opposed to program material provided by a user for a specific task” The program material referred to is data which is defined in the Oxford English Dictionary as “The quantities, characters, or symbols on which operations are performed by computers and other automatic equipment, and which may be stored or transmitted in the form of electrical signals, records on magnetic tape or punched cards, etc.”

<sup>42</sup> *Dixon SC*, at [35].

“where a person accesses a computer system without authority in order to locate, copy and then deal with valuable digital files contrary to the interests of the files’ owner.”<sup>43</sup>

## 5. *Property Elements*

The Court then went on to consider some of the fundamental elements of property noting that property as defined in the Property Law Act 2007 defined property as something that was capable of being owned, whether it was tangible or intangible.<sup>44</sup>

The file that Mr Dixon copied on to his USB device was, as the Court described it, a compilation of sequenced images from a CCTV system that had an economic value and were capable of being sold and had a material presence<sup>45</sup> – the association of medium and information that was a characteristic not of property but of a document.

## 6. *American Authority*

The Court then gave some consideration to American authority. In this regard care must be taken in using United States authority because there is a different approach to concept of information as property.<sup>46</sup> The approach of the Supreme Court was to draw an analogy with cases where software had been treated as tangible property.<sup>47</sup> The issue of property in the context of software is a complex one and depends very much upon the circumstances of the case. For example software falls within the definition of “goods” for the purposes of Part III of the Contract and Commercial Law Act 2017.<sup>48</sup> The issue of the tangibility of software code for depreciation in the context of tax provides a further and different context.<sup>49</sup>

## 7. *Electronic Conversion*

---

<sup>43</sup> At [36]-[37].

<sup>44</sup> At [38].

<sup>45</sup> At [39].

<sup>46</sup> For a full discussion see David Harvey *Collisions in the Digital Paradigm* above n. 1 at 138 et seq [Harvey *Collisions in the Digital Paradigm*].

<sup>47</sup> *Dixon SC*, at [40] (citing *South Central Bell Telephone v Bartelemy* 643 So 2d 1240 (Lou 1994)).

<sup>48</sup> Part 3 of the Contract and Commercial Law Act 2017 contains the former Sale of Goods Act 1908.

<sup>49</sup> *Erris Promotions Ltd v Commissioner of Inland Revenue* [2004] 1 NZLR 811(HC).

The Court also gave consideration to American authority which held that electronic records and databases had been held to be property capable of being converted<sup>50</sup> referring to the case of *Thyroff v Nationwide Mutual Insurance Co.*<sup>51</sup> The issue in that case was whether or not there could be conversion of electronic records which were intangible. It was held that conversion was available notwithstanding intangibility on the basis that the electronic records were functionally equivalent to tangible property.<sup>52</sup>

#### 8. "Document Merger" and Conversion

It should be noted that the problem of conversions of intangibles was addressed in the case of *Kremen v Cohen*<sup>53</sup> where the Court applied the theory of "document merger."

The court discussed the concept of merger of intangible rights in a tangible item such as a document. This theory developed in the American Restatement of Torts recommended:

1. Where there is conversion of a document in which intangible rights merged, the damages include the value of such rights.
2. One who effectively prevents the exercise of intangible rights of the kind customarily merged in a document is subject to a liability similar to that of conversion, even though the document is itself not converted.<sup>54</sup>

Kozinski J observed that courts routinely applied the tort to intangibles without inquiring whether they are merged in a document and, while it was often possible to find a document to which the intangible is connected, it was seldom one that represented the owner's property interest. The court considered that the issue of merger was minimal, requiring only some connection to a document or a tangible object.

---

<sup>50</sup> *Dixon SC*, at [47].

<sup>51</sup> *Thyroff v Nationwide Mutual Insurance Co* 8 NY 3d 283 (NY 2007).

<sup>52</sup> Discussed in *Dixon SC*, at [47]-[48]. For the problems of using the concept of "functional equivalence" as an argument to explain paradigmatically different types of information, see *Harvey Collisions in the Digital Paradigm* at 55-63.

<sup>53</sup> *Kremen v Cohen* 337 F 3d 1024 (9<sup>th</sup> Cir 2003). For a full discussion of *Kremen*, see *Harvey Collisions in the Digital Paradigm* at 140 et seq.

<sup>54</sup> American Law Institute *Restatement (Second) of Torts* (4 Vols) § 242 (Philadelphia, American Law Institute, 1965).

*Kremen* involved an action for a converted domain name. The “document” or collection of documents was the electronic database that comprised the Domain Name Server. Thus *Kremen* demonstrates the analytical process that does not appear to have been present in *Thyroff* which preferred to use the suspect approach of functional equivalence.

## 9. *Confusing Software and Data*

In *South Central Bell Telephone v Bartelemy*<sup>55</sup> the issue was whether or not computer software was tangible personal property and the Court in that case discussed in some detail what software does, noting that it was a program – a set of instructions that tells a computer what to do and when stored upon a medium the machine readable code is a physical manifestation of information in binary form.<sup>56</sup>

The problem that arises from this approach is conflating software – correctly described as the instructions that make a computer work – with a data file which is information – in *Dixon* the CCTV file. Software such as Microsoft Word is recorded in machine language in binary format but has quite a different function from a data file – say a Word.docx file – that requires the software to read it. The Court of Appeal had referred to a computer file as a “stored sequence of bytes.” The file which constitutes the “stored sequence of bytes” which could not be distinguished from “pure information” is the visual representation that appears on a directory screen. The reality behind that visual representation is quite different.<sup>57</sup>

The Supreme Court deconstructed this approach by commencing with a consideration of the nature of a document. But as has been demonstrated, both in the case of *Misic* and in the definition of document in the Crimes Act 1961 the important aspect is the associated of information with a medium for a particular purpose. The Supreme Court then took the definition of document and the example of a Microsoft Word document and considered it odd that a Word document would not fall under the definition of property for the purposes of s 249(1)(a) of the Crimes Act 1961.<sup>58</sup>

---

<sup>55</sup> *South Central Bell Telephone v Bartelemy*, above n 41.

