

Beyond Creative Commons: Seeing copyright's public domain as a whole (An Australian case study)

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1. The value of Australia's copyright public domain

1.1. What do these innovations have in common?

A set of examples follow. They all involve valuable contributions to Australian innovation in the area of information goods. They all involve copyright works in which various parties have continuing proprietary (copyright) interests. But they also involve the public (or classes of the public) having rights to use those works in ways which involve some of the exclusive rights of the copyright owner. The Creative Commons slogan 'Some Rights Reserved' sums up rather well the way in which these intellectual goods combine proprietary and non-proprietary elements, but most of these examples of what I will call 'the public domain' don't involve the use of Creative Commons licences.

The theme of this article is what these examples have in common, how Australia's copyright law and the institutions that support innovation have paid insufficient attention to these common elements, and how – in Australia at least – we need to have a law reform review with the copyright 'public domain' as its focus.

1.2. Examples from Down Under

Australians make very substantial contributions to the development of **open source software** and thus to the Internet's global infrastructure. These include contributions to the *Linux kernel*, the *Samba* re-implementation of the SMB/CIFS networking protocol, the file transfer utility *rsync*, the *pppd* daemon used by a significant proportion of ADSL home routers, the *radiud* authentication server used by many ISPs and the SSL library which is the cryptography engine used by much e-business¹.

The **AEShareNet** Licensing System, operated by TVET Australia, licences about 3,000 learning objects for free educational use, primarily in the technical and further education (TAFE) sector. In addition, about 600 pages on the web use its 'Free for Education' (FFE) licence. It was one of the world's earliest developments of open content licensing, having been started at approximately the same time (2001) as Creative Commons.

PANDORA, described as 'Australia's Web Archive' by the National Library, now has over 50M files (over 2 TB) comprising over 36,000 'archived instances', growing at nearly 2% per month.

Australia has developed significant open source **e-learning platforms** such as **LAMS** (Learning Activity Management System) developed at Macquarie and **Moodle** which has particular strength in wiki development, and a user base of 42,080 registered sites with 16,927,590 users in 1,713,438 courses (Wikipedia, 2008: 'Moodle' entry).

By 2007 usage of **Creative Commons licences** in relation to Australian content had resulted in at least 2,000 websites containing over 100,000 pages of CC licensed content (Bildstein, 2007), though this may be something of an under-estimate. This includes both the use of the Australian CC licences, and the use of the 'generic' CC licences over Australian materials (from Bildstein, 2007: 4.2.4). The most popular licence attributes are 'Non-commercial' and 'Share-alike'.

Despite Australia's Crown Copyright in cases and legislation, **Australian law** has been the site of world-leading initiatives in free access to law, including the Australian Council of Chief Justices'

¹ Andrew Tridgell assisted in the compilation of this list. Details are in Greenleaf *Innovations Submission* (2008).

'Court designated citations' standard (1998), which enables cases to be cited authoritatively from the moment they are handed down, and has been adopted across much of the common law world. Since 1995 the *Australasian Legal Information Institute* (AustLII), an initiative of two university law schools, has created the world's largest free access online law resources.

Screenrights, the collecting society for educational use of audio-visual materials, as part of its business model, contributes back a large quantity of free-access educational resources such as study guides about programs which are being screened on TV, through its *Enhance TV* service. Free access **repositories of Australian academic research** are becoming more common. The ARROW consortium of Universities (Australian Research Repositories Online to the World) provide about 12,000 academic papers for free access (but usually with no licences providing other rights). **Australian scientists** are making use of public rights licensing, such as the Murdoch University research team published their simple diagnostic test for African Sleeping Sickness² on the Public Library of Science under an Australian Creative Commons licence (CC BY 2.5).

The National Library of Australia's **Picture Australia** aims to be the definitive pictorial service for and about Australians and Australia, providing one search over collections in 45 major Australian public institutions. Its 'Click and Flick' initiative opens Picture Australia to contributions from the Australian public, through uploads to Flickr using Creative Commons licences, and now includes over 1.1 million images from the collections of 45 organisations and from individuals via Flickr. Similarly, the **Powerhouse Museum**, Sydney is one of the first cultural institutions in the world to release their public domain images on Flickr (April 2008).