<sup>56</sup> At 1243. It should be observed that there is not complete consensus among US courts that software amounts to tangible property. See Ken Moon “The Nature of Computer Programs: Tangible? Goods? Personal Property? Intellectual Property?” (2009) 31(8) EIPR 396 at 399.

<sup>57</sup> As discussed below.

<sup>58</sup> *Dixon SC*, at [47].

The Court concluded, along with the Court of Appeal, that Mr Dixon's conduct fell within the ambit of s 249 and there is no doubt that it did. The Supreme Court was prepared to hold that the computer file was property and both statutory purpose and context supported that view.

It will be plain by now that the author does not unreservedly agree. There are a number of areas where *Dixon* is in error. The first is that the findings and some of the assumptions used by the Supreme Court do not accord with technological reality. Secondly, the decision brings a significant element of inconsistency into the law. Thirdly, the decision and the holdings in *Dixon* are procedurally unsound. Finally the decision will lead, and has led, to consequences that were unintended by the Supreme Court and introduce wider scope to "digital crime" than was intended by the Crimes Act 1961.

Throughout the decision the Supreme Court seems to assume that a digital data file is a coherent whole. The difficulty started in the argument that was advanced by counsel for the Crown who argued that a USB stick is equivalent to a roll of film and a computer file to a paper file.<sup>59</sup> The Supreme Court seems to have adopted that theory of the nature of digital data in referring to the digital files as a "compilation of sequenced images from the bar's CCTV system"<sup>60</sup> and a "stored sequence of bytes".<sup>61</sup>

### 1. *Incorrect Comparisons*

The problem with the analogies advanced by the Crown is that they use comparators that involve fundamentally different ways of retaining information or data. A roll of film is a celluloid medium which, as a result of treatment with chemicals, is capable of storing images. A paper file consists of a medium – paper – upon which information is written or printed. Both media contain information in a complete, sequential, linear and coherent form.

A digital file does not do that. The bytes that make up the file are not in a sequence. They are not in a compilation. Depending upon the medium upon which the bytes are stored, they may be arranged in fundamentally different ways.

### 2. *Data Storage*

---

<sup>59</sup> *Dixon SC*, at 682.

<sup>60</sup> At [39].

<sup>61</sup> At [45].

None of this is apparent to the computer or device user. This is because of the way in which file and directory information is presented on a screen by the particular operating system. Generally the information is presented by means of a directory and file structure.<sup>62</sup> The term “directory” refers to the way a structured list of files and folders is stored on a computer.<sup>63</sup> The hierarchical file system that is used in computing is represented in the familiar graphical interface as a collection of folders and files. But this graphical representation in no way reflects the reality of how digital data – be it software programs or data – is stored on a medium such as a hard drive. It is helpful for the user for the purposes of locating, executing or accessing a program or data but really it is the information that is contained within the directory sector of the medium. This sector contains all the information about where the various bytes that make up the file or program may be located throughout the medium.

To add another layer of complexity to the issue it should be noted that data used by a computer may be located in primary storage<sup>64</sup> which is directly accessible by the computer processor. Data in primary storage is volatile, unlike data in secondary storage which is not directly accessible by the processor such as hard drives, USB drives or other external storage devices.<sup>65</sup>

It immediately becomes clear that it is unwise to make generalised assumptions about the nature of computer data when there are a number of variables that have to be considered.

### 3. *Common Terms*

Many of the terms that we use and the assumptions we adopt when dealing with digital data arise from our unfamiliarity with a paradigmatically different way of dealing with information. We use of familiar terms and metaphors to help us feel more comfortable in the new digital space. Thus we use the term “documents” because on a screen the information has the same visual appearance as print on paper. We “turn” the pages on our Kindles or eReaders and “put” them in files or

---

<sup>62</sup> Although Unix treats a directory as a type of file. See Joseph L. Zachary *Introduction to Scientific Programming* (Springer-Verlag New York Inc, New York 1996) Online version <https://www.cs.utah.edu/~zachary/isp/tutorials/files/files.html> (last accessed 18 August 2017)

<sup>63</sup> Charles M. Kozierok “The PC Guide” (Online Version 2.2.0 April 17, 2001) <http://www.pcguide.com/ref/hdd/file/fatInternal-c.html> (last accessed 19 August 2017)

<sup>64</sup> Such as data stored in the random access memory (RAM) or the read only memory (ROM).

<sup>65</sup> George RS Weir and Stephen Mason “The sources of electronic evidence” in S Mason (ed) *Electronic Evidence* (4<sup>th</sup> ed) (University of London, London, 2017) at 4 (available in electronic format under a Creative Commons Licence at <<http://humanities-digital-library.sas.ac.uk/index.php/hdl/catalog/book/electronicEvidence>>.) [Mason *Electronic Evidence*].

folders. Email also mimics the traditional hard copy letter which we “write” rather than type.<sup>66</sup>

These terms and assumptions, and the way that the information is presented to us on a screen can create the misleading impression that the electronic file exists somewhere on the computer as a single, complete whole and maintains its structural integrity even when the computer is turned off in the same way that a paper document or a film continue to exist when put into a file folder or a canister.<sup>67</sup>

#### 4. *Hardware and Software Dependency*

Data in electronic format is dependent upon hardware and software. This was the subject of an oblique reference by the Supreme Court when it observed that files “have a physical presence, albeit one that cannot be detected with the unaided senses.”<sup>68</sup> However, the Court did not go on to examine the way in which the file is stored and accessed on a device.