1.3. An important caveat

These examples of Australian intellectual goods illustrate the major role that public rights of differing types play in Australian innovation and culture. This article is about these public rights and how they can be used to stimulate innovation and enhance national culture. But there is an important caveat which needs to be stated at the outset. Both now and in future such works which involve predominance of public rights over private rights will only be part of Australia's creative landscape, and most probably the minor part: 'All rights reserved' may continue to be appropriate for most creators, most of the time.

In Australian, most changes to copyright law in the last decade have strengthened copyright ('all rights reserved'), and have involved much less to stimulate Australia's public domain ('some rights reserved'). I argue that we should be trying to get the most out of both methods of stimulating innovation. Other countries may have a similar need.

2. 'Public rights' and the public domain

'Public domain' is an ambiguous term. At its narrowest it means those works in which copyright has expired due to the expiry of the copyright term. A slightly broader usage includes works which don't ever attract copyright protection, and those over which the author has renounced all claims of copyright. However, it has a more modern and expansive usage which encompasses all types of 'public rights', including in addition, other aspects of copyright law which give rights to the public, such as fair dealing exceptions and uses allowed under compulsory licences. 'Public domain' in this broad sense can be used in relation to copyright (see Greenleaf, 2003) and in relation to other forms of intellectual property rights. Samuelson, (2006) provides seven maps indicating how different scholars see this broader notion of the public domain. I will use 'public domain' to mean the broadest usage of 'public rights' in relation to copyright.

² <<http://creativecommons.org/weblog/entry/8112>>

2.1. Avoiding a misleading dichotomy

Used in its narrow sense 'public domain' describes a dichotomy of works: some works are in the public domain but only if they are old enough, and all other works are not. In reality almost all works contain both public and proprietary components, and fall somewhere on a continuum between the extremes of works which are subject to 'private rights only' and those which are subject to 'public rights only'. At the public rights extreme are public domain works such as the plays of Shakespeare. However all proprietary works are at least subject to some minimal 'fair use' exceptions in copyright law, and so are subject to some public rights. The proprietary extreme of the continuum is empty.

The normal nature of works is a composite of public and proprietary rights, with each work situated at some point along a continuum between the two extremes. There is therefore normally a dichotomy between public and private rights, but it is one which exists within each work, rather than between works. The Creative Commons slogan "some rights reserved" recognises this inherent duality in works and builds on it.

2.2. 'Effective' public rights – a useful refinement

In this paper, I mean by "public rights" all those aspects of copyright law and practice that are important in determining the ability of the public (or a significant class of the public) to use works without obtaining a licence on terms controlled by the copyright owner. In other words, public rights are 'The effective extent to which I can use your works without seeking your permission.' Including factors that determine the effective exercise of otherwise formal rights, reduces the precision of the notion of public rights, but does allow us to give a richer and more useful description of a country's public domain. The corollary of this definition of 'public rights' is that private/proprietary rights are the effective ability of the owners of copyright in works to refuse to allow other people to use those works, except on terms set (and changeable) by them.

3. The global copyright public domain

There are common elements in the public domains of most jurisdictions around the world, for two reasons: (i) the near-universal adoption of the Berne Convention (1886) (and some effects of the TRIPS Agreement) and (ii) some global effects of the Internet, particularly those associated with search engines and with viral licences. We may discuss a global public domain, but what is relevant here is the effect of these global factors on the shape of Australia's national public domain.

3.1. International agreements and their limiting effects

The main effect of international agreements has been to restrict what can be included in a national public domain according to international law. The Berne Convention (1886) and its subsequent amendments³ are the main factors determining the size of national public domains, and many of their features⁴. Five specific negative elements of Berne constrain public domains.

³ *Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886*, completed in PARIS on May 4, 1896, revised at BERLIN on November 13, 1908, completed at BERNE on March 20, 1914, revised at ROME on June 2, 1928, at BRUSSELS on June 26, 1948, at STOCKHOLM on July 14, 1967, and at PARIS on July 24, 1971, and amended on September 28, 1979. For a broader discussion on the provisions of the Berne Convention, see Ricketson and Ginsburg (2006).

⁴ This is not an historical observation: some countries' laws included features mentioned here before they were included in the Berne Convention.

- Under Berne, registration of works is not required for copyright (Article 18 and elsewhere). This creates a shrunken public domain, as it reverses the default condition of a work from 'public' to 'proprietary'. If registration was required, most works would probably not be registered, and the public domain would be correspondingly larger. When between 1978-89 the USA abandoned a compulsory registration system for copyright⁵ and publication and notice requirements and belatedly joined the Berne Convention (1989), this may have been the largest contraction (since Berne itself) of the scope of the world's public domain. The absence of any requirement for registration is a major contributor to problems such as 'orphan works'. When the US had a registration system, only about 10% of all works registered were re-registered at the end of the 28-year term so the other 90% of those works would then have entered the public domain in the pre-Berne US environment.
- Under Berne is the requirement, since 1908, of a minimum copyright term of life of author plus fifty years (Article 7(1)). Without this requirement, the minimum term of protection of some types of works, such as computer programs, may have been less, and they would have become part of the public domain (in the narrow sense) earlier.
- Moral rights (including integrity) may be perpetual according to the interpretation of some state parties such as France. This limits the potential re-use of such works.
- The fair use '3 step test' (Article 9(2)) is seen by some as limiting the extent to which countries can expand the scope of fair use and compulsory licences, although this interpretation is contested.
- Berne is a minimum rights treaty (Article 20) and it is therefore possible for a consensus of national developments to further reduce most public rights.

There are also aspects of the Berne Convention that support the existence of public rights, or are at least neutral. These include that there shall not be protection of 'news of the day' or 'miscellaneous facts' (Article 2(8)). Berne leaves open for national decision (and is therefore neutral) the vital areas of (a) compulsory licensing; (b) fair dealing and (c) protection of legal materials (Article 2(4)). Perhaps the most important positive aspect of Berne is something that it does not mention, and therefore leaves outside the scope of copyright, namely that the rights to control who can read, listen to or view a work are not in themselves part of the exclusive rights of copyright owners. However, these 'user rights' have been made less secure by the recent laws concerning technological protection measures.

It is unlikely that these international agreements will be amended in the short term. The obligations in these treaties constrain any Australian law reform. Some of these provisions may be undesirable but they are likely to be permanent. They are the settled context of our public domain. The challenge for those who wish to encourage innovation and the public interest through a broader public domain is to identify practical changes to the law which are consistent with these constraints, or reforms to policy and practices which do not require changes to the law.

3.2. The expanding informal global commons

In contrast to international agreements, global practices related to the Internet have effectively expanded public rights globally, and have therefore expanded Australia's public domain.

The Internet's world-wide-web from the early 1990s created a global commons for *browsing* and private use (including reproduction) of works that authors made accessible on the Internet. From

⁵ The US Library of Congress maintains a voluntary registration system for most types of works. 'Before an infringement suit may be filed in court, registration is necessary for works of U.S. origin' (US Copyright Office (2007) 'Copyright Registration' and 'Copyright Office Basics').

1996 search engines have created a global *de facto* commons for the *searching* of such works. Creation of the searchable commons has required the acquiescence of copyright owners in practices by search engine providers (particularly creation of concordances/indexes and retained caches) which may breach copyright laws on a massive scale, though this varies between countries. This is probably the largest expansion of the effective public domain to occur, at least since the development of public libraries turned the right to read works into an effective public domain. It has been described as an example of creation of a commons by 'friendly appropriation and acquiescence' (Greenleaf, 2006). An unresolved question is whether Google Books and other book search facilities will succeed in creating another extension, a global searchable commons for literature which copyright owners have *not* made freely accessible via the Internet. The recent draft settlement between Google and book publishers makes this more likely.

Viral licences are voluntary licences of works offered by the author of the work which allow the software or document to which they apply to be modified or combined with other software or texts, but only on the basis that the resulting software or text is available to the public under the same licence conditions. Where they are adopted in preference to non-viral licences, the quantity of software or texts available to the public under the licence expands. The most effective viral licences create an intellectually very significant and rapidly expanding global public domain in certain types of information. The most obvious and important example is open source software created by the viral GNU General Public Licence (GPL) and some other Free and Open Source (FOSS) licences. There are many millions of instances of such licences being used globally. The most important examples in relation to textual works are Wikipedia and other collaborative reference works created under the viral GNU Free Documentation License or similar viral licences.

There has also been widespread adoption across the world of other open content licences which are not 'viral', particularly those Creative Commons licences which do not include the 'share-alike' attribute. Such licences expand the public domain by allowing either any licencees, or defined classes of licencees, to use the content without payment, according to terms of the (non-viral) licence. Some of these licences have national origins, are tailored to national laws, and are mainly used within a particular country (for example, the TVET/AESN licences in Australia). However, the greatest proliferation of content licensed under (non-viral) open content licences is of a 'global' rather than national nature. The Creative Commons 'movement' and its suite of licences originated in the USA and were tailored to US law, but have been 'ported' to comply with the legal environments of different countries. These suites of 'CC' licences have a very high degree of similarity to the 'generic' Creative Commons licences, and to those of other countries.