The data contained upon a medium such as a hard drive requires an interpreter to render it into human readable format. The interpreter is a combination of hardware and software. Unlike the paper document, the reader cannot create or manipulate electronic data into readable form without the proper hardware in the form of computers.<sup>69</sup>

There is a danger in thinking of electronic data as an object ‘somewhere there’ on a computer in the same way as a hard copy book is in a library. Because of the way in which electronic storage media are constructed it is almost impossible for a complete file of electronic information be stored in consecutive sectors of a medium. An electronic file is better understood as a *process* by which otherwise unintelligible pieces of data are distributed over a storage medium, are assembled, processed and rendered legible for a human user. In this respect the “information” or “file” as a single entity is in fact nowhere. It does not exist independently from the *process* that recreates it every time a user opens it on a screen.<sup>70</sup>

---

<sup>66</sup> Burkhard Schafer and Stephen Mason “The Characteristics of Electronic Evidence” in Mason *Electronic Evidence*, at 20.

<sup>67</sup> At 20.

<sup>68</sup> *Dixon SC*, at [25].

<sup>69</sup> Burkhard Schafer and Stephen Mason, “The Characteristics of Electronic Evidence” in Mason *Electronic Evidence*, above n 69, at 21-22.

<sup>70</sup> At 22.

Computers are useless unless the associated software is loaded onto the hardware. Both hardware and software produce additional digital material that includes, but is not limited to, information such as metadata and computer logs that may be relevant to any given file or document in electronic format.

This involvement of technology and machinery makes electronic information paradigmatically different from traditional information where the message and the medium are one. It is this mediation of a set of technologies that enables data in electronic format – in its basic form, positive and negative electromagnetic impulses recorded upon a medium – to be rendered into human readable form. This gives rise to other differentiation issues such as whether or not there is a definitive representation of a particular source digital object. Much will depend, for example, upon the word processing programme or internet browser used.

The necessity for this form of mediation for information acquisition and communication explains the apparent fascination that people have with devices such as smart phones and tablets. These devices are necessary to “decode” information and allow for its comprehension and communication.

Thus, the subtext to the description of the electronically stored footage which seems to suggest a coherence of data similar to that contained on a strip of film cannot be sustained. The “electronically stored footage” is meaningless as data without a form of technological mediation to assemble and present the data in coherent form. The Court made reference to the problem of trying to draw an analogy between computer data and non-digital information or data and referred to the example of the Word document.<sup>71</sup> This is part of an example of the nature of “information as process” that I have described above. Nevertheless there is an inference of coherence of information in a computer file that is not present in the electronic medium – references to “sequence of bytes” are probably correct once the assembly of data prior to presentation on a screen has taken place - but the reality is that throughout the process of information display on a screen there is constant interactivity between the disk or medium interpreter, the code of the word processing program and the interpreter that is necessary to display the image on the screen.

Underlying the approach of the Supreme Court is an assumption of coherence of digital content – be it described as data or information – sequentiality and identifiability independent of the machine. This assumption is incorrect

### *B. Inconsistency*

---

<sup>71</sup> *Dixon SC*, at [31] and [46].



The Supreme Court was considering the nature of a digital file as property for the purposes of s 249(1)(a) of the Crimes Act 1961. Thus a digital file as property was limited to that section.

However, the failure of the Court to address the “orthodox view” that there is no property in information creates confusion and inconsistency in the law. For example the decision of *Oxford v Moss*<sup>72</sup> which held that information could not be property for the purposes of a charge of theft still remains. The Canadian case of *Stewart v R*<sup>73</sup> dealt with the issue of whether confidential information could be property and the subject of theft. In that case confidential information was held to be intangible and did not qualify as “anything” under the Canadian statute and was not capable of conversion. That case might still be good authority because of the way in which the Supreme Court limited the definition of a digital file as property to charges under s 249.

The issue of the susceptibility of digital data to remedies such as a possessory lien was dealt with in the case of *Your Response Limited v Data Team Business Media Limited*<sup>74</sup> where it was held that digital data could not be the subject of a possessory lien, referring to *OBG v Allen*<sup>75</sup> which held that wrongful interference with contractual rights could not constitute the tort of conversion because the tort applied to chattels and not to *choses in action*.

As matters stood following the Court of Appeal decisions in *Dixon* and *Watchorn* there was overall consistency in the approach of the law to the issue of property in information and digital data as a form of information. The decision of the Supreme Court muddies the water, holding that digital data is property for a particular section of the Crimes Act, but not for others. This inconsistent approach to property and digital data makes the law unclear and uncertain. The answer to the question “is there property in a digital file?” is “it depends”

Ortmann

At para 138 Gilbert J referred to the Supreme Court holding that a digital file was a document and therefore could be so for the purposes of section 228 of the Crimes Act. He then observed at para 225

“In accordance with the Supreme Court’s decision in *Dixon*, the digital files recording the copyright protected films are “property”. It is alleged that this property was “obtained” in the sense that it was “retained” as a result of the

---

<sup>72</sup> *Oxford v Moss* (1979) 68 Cr App R 183.

<sup>73</sup> *Stewart v R* (1988) 1 RCS 963.

<sup>74</sup> *Your Response Limited v Data Team Business Media Limited* [2014] EWCA CIV 281.

<sup>75</sup> *OBG v Allen* [2007] UKHL 21; [2008] 1 AC 1.

deceptive emails. Mr Illingworth concedes that the emails may have enabled the appellants to retain the files, preserving the existing situation. It follows that the conduct alleged in counts 9 to 13 would be within s 240 of the Crimes Act if it had occurred in New Zealand.”

Section 240 of the Crimes Act creates the offence of obtaining or causing loss by deception. There are four circumstances in which the offence may occur, all of them requiring elements of deception on the part of the perpetrator together with an absence of claim of right.

It was conceded that the element of deception could be made out by virtue of false representations that were contained in emails. The element of obtaining was satisfied by the extended definition of obtaining which included retaining, as discussed above.