4. Australia's national copyright public domain

To understand how Australia's public domain can contribute to innovation, it is necessary to appreciate all of the different types of public rights that comprise this public domain. We also need to note those elements found in other countries' public domains but which are lacking in Australia. Given that some of the shape of Australia's public domain has been determined by its own history, and its interaction with international influences, we need to examine that history before analysing the current state of Australia's broad public domain.

4.1. The historical context

The public domain has always existed in Australia but its shape and boundaries have changed over time. The rhetoric of a balancing of rights or strong public interest considerations has never been at the core of our national copyright legislation (Atkinson 2007), but has played a role in its development by both the legislature and judiciary. From the earliest colonial copyright legislation, in Victoria in 1869, governments recognised copyright was a limited right that would expire, so that

previously-proprietary materials would be free for anyone to use (Bond, 2008). The copyright term which originally reflected the English duration of life of the author plus seven years (or forty two years for books), was extended to the Berne-mandated life plus fifty years in 1912, where it remained until this century.

Australia also inherited from the 1842 United Kingdom *Copyright Act* the notion of legal deposit, which was incorporated into the first colonial copyright statute. By this time, registration was not tied to protection in Australia, but a registry of copyright works was still kept (including books, paintings, photographs *etc*) and registration was a precondition to a cause of action for infringement. A copy of a book first published in a colonial State jurisdiction had to be deposited in a prescribed Public Library. This continued after federation with the *Copyright Act 1905*, becoming optional in the *Copyright Act 1912* (although a condition for pursuit of some remedies). Since the *Copyright Act 1968* we have no registration system, but legal deposit of published print works is still required.

Thus the Australian public domain has been subject to international influences (including those of the then British Empire and Commonwealth), but has developed according to local circumstances.

4.2. Components and characteristics

The elements of law, policy and practice that are significant in determining the nature and scope of public rights to works in Australia can be divided into six categories:

1. Limits to copyright subsistence
2. Exceptions to copyright
3. Extinguishment of rights
4. Voluntary public licences (take-up and limits)
5. *De facto* public rights
6. Effectiveness supports and constraints

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The first three categories are mainly to do with formal copyright law, whereas the last three have more to do with practice and institutions. The elements and categories identified have similarities to those found in other countries' public domains, but are not identical to those found in any other country. Their unique combination make up Australia's public domain. Each is examined below. Section references are to the Australian *Copyright Act 1968*.

4.3. Limits on copyright subsistence

Australia's public domain gets off to a very unpromising start, if we first consider its constitutional position. Court interpretations of the federal Constitution's intellectual property clause (s51(xviii))⁶ have not placed significant limitations on what is capable of being protected by copyright law⁷. It is unlikely our Constitution could be invoked to limit extensions to the term of copyright, or to place new limitations on copyright in the name of freedom of speech. However it is possible (Bond, 2007).

⁶ Section 51(xviii) of the Australian Constitution reads: 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to...(xviii) Copyrights, patents of inventions and designs, and trade marks.'

⁷ Under some circumstances the intellectual property power may have significant limitations because it cannot 'monopolize words in the English language' (*Davis v Commonwealth* [1988] HCA 63), or constrain the implied freedom of political communication (discussed by Kirby J in *Stevens v Sony* [2005] HCA 58). A levy on blank tapes was held to be outside the constitutional power: *Australian Tape Manufacturers Association Ltd v Commonwealth of Australia* [1993] HCA 10. (see also *Nintendo Co. Ltd. v Centronics Systems Pty Ltd* [1994] HCA 27).

No registration of works is necessary for protection: for example, copyright subsists in any unpublished literary, dramatic, musical or artistic work where the author is a qualified person, or in published works that are first published in Australia (s32). In default any works created are primarily subject to private rights: public rights play only a minor role. As Berne allows, Australia has material form requirements, however broad definitions of material form means these are not significant barriers against copyright protection.

There are no significant legislative restrictions on what types of works can obtain copyright protection. Works of a 'legislative, administrative and legal nature' have both Crown copyright and prerogative rights.⁸ Australia has implemented rental rights of various types, and moral rights. There are some limitations on those works in which copyright will be refused because they lack the minimal requirements of originality, or on public policy grounds, but they not significant. The *prima facie* scope of copyright's private rights in Australia is very broad: works starting life with no copyright protection are almost non-existent.

Other factors are also relevant to the public domain's scope. Australia's copyright law protects compilations⁹ to an extent that is in many respects at least equivalent to the protections provided by the EU's database Directive¹⁰, and possibly stronger in light of recent EU case law (Waelde, 2007). Both Australian and EU protections are in contrast to the much more narrow approach taken by the *Feist case* in the USA¹¹. The breadth or restrictive nature of the principles determining the scope of implied licences to use works is another factor. It is uncertain in Australian law at present and before the High Court¹².

4.4. Exceptions to rights

Assuming copyright subsists in a work, what uses may the public make of that work without infringing? Little can be copied without infringement: 'substantial part' can mean something close to 'insubstantial'¹³, and this provides little scope for public rights. Similarly, Australia does not have any broad 'fair use' defence,¹⁴ but only a narrow range of 'fair dealing' defences of relatively fixed scope¹⁵; (i) reporting news (ii) criticism and review; (iii) research or study; (iv) and legal advice.¹⁶ These have been augmented recently by a further defence of uses 'for the purpose of parody or satire'¹⁶, and other defence-like provisions such as those allowing format-shifting and time-shifting. Though these provisions add to 'public rights', their limited application to private purposes means that they do not add to the public domain in any significant sense.

In contrast to these narrowly-drafted 'fair dealing' provisions, Australia's public rights created by compulsory licences are more extensive than those in many jurisdictions. Australia has compulsory licences for the benefit of entertainment industries similar to other countries. It has been argued that these compulsory licences are the principal reason for the financial success of the recorded music, radio and cable TV industries of the USA (Lessig, 2004: Ch 4). Australia also has compulsory licences for educational purposes, both for reproductions of print works, and for reproductions and in-class uses of audio-visual works, which are much more extensive than those of many other

⁸ See Part VII, Division 1, *Copyright Act 1968*; section 35(6), *Copyright Act 1968*; section 8A, *Copyright Act 1968* and *Attorney-General for New South Wales v Butterworth & Co.* (1938) 38 NSWSR 195.

⁹ *Desktop Marketing System Pty Ltd v Telstra Corporation Ltd* [2002] FCAFC 112

¹⁰ *Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.*

¹¹ *Feist Publications Inc v Rural Telephone Service Co Inc* 499 US 340 (1991)

¹² *Copyright Agency Limited v State of New South Wales* [2008] HCA Trans 174 (22 April 2008)

¹³ See *Network Ten v TCN Channel Nine* (2004) 218 CLR 273.

¹⁴ In this sense I refer to 'fair use' as codified in United States law: see 17 U.S.C. § 107.

¹⁵ Sections 42, 41, 40 and 43 (for literary, dramatic, musical or artistic works); sections 103B, 103A, 103C, 104 (for audio-visual items).

¹⁶ Section 41A (for literary, dramatic, musical or artistic works); section 103AA (for audio-visual items).

countries. These compulsory licences, particularly those in the education sector, are a distinctive part of Australian public rights, creating a closed commons (Drahos, 2006) for benefit of certain classes of users.

Lessig (2006) notes that the 'permission free' resources he discusses could cost something, so long as the user had the right to buy access. In my view this is essential for a full understanding of public rights. On that basis, compulsory licences may be the largest and most important limitation on the right of copyright owners to unilaterally determine the conditions of use of works. If so, it is important that these licences are administered to maximise their benefit to the Australian public

4.5. Extinguishment of rights

Due to the *Australia-US Free Trade Agreement* [2005] and implementing legislation¹⁷, Australia has extended the copyright term to the life of the author plus seventy years as in the USA¹⁸. Works will therefore now enter the Australian public domain (in the narrow sense) at a slower rate than was previously the case. No study has yet attempted to quantify this or estimate its likely effect on Australian cultural development. The extension of the term of copyright applies prospectively rather than retrospectively; therefore, where a work had already entered the public domain, copyright in that work was not 'revived' pursuant to the AUSFTA. This position is in contrast to the United States and the European Union, where the term is extended retrospectively.¹⁹

A feature of the Australian situation positive for public rights is that, although Australia has introduced moral rights, their duration is co-extensive with the economic rights of copyright.²⁰ This is particularly important to the right of integrity: if this right was of longer duration than the term of the economic rights, anyone modifying a work after it had entered the public domain (narrow sense) would still have to consider whether they might infringe the right of integrity.