For the offence to be complete, property had to be obtained. Gilbert J held that the copyright protected films in digital file format were property and cited as authority the case of *Dixon v R*.<sup>76</sup>

In this commentator’s respectful view Gilbert J read *Dixon* more widely than was available to him. *Dixon* was a case that centred around whether or not a digital file was property for the purposes of section 249 of the Crimes Act. The Supreme Court held that it was, and in doing so has introduced a level of uncertainty in the law surrounding the issue of whether or not there is a property right in information. It is my contention – and I have argued it in detail elsewhere – that *Dixon* was wrongly decided and is both legally and technologically unsound. Nevertheless, until the Supreme Court reconsiders its decision it must stand. However, the scope of the holding, on a strict reading of the decision, is that a digital file is property is limited to the provisions of section 249 of the Crimes Act.<sup>77</sup> The Supreme Court held thus, and to expand the scope of the finding to include digital files as property for offences other than under s. 249 is, in my respectful view, a misinterpretation of *Dixon*.

But the Court found that s. 240 of the Crimes Act provided an available pathway for the wire fraud counts. In a single stroke, Gilbert J expanded the applicability of the “digital file as property” holding in *Dixon* which was restricted by the Supreme Court to s. 249. In essence this expansion represents a significant “creep” of the limited application of *Dixon*.

One of the very significant aspects of the decision is the way in which provisions of the Crimes Act have been used to provide pathways to copyright infringement. This doesn’t mean that these offences are pathways to only extradition offences, although that is the way that they have been used in this case. The generalised holding means that there are alternative means of criminalising copyright infringement apart from the provisions of section 131 of the Copyright Act 1994.

---

<sup>76</sup> Above.

<sup>77</sup> *Dixon* para [50] – [51].

The citation of authority by Gilbert J to suggest that for some time criminal offences have been available to address copyright infringement cannot be displaced. In some cases these comments were speculative<sup>78</sup> –in others they were more direct.<sup>79</sup> The decision of Gilbert J now cements these comments into the structure of the law.

This means that copyright owners have different avenues by which they may pursue infringers in the criminal courts where section 131 is not available. Furthermore, while *Dixon* is still good law, copyright owners may use the provisions of the Crimes Act (given Gilbert J's wide interpretation of that case) or at least section 249 to pursue infringers for what is effectively "on-line theft" of copyright material. I commented that when it was decided potentially the holding in *Dixon* could give truth to the mantra "copyright infringement is theft". That potential has been realised.

The Court of Appeal adopted a slightly different approach, but in doing so highlighted the fact that a digital file could be an object for the purposes of the Copyright Act. The Court observed at para 148

"We do not think Parliament can have intended to limit infringing copies to tangible, physical articles, as Gilbert J thought. We do not construe "object" to mean anything other than the output or product of the act of copying a copyright protected work, the infringement of the most fundamental copyright. In many instances that product will be a tangible, physical article. But it need not be so in the increasingly digital age with which the 1994 Act is concerned. In this sense the meaning of "object" under the 1994 Act has many similarities with the definition of "document" in s 217 of the Crimes Act 1961 discussed by the Supreme Court in *Dixon v R*.

There the Supreme Court held that digital CCTV footage extracted from an employer's computer by a security guard was both a "document" for the purposes of s 217 and "property" for the purposes of s 249(1)(a) of the Crimes Act. This was because the digital files involved could be identified, had a physical presence and value, and were capable of being transferred to others. Similarly, digital copyright works are identifiable, can be possessed exclusively and are capable of transmission. These qualities are at the heart of what copyright protects."

However, interestingly enough when the Court of Appeal came to consider the applicability of s. 240 it held that Gilbert J was correct. However, in doing so the Court overlooked the fact that the property obtained was a digital file which, as has been observed, had a limited applicability according to the Supreme Court but which Gilbert J extended. It is therefore implicit in the Court's conclusion as to the applicability of s. 240 that they accept Gilbert J's expansion of digital property to other sections of the Crimes Act.

---

<sup>78</sup> See *Cooke P in Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461

<sup>79</sup> See *Scott v Metropolitan Police Commissioner* [1975] AC 819 (HL)

Therefore, there exists the possibility for ongoing confusion in the area of both Copyright and Criminal Law. To resolve this confusion the following suggestions are advanced:

1. The definition of property in the Crimes Act should specifically exclude digital files – digital files could still be capable of providing a benefit or advantage under s. 249. A digital file would still fall within the characterisation of a “document”
2. The Court of Appeal dictum regarding the nature of an object at para 148 allows a digital file to constitute an object for the purposes of copyright law.

### **What are the problems (or advantages) with the way the format shifting exception currently operates? What changes (if any) should be considered?**

As I was preparing my notes on this question it occurred to me that format shifting and time shifting and the drivers for these exceptions merge together. It may well be that format shifting and time shifting rules come together because they essentially fulfil the same consumer need. It should be noted that technologically format shifting involves the copying of a file from its original digital format to another digital format (Say CDA to MP3 or MOV to AVI)

In summary the principle problems posed by the current format shifting regime is that it is available only where a music file has been “ripped” from a legitimately acquired physical source such as a CD and stored on an alternative device. In this respect it is out of date, has failed to keep pace with technological developments and discriminates against other forms of digital content. In addition the current structure of the format shifting rule limits the shift to one device. Many consumers have a number of devices that they may use or alternate between.

Given that a vast array of content is available in digital form, and that users’ expectations are that content should be available for consumption irrespective of the type of device being deployed. In addition, content is available in digital format from the Internet or the Cloud. The limitation to a legitimately acquired physical medium is anachronistic.

In some cases format shifting is permitted as part of use licensing between provider and consumer. The “purchase” of music files from iTunes or Spotify provides an example. Licensing arrangements with games providers such as Steam mean that users may install games on a number of devices – for example a desktop and a laptop or tablet computer.

The provision of on-demand services in many ways eliminates the immediate need for format shifting although some providers (such as TV networks) limit the availability of on-demand content. There may be occasions where a consumer may find it inconvenient to access on-demand content within the time frame

available and wish to store the content. The time shifting provisions could provide a partial answer to this problem.