The other way to 'extinguish' copyright in a work is to somehow put that work into the public domain (in the narrow sense) before the copyright term has expired however it is questionable how this may be done under Australian law. Whether moral rights can be so extinguished is also questionable.

4.6. Voluntary public licences (take-up and limits)

The existence of various licences creating public rights, for voluntary use by authors within a jurisdiction, has no effect on the public domain until those licences are used, and is proportional to the extent of their uptake and the significance of the works in relation to which they are used. Estimating the extent of use made by Australian authors, or in relation to Australian content, is complex. By mid-2006 Bildstein identified over 100,000 web pages linked to particular Creative Commons licences (Bildstein, 2007: 4.2.3). However, he concluded that "even though Australian versions of the licences are available, the tendency for people to use the American licences is still significant." Nevertheless it seems that works under public rights licences do now constitute a significant, if modest, part of Australia's public domain.

4.7. De facto public rights

These have been mentioned above in relation to the global dimension of commons. The Australian position has its own special factors, while remaining consistent with the overall global

¹⁷ Copyright Legislation Amendment Act 2004 (Cth); US Free Trade Implementation Act 2004 (Cth); Copyright Amendment Act 2006 (Cth)

¹⁸ Due to the *Copyright Term Extension Act of 1998*; see also *Eldred v Ashcroft* 537 U.S. 186 (2003)

¹⁹ Joint Standing Committee on Treaties, *Report 61: Australia-United States Free Trade Agreement*, Chapter 16: Intellectual Property Rights and Electronic Commerce, p. 231, footnote 28.

²⁰ See section 195AM, *Copyright Act*.

developments. There is more likelihood of search engine caching practices being held to be in breach of copyright law in Australia (Greenleaf, 2007) than in the USA with its broader fair use provisions, but there have been no actions in Australia to disturb the *de facto* searchable commons. On the negative side, some *de facto* protections of privacy in the 'private use' of copyright works are being eroded by the surveillance capacities of some categories of digital works (Greenleaf 2003).

4.8. Effectiveness supports and constraints

Lessig (2006) has said that his aim was to 'map a strategy for [the public domain's] defense'. He talks about 'crafting an "effective" public domain – meaning a free space that functions as a public domain, even though the resources that constitute it are not properly within the public domain'. He could have been discussing the sixth element that I have listed as contributing to Australia's public rights in copyright. I use the same term: 'effective'.

This element comprises related laws, or policies or practices that help or hinder the operation of the first three elements (formal legal rules operating to the advantage of the public domain), or are impediments to the operation of voluntary licences of public rights. They are vital to the effective operation of public rights. Examples of such supporting or constraining factors are that although Australia has 'legal deposit' requirement for print works published in Australia, we have no equivalent for digital or audio-visual works. Nor do we have effective registers to locate authors, or to determine whether authors have died. Another is the increasing practice of Australian academic funding bodies to require that the outputs of publicly-funded research be made available through free-access repositories. These 'effectiveness' elements are discussed at many points throughout the rest of this article.

4.9. A decade of net gains for proprietary rights

For over a decade, reforms to Australian copyright law have repeatedly strengthened the rights of authors and other proprietary rights-holders.²¹ During this period there have also been reforms which have strengthened some aspects of non-proprietary rights to access and use some works. The general trend has been the creation of whole new areas of proprietary rights and the carving out of parts of the public domain, coupled with either concurrent or subsequent 'handing back' of some parts of the public domain by way of very limited and technically defined exceptions. Public rights have certainly been on the losing side in the last decade, despite some attempts to mitigate the most unfair aspects of these losses.

It is not my purpose to criticise any of these reforms. I merely point out that there has been a steady expansion of proprietary rights, often in order to comply with multilateral or bilateral obligations. If broader and stronger proprietary rights strengthens innovation, then Australia has given this impetus to innovation plenty of opportunity for over a decade. In my view it is time to give more concentrated attention to the impetus for innovation that public rights can provide.

²¹ See Greenleaf *Innovations Submission* (2008) 5.1 for details of both the legislative developments that have expanded authors' rights and those that have strengthened public rights, as noted below.