There may be occasions where there may be a need for on-demand content to be format shifted. For example a consumer may be travelling to a place where Internet access is not available or may wish to access content via a portable device while travelling in an aircraft. Thus there may be a requirement for format shifting to be available to meet such a need.

The advantage of the current rules lies in their structure and in my view this structure can be broken down as follows:

1. The content must be in digital format or capable of being "shifted" to digital format
2. The content must be legitimately acquired in its original format
3. The shifted format must be for personal and not commercial use

I have already commented on the limitation to one copy and consider that as artificial in the current digital environment. There is no economic consequence if more than one copy is made.

The restriction that format shifting should not take place with a communication work needs to be revisited given that a user may wish to format shift to a device for more convenient consumption, although it is to be acknowledge that this proposition does overlap with time shifting.

[What are the problems \(or advantages\) with the way the time shifting exception operates? What changes \(if any\) should be considered?](#)

The use of VCRs and other recording devices or services such as MySky have meant that time shifting has been normalized as well as lawful.

I find the prohibition against time shifting from an on-demand service artificial and should be part of the permitted use. My reason for saying that has been referred to above:

1. Often on-demand programmes are available for a limited time only
2. There may be occasions when an on-demand programme is to be consumed where on-demand services are not available

In addition it seems to me to be artificial to differentiate between on-demand content and "appointment viewing" content. Furthermore the retention rule seems to be artificial. There seems to be little economic justification for limiting the period of retention.

Time shifted content should be capable of being format shifted or copied. For example, the MySky decoder which allows content to be recorded does not allow for that content to be copied to another device or to another MySky decoder. I personally lost some recorded content when my MySky recorder failed to operate properly and had to be replaced. The stored content could not be copied to the new device.

What are problems (or benefits) with the ISP definition? What changes, if any should be considered?

I consider that the wider definition of an ISP to include content hosts should be retained. The reason for this relates to basic functionality. ISPs fall into two major categories – the provision of connectivity and the provision of content hosting. Fundamentally in both cases the ISP acts as a neutral carrier. Connectivity in and of itself has no content implications other than that data is routed through the ISP servers. Content hosting occupies an area of different neutrality. This is that instead of only allowing data to pass through its servers, the ISP preserves or hosts data on behalf of customers. It is unreasonable, even in these days of sophisticated algorithms and the development of AI to expect a content host to monitor content. To make such a requirement would mean that the content host would be required to monitor ALL content. Once the obligation is there to monitor content there can be no discrimination. Either all content is monitored or there is no requirement to monitor content.

In addition the content host merely provides a neutral service. However, once there is evidence of infringement on the part of a user of that service, and the content host is placed on notice, liability for hosting that particular content could attach. If the content host takes required steps, that liability is avoided – a very simplified description of the safe harbor.

The definition of an ISP depends very much upon the extent of the safe harbor provisions. As stated below, I consider that the safe harbor provisions are adequate and do not require fundamental change. The principles that underly the safe harbor provisions are strong, clear and robust.

Are there any problems (or benefit) with the absence of an explicit exception for linking to copyright material and not having a safe harbour for providers of search tools (eg search engines)? What changes (if any) should be considered?

From a copyright theory perspective The act of linking utilises functionality rather than expression, and that can be done without reference to content, thus rendering the functional aspect of link content neutral.

The mere provision of a link (<http://www.law.auckland.ac.nz>, for example) does not infringe the reproduction right of the linked-to website, because it does not copy the website's content. There is no copyright in a website address. The linking party merely provides a Universal Resource Locator (URL) that directs the user to the content of the destination webpage.

There is a firm policy basis for this:

It does not make sense to adopt a rule that could lead to the liability of countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for functioning of the internet,

even where the internet provider has knowledge of potential copyright infringement by its subscribers.<sup>80</sup>

Thus, a linking party is not liable for direct copyright infringement. This was also the case in *Perfect 10 v Google*<sup>81</sup> where it was held that the operator's act of framing in-line linked full-size images of copyrighted photographs was not "display" of owner's works.

However, there is a difference between mere linking — that is, providing a hypertext linking to another user's homepage — and other forms of access to material on the web. Most of the cases in this area have focused on copyright law to provide a remedy for what is perceived as an unjustifiable interference with material that has been posted on the web.

The European Copyright Society<sup>82</sup> in a submission to the Court has argued that the act of hyperlinking to copyright material without permission ought not to constitute outright infringement. In an 18 page submission<sup>83</sup> the Society argues<sup>84</sup>:

"Clearly, hyperlinking involves some sort of act – an intervention. But it is not, for that reason alone, an act of communication. This is because there is no transmission. The act of communication rather is to be understood as equivalent to electronic 'transmission' of the work, or placing the work into an electronic network or system from which it can be accessed. This is because hyperlinks do not transmit a work, (to which they link) they merely provide the viewer with information as to the location of a page that the user can choose to access or not. There is thus no communication of the work. As Abella J explained, speaking for the majority of the Supreme Court of Canada (in a case concerning hyperlinks and defamation):

'Communicating something is very different from merely communicating that something exists or where it exists. The former involves dissemination of the content, and suggests control over both the content and whether the content will reach an audience at all, while the latter does not.

...

Hyperlinks ... share the same relationship with the content to which they refer as do references. Both communicate that something exists, but do not, by themselves, communicate its content. And

---

<sup>80</sup> See *Religious Tech Ctr v Netcom On-line Commun Servs, Inc*, 907 F Supp 1361, 1370, 1372 (ND Cal 1995).

<sup>81</sup> 487 F.3d 701 (2007) 9<sup>th</sup> Cir. For discussion see below.

<sup>82</sup> The European Copyright Society is a year-old group of academics and scholars that it has said seek to "promote their views of the overall public interest". The group's opinion on the issues before the CJEU was formed by 17 academics from across Europe, including Professor Lionel Bently from Cambridge, Professor Graeme B Dinwoodie of Oxford University and Professor Martin Kretschmer, the director of CREATE at the University of Glasgow.

<sup>83</sup> Opinion on the reference to the CJEU in Case C-466/12 Svensson – 15 February 2013 [http://www.ivir.nl/news/European\\_Copyright\\_Society\\_Opinion\\_on\\_Svensson.pdf](http://www.ivir.nl/news/European_Copyright_Society_Opinion_on_Svensson.pdf) (last accessed 19 March 2013).

<sup>84</sup> *Ibid.* paras [35 – 36].

they both require some act on the part of a third party before he or she gains access to the content. The fact that access to that content is far easier with hyperlinks than with footnotes does not change the reality that a hyperlink, by itself, is content-neutral — it expresses no opinion, nor does it have any control over, the content to which it refers.'

The Society provided a very strong and technologically correct statement on the function of a link within the context of transmission and communication of a work.

"(a) Hyperlinks are not communications because establishing a hyperlink does not amount to "transmission" of a work, and such transmission is a prerequisite for "communication"

(b) Even if transmission is not necessary for there to be a "communication", the rights of the copyright owner apply only to communication to the public "of the work", and whatever a hyperlink provides, it is not "of a work"."<sup>85</sup>

In addition, the Society argued that the CJEU should generally uphold that hyperlinking does not constitute a communication to the public of copyrighted content regardless of the 'framing' given to the content when it appears after a hyperlink has been clicked on.

"In so far as there might be technical differences in some cases where the work is made available from the server of a person providing a hyperlink, it is our view that, even were there an act of communication or making available, such a communication or making available is not "to the public" because it is not to a "new" public – it is a public which already had the possibility of access to the material from the web. Just as an improved search-engine that improves the ability of users to locate material for which they are searching should not be required to obtain permission as a matter of copyright law, so providing links or access to material already publicly available should not be regarded as an act that requires any authorisation."<sup>86</sup>

In the Canadian case of *Crookes v Newton*<sup>87</sup> – which was a defamation case – the majority of the Court observed as follows:

Hyperlinks are, in essence, references, which are fundamentally different from other acts of "publication". Hyperlinks and references both communicate that something exists, but do not, by themselves, communicate its content. They both require some act on the part of a third party before he or she gains access to the content. The fact that access to that content is far easier with hyperlinks than with footnotes does not change the reality that a hyperlink, by itself, is content-neutral.

---

<sup>85</sup> Ibid. para [6 (a) – (b)]. The argument is developed later in the submission by a careful analysis of CJEU cases on the notion of communication and the significance of transmission – see paras [23 – 26]

<sup>86</sup> Ibid. para [55].

<sup>87</sup> [2011] SCC 47, [2011] 3 S.C.R. 269



Furthermore, inserting a hyperlink into a text gives the author no control over the content in the secondary article to which he or she has linked.

A hyperlink, by itself, should never be seen as “publication” of the content to which it refers. When a person follows a hyperlink to a secondary source that contains defamatory words, the actual creator or poster of the defamatory words in the secondary material is the person who is publishing the libel. Only when a hyperlinker presents content from the hyperlinked material in a way that actually repeats the defamatory content, should that content be considered to be “published” by the hyperlinker.

The challenging of links based on copyright theory raises a greater issue as far as the internet is concerned. This goes to the heart of the function of the world wide web, the architecture and environment of the internet and the way in which, if at all, such fundamental aspects of the new technology are going to be regulated or governed.

Linking is what gives the web its awesome power. It is an attraction for ordinary people who wish to obtain information quickly and easily without having to understand the mysteries of code or remember complex address parameters or details. Linking is an indispensable tool that allows internet users to benefit from information that is located on the web. To establish that a mere link or mere browsing infringes copyright would be the equivalent of killing the world wide web, which represents the internet to the majority of computer users.

Linking seems to have attracted the attention of copyright specialists because it provides a means by which potential infringements may take place by directing users to copyrighted material. Thus, although the link is merely what could be classified as an intermediate step in the process of potential infringement, it seems to have assumed a significance that goes beyond what it really is. Further, it gives copyright owners a convenient target — the owner of the linking site — rather than the ultimate consumer, and even then there may be some doubt as to whether there has in fact been an infringement by the mere accessing of a webpage without more.

Linking holds no mystery. A link is merely a line of code that allows a step to be taken. Tim Berners-Lee, who developed the world wide web at the European Organisation for Nuclear Research (CERN),<sup>88</sup> puts the matter as “the intention in the design of the web was that normal links should simply be references, with no implied meaning”.<sup>89</sup>

The contents of the linked document may contain meaning and often do but the link itself does not. A recommendation to go to a particular site followed by a link, or even the embedding of a hypertext reference (HREF) within the recommendation does not add any extra meaning to the link.

A useful analogy for a link is to treat it as a card index system in the library that directs a researcher or library user to a particular location within the shelves of

---

<sup>88</sup> <http://public.web.cern.ch/Public/Welcome.html> (last accessed 21 June 2005).

<sup>89</sup> Tim Berners-Lee, “Links and Law” <http://www.w3.org./DesignIssues/LinkLaw> (last accessed 21 June 2005).

the library. The library card carries no more information than is necessary to enable the user to satisfy him or her that the book is the one that is sought and to locate it.<sup>90</sup> A hypertext link does not even go this far. It only contains the information about the location of the information on the destination site and makes that site available to the computer user.

However, it is, as has already been stated, an essential part of the architecture of the internet. This then raises a question that relates to the way in which the law applies to the internet, and touches on an even deeper issue that is the purpose of law itself.

The purpose of the law is to regulate the behaviour of individuals within society. One of the areas that the law has been unable to regulate is the environment within which individuals operate. That environment is governed by what we may refer to as the "laws of nature" or the "laws of science". It is, if you like, the architecture within which society operates.