5. Ten topics for a Public Domain Review

Following is a summary²² of ten areas where Australia's copyright public domain needs more attention from the legislature, government policy and business and civil society initiatives if its potential contribution to Australian innovation and culture is to be maximized:

- (1) Further exceptions to copyright;
- (2) Legal deposit and the public domain;
- (3) Finding missing rights-holder (orphan works);
- (4) Encouraging open content licensing;
- (5) Maximising the value of open source software;
- (6) Enhancing open standards;
- (7) Coexistence of collecting societies and public rights;
- (8) Re-usable government works;
- (9) Public rights in publicly-funded research;
- (10) Indigenous culture's relationship to the public domain

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These issues are interlocking, and they are important to innovation in Australia. I suggest that they justify a comprehensive review of Australia's copyright law (and possibly other intellectual property laws) with the question of public rights in information goods as the focus. Such a review has never happened in Australia, or to my knowledge elsewhere in the world. Australia would benefit from a considered examination of public rights and their relationships with proprietary rights, and a balance between them which would maximise the national interest. I refer to such a review in the following as a 'Public Domain Review'.

5.1. Scope for more balance by exceptions to copyright

The Copyright Law Review Committee recognised 'that the exclusive rights of copyright are partly defined by the exceptions, in that the rights only exist to the extent that they are not qualified by the exceptions' (CLRC, 2002: 201).

The 3-step test in Australia – restricting or not?

The scope of this fundamental aspect of the public domain may depend on the '3 step test' for exceptions established by the Article 9(2) Berne Convention,;

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

Although "it has become the centerpiece of the exceptions regimes that have been incorporated into the TRIPs Agreement and the WCT" confusion still surrounds the interpretation of this Article (Ricketson and Ginsburg, 2006, [13.03]). The three step test was also included as part of the

²² These ten areas are examined in considerably more detail in Greenleaf *Innovations Submission* (2008), which poses over 100 questions that need to be addressed by any Public Domain Review.

*Australia-US Free Trade Agreement*²³ and subsequently implemented by Australia in s200AB *Copyright Act 1968*). Whether these various implementations of the '3 step test' impose any significant limitation is contested. Kenyon and others²⁴ argue that s200AB has a very limited role. There is similar uncertainty elsewhere: many international scholars question whether the three step test is intended to limit the capacity of countries to create exceptions, or is merely an attempt to reconcile the many different types of exceptions that already existed when it was introduced. Patry's interpretation is that 'National governments are free to craft laws that serve their own needs and policies, including liberal limitations and exceptions'²⁵.

Any Public Domain Review should therefore consider whether and to what extent the 3-step test limits the capacity of Australia to create further exceptions/defences to copyright, or compulsory licences (eg concerning orphan works).

Fair's fair – Would 'fair use' give more balance?

A common objection to the *Australia-US Free Trade Agreement* was that it was unbalanced: it imported the restrictive elements of US copyright law without any of its countervailing features which give some protection to public interests and public rights in copyright. During its passage and implementation, numerous calls were made for Australia to implement a fair-use provision.

The Copyright Law Review Committee, (CLRC, 1998)²⁶ proposed 'expansion of fair dealing to an open-ended model that specifically refers to the current exclusive set of purposes ... but is not confined to those purposes' considering this "consistent with Australia's current international obligations". This provision would not have been as broad as a 'fair use' equivalent, but it would have been a step in this direction.

Following the introduction of the *Australia-US Free Trade Agreement*, the Australian Government undertook a review into whether Australia should scrap its individual fair dealing provisions and introduce a broad US-style 'fair use' provision. The Attorney-General's Department released an Issues Paper outlining four options for reform:

- 'Option 1 – consolidate the fair dealing exceptions in a single open-ended provision;
- Option 2 – retain the current fair dealing provisions and add an open-ended fair use exception;
- Option 3 – retain current fair dealing exceptions and add further specific exceptions;
- Option 4 – retain current fair dealing exceptions and add a statutory licence that permits private copying of copyright material.

Eventually the Government adopted Option 3, enacting a range of specific exceptions as part of the *Copyright Amendment Act 2006*. Given that the United States, as a member of the Berne Convention, has a more flexible way of providing exceptions to copyright through its 'fair use' exception, it is worth re-considering Options 1 or 2, despite the academic cautions noted by Weatherall (2007:34). The United States has never been held in breach of its obligations under Berne on the basis of its fair use exception, and it seems unlikely that it will be in future. Hence the most far-reaching question that a Public Domain Review should ask is whether Australia should adopt a flexible 'fair use' exception to copyright, modelled on the USA.