Similarly with the internet — inherent within what has been called cyberspace is a fundamental architecture or system within which we may operate and without which the internet or parts of it cannot function. An example may be found in the TCP/IP protocol that allows different computers to communicate with one another. Another is the system of IP numbers that are assigned to machines on the internet. Although we may set rules for the assignation of IP numbers<sup>91</sup> the internet simply will not function without these two essential aspects of the internet environment or its architecture. This environment or architecture is not a part of nature such as is the real world environment. It is created by human beings. However, that architecture sets the metes and bounds of the internet or cyberspace and receives its expression in code.

The world wide web built on existing internet protocols and added another dimension to the internet. However, what the world wide web actually is and its limitations are governed by the code that makes it operate. Part of that system of operations is hypertext linking, activated in code by the term HREF. Linking cannot take place without the HREF expression. Thus linking is an essential part of the architecture and the environment of the world wide web. To attempt to limit or regulate its use is rather like a Judge trying to slow the growth of a tree by judicial decree.

Lest it is suggested that it is not the architecture that is being regulated but the way in which people behave — that is, utilise the architecture — we must return to first principles and see what the HREF expression does. Unlike a mechanical creation, which may be used for good or ill, HREF allows only one thing and that is a hypertext link — a means of locating a page and bringing it into a user's computer. To attempt to legislate or regulate what is an essential part of the web does violence to the environment within which the internet user may expect to operate. Indeed, the most extreme view might be that for the purposes of ensuring that internet users have certainty in terms of the lawfulness of their activities within the environment, the law should not concern itself with issues of the use of basic and necessary parts of the internet by using copyright theory to limit the use of these fundamental operators. The real issue should be with the use that the ultimate user may make of copyrighted material. If that causes copyright owners a problem in terms of detection and enforcement so be it. Back-

---

<sup>90</sup> The analogy of a referencing system was used in *Crookes v Newton* above n.90

<sup>91</sup> One of the functions of ICANN.

door methods should not be used which do violence to the internet environment and simultaneously to legal principle.

In a sense the code or the architecture of the internet limits the way in which the law can be applied to regulate or govern it. In a sense the code and the architecture that it provides imposes its own regulatory metes and bounds not only in terms of what may or may not be done, but in terms of the boundaries of any regulatory or governance system that may be imposed upon it by the law, either as pronounced by the Courts or by legislative bodies.

If, however, linking activity is going to be the subject of regulation under, say, principles of copyright, the effect upon the internet will be dramatic.<sup>92</sup>

First, the internet will cease to be the free information environment that it was originally conceived to be. Freedom of navigation for information on the internet will become restricted in the same way that "real space" is. The freedom that users enjoy to link to content on similar subjects whereby a collection of links on, say, copyright law are all brought together, may be compromised or indeed become impossible. Not only would the free information environment be restricted but the utility of the internet as a source of information would be hampered.

Secondly, the internet could become divided into a number of information "zones" of open and closed areas. Distinctions between sources of information may be made on a number of criteria, among them pricing considerations, the willingness of a user to provide information about himself or herself, the willingness of a user to accept additional information on products or services, whether the site is a commercial site or a non-commercial one and so on. In some respects this is already taking place. For example, when the *New York Times Cyberlaw Journal* existed online it was often linked to from legal sites. However, a visitor to that site for the first time was unable to access it until he or she registered, and that registration was specific to the particular machine. Thus, if the user wished to access the *Cyberlaw Journal* from another machine, the registration information (user name and password) had to be re-entered. The *New York Times Cyberlaw Journal* was free of charge, but the mechanism prevented casual access to the site by deep linking.

Other technological solutions may be available such as requiring a password to gain access, or building dynamic webpages that only appear when the user uses a certain program. There may be feasibility issues for commercial sites who would try to obtain as big a reach as possible that would mitigate this solution, although it may be satisfactory for non-commercial sites. The irony is that the complaints about deep linking arise mainly from commercial sites, whereas non-commercial

---

<sup>92</sup> The Copyright Amendment (Digital Agenda) Act 2000 (Australia) which substantially amends the Copyright Act 1968 provides that copyrighted subject-matter is not infringed by making a temporary reproduction or copy of the subject-matter as part of the technical process of making or receiving a communication, provided that the making of the communication is not an infringement of copyright (ss 43A and 111A). Although this substantially clarifies the position as far as incidental copying associated with online activity is concerned, the legislation remained silent on the issue of hyperlinks. There is no relevant Australian case law on the issue although an early draft of the Digital Agenda Bill suggested that one of the objects of the legislation was to relieve uncertainty as to whether practices such as internet browsing and hyperlinks violated the Copyright Act. However, the matter has been left to the Courts. See Maree Sainsbury, "The Copyright Act in the Digital Age" 11 *Jnl Law and Information Science* 182.

sites are generally more attuned to the “information wants to be free” ethic that underpinned the early internet.

It is possible to program webpages to reject linking from unwelcome sources or users. In a sense this is a logical and acceptable solution, for it puts control of access to the site in the hands of the site owner. This enables the owner to obtain the exposure that is required while at the same time preventing unwelcome links, such as in the case of Havana House Cigars in New Zealand. Framing may also be prevented in that the frame may be “dissolved” thus enabling the user to see the entire page from its source and not as a part of another site.

There is no doubt that there will be further litigation about links and in the near future there will be some considered and possibly definitive solutions. However, those solutions will further obscure this complex area. Decisions emanating from the US will have to resolve apparent conflicts between the Digital Millennium Copyright Act and the Constitution of the US, in particular the First Amendment. With legislation in Australia in force another outcome may well be presented, for Australia has no constitutional equivalent to the US Constitution or its Amendments.<sup>93</sup>

Thus it is likely that there will be a jigsaw of rules and regulations limited by territorial jurisdictions and applicable in some areas and not in others. The casualties in the resolution of these conflicts will be the law, which, when territorially based will be unable to provide consistency and certainty for an environment that does not know borders, and tragically the internet itself.

From a fundamental point of view it will be clear that because there are no copyright implications in the provision of links, there is no liability and thus no need for a safe harbor provision.

[Do the safe harbour provisions in the Copyright Act affect the commercial relationship between online platforms and copyright owners? Please be specific about who is, and how they are, affected.](#)

In answering this question I shall refer to the issues under consideration in the review of the DMCA Act.

[General effectiveness of the safe harbour regime and how this has impacted on the growth and development of online services.](#)

*Subject to what I have to say below about the scope of the safe harbour, I am of the view that the safe harbour provisions are workable and effective.*

[Overcoming the ‘whack-a-mole’ phenomenon – does the notice and takedown regime sufficiently address the reappearance of infringing material on hosting websites?](#)

*If the material reappears on the site of a content host that has been the subject of a takedown request, there should be an obligation on the content host to*

---

<sup>93</sup> For an example of conflicting outcomes between Australia and England see *Sony Computer Entertainment v Owen* [2002] WL 346974 (Ch D), [2002] EWHC 45 and *Sony Computer Entertainment v Stevens* (2002) FCA 906 (26 July 2002).

*check to see that the material does not reappear. This can be automated using MDA Hashing tools.*

Should ISPs be obliged to detect and delete all infringing copies of a work, not merely the copy identified in a 'takedown' notice?

*No – it should be incumbent upon the requester to identify infringing copy. Once that has been done, the content host is on notice in respect of any future appearances of infringing content.*

The adequacy of the notice and takedown regime to protect against fraudulent, abusive or unfounded notices.

*Because there are numerous examples of the failure of copyright infringement actions because the allegation by the copyright owner that they held copyright was incorrect, it is incumbent upon the person alleging infringement to establish entitlement to a remedy.*

The effectiveness of the counter notifications for addressing false or misleading assertions of infringement (the Copyright Act does not explicitly provide a counter notification procedure).

*The counter-notice provisions of the Harmful Digital Communications Act provide a means by which there may be a challenge to the original notice – see below.*

What other problems (or benefits) are there with the safe harbour regime for internet service providers? What changes, if any, should be considered?

The Harmful Digital Communications Act has safe harbour provisions for content hosts who host but do not post harmful content. The provisions are a modification of those provided in the Copyright Act but in fact are wider in terms of the protection provided.

In essence a person may complain to an online content host about the hosting of material alleged to be harmful and in breach of communications principles in the HDCA.

The content host is not required to make an evaluation of the content. The host – to obtain the benefit of the safe harbor – must notify the person who posted the content and advise that there are 3 options available – to take the content down; to file a counter notice or do nothing. In the event of the filing of a counter notice the content host has the protection of the safe harbor and the matter becomes one between the complainant and the poster. In the case of options 1 and 3 the content is removed and the host has the benefit of the safe harbor.

If this model were applied to the copyright safe harbor it would clarify liability for the content host in that the safe harbor would be available upon compliance with the notice steps. The real contest would then be between the copyright owner and the infringer – where in fact the contest should lie.

In addition it would provide consistency between the Copyright Act and the HDCA.

Copyright owners would probably resist such an extension of the safe harbor. It would mean that deep pocketed content hosts could very simply avoid liability. However, it would avoid complex arguments about the nature of content host liability in the digital paradigm.

What are the problems (or benefits) with the TPMs protections? What changes (if any) should be considered?

Is it clear what the TPMs regime allows and what it does not allow? Why/why not?

I can answer both questions at once. First, the principles that underpin the New Zealand approach to TPMs are correct. The distinction between circumvention for access where content has been legitimately acquired and circumvention that has copyright implications – e.g. circumvention for the purposes of copying content – is correct. It recognizes realities within the digital paradigm that were not present in what could be called the kinetic paradigm.

I think that the provisions involving consultations with specialists to circumvent a TPM for fair use purposes are clumsy, hard to understand and obscure. Because a TPM is binary (either it allows an action or it does not) demonstrates the “blunt force” of a TPM. It cannot encompass the subtleties and nuances of copyright law.

A possible solution may be to make circumvention of a TPM for copying purposes (e.g. fair use) prima facie infringement with the onus on the circumventer to prove that the copying in question was within the exceptions permitted in the Copyright Act.

One of the problems with the application of TPMs has been in the area of geoblocking. The most obvious examples can be found with the region coding of DVDs and games. The current provisions, recognizing that geoblocking has access rather than copying implications has been recognized in the current legislation.

The waters become a little muddied when one considers the geoblocking implications of on-demand content sourced from overseas servers such as Netflix US, Hulu or indeed video news content from the BBC which often returns a message “content not available in your country”. This, of course, is geoblocking.

Because the Digital Paradigm introduces new concepts and properties of technologies previously not present in the pre-Digital or kinetic paradigm one

must revisit some of the fundamental premises that underlie activities such as geoblocking.

First, geoblocking does not have copyright implications. It used to be tied in with the marketing of releases of content, primarily of movies, in theatres to coincide with the greatest audience interest – i.e. holidays. This was perfectly legitimate when physical copies were the only form of distribution. Digital copies sourced from a server and available world wide challenge the earlier distribution based rationale for geo-based release of content.

Secondly, it is possible for a consumer in virtually any country to sign up for a subscription to streaming services. This means that a person has paid a consideration for the service. Geoblocking interferes with the fulfilment of contract obligations. It may well be that terms and conditions of contract clarify issues of availability. Should a consumer use a circumvention measure such as a VPN to avoid geoblocking, the matter is one not of copyright but of contract between supplier and consumer. In such a case the supplier could cancel the contract and terminate the subscription. A contract based approach is a much more principled way of approaching geoblocking of streaming content.

For those reasons I consider that it should be made clear that the circumvention of geoblocking does not constitute circumvention of a TPM and the definition of a TPM should recognize this.