²³ Article 17.10 '(a) each Party shall confine limitations or exceptions to exclusive rights to certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder'.

²⁴ See Wright, Christie and Kenyon (2008)

²⁵ William Patry, 'Fair Use, the Three-Step Test, and the Counter-Reformation' in *The Patry Copyright Blog*, 2 April 2008

²⁶ See Copyright Law Review Committee, *Simplification of the Copyright Act 1968 – Part One: Exceptions of Exclusive Rights of Copyright Owners* (September 1998)

5.2. Expanding legal deposit's role in the public domain

To effect a public domain at the expiry of copyright in a work there must be at least one copy of the work available to the public for subsequent reproduction by anyone. In Australia this requirement is satisfied for print works by 'legal deposit' requirements in federal law and that of various States²⁷, but they do not apply to audio-visual works (now very often digital) or texts published in digital form. So there is no guarantee that a copy of a published digital work will be in a publicly accessible repository when its copyright expires. Increasingly digital works are only accessible through access control systems or distributed with technological protection measures, so that copyright in such works may expire with no copy *which can be accessed technically* being available.

The *Discussion Paper* for the Australian federal government's enquiry into the extension of legal deposit to audio visual and digital text works (Legal Deposit DP, 2007) does not specifically mention the importance of legal deposit schemes to the maintenance of a healthy public domain in Australia, stressing instead that the purpose of such schemes around the world is to 'preserve national heritage, and to provide the public with access to that material for research or study' (2007: para 110). This approach does not adequately recognise the other objective function of legal deposit schemes, to provide copies of works which may be republished, or re-used in other ways, once the work is no longer subject to copyright protection because of expiry of copyright. Even during the term of copyright protection, if the only publicly accessible copy of a work is provided by a legal deposit institution, then legal deposit is essential for fair dealing or compulsory licence uses. These are both 'public domain functions' of legal deposit, in both the narrow and the broad usage of the term.

From the public domain perspective the main role of a legal deposit scheme should be to guarantee that when the copyright term expires a copy is available for anyone to reproduce, so that they can obtain a copy to further transform? The US Library of Congress indicates that less than 20% of U.S. feature films from the 1920s remain wholly intact in American archives (Menell, 2007: 28). This supports not only the case for archiving, but also digital archiving. Furthermore the scheme should guarantee that, when the copyright term expires, there will be no impediment to access or reproduction because of the use of technological protection measures (TPMs) in relation to the work? Fitzgerald, Coates and Kiel-Chisholm (2008) consider that it is uncertain whether the Australia-US Free Trade Agreement allows depository institutions to obtain and create devices to ensure that materials lodged under legal deposit schemes may be accessed or, alternatively, to require deposit of copies which are not protected by technological protection measures?

The role that legal deposit should play in relation to audio-visual works, requires detailed consideration. In our view (Greenleaf, Paramaguru, Bond and Christou, 2008) Australia should require deposit under the same conditions as would make a person a 'publisher' in relation to print materials. However for all materials available for free access on the Internet, depository institutions should be entitled to make copies for the purposes of legal deposit, without the publisher being required to provide a copy. We make numerous other recommendations.

5.3. Finding missing rights-holders: orphan works

The problems of orphan works and missing authors/creators

'Orphan works'²⁸ arise where the author either cannot be identified or located, and thus a license to use a work cannot be sought. They are a major impediment to all publishing industries. If authors

²⁷ For state government legal deposit schemes, see <www.nla.gov.au/services/ldeposit.html> (National Library of Australia).

²⁸ The term was apparently coined by Brewster Kahle of the Internet Archive

could be located, and are still alive, then they are likely to be willing to licence their works for a fee or to do so under some form of public licence. Both the proprietary and public aspects of copyright are harmed by the orphan works problem.

Another aspect of this problem is to determine whether an author, if identified, is dead or alive. Failure to determine this creates another category of 'frozen' works, where potential public rights are ineffective because of a lack of information. Here, the main problem is the practical one of determining whether an author is dead, and if so when did they die. If they died over 70 years ago (or over 50 years before 2005), then the work is available for public use. Otherwise, this is an orphan work problem, the issue being whether it is a live author who cannot be located or the legal successors to their copyright interest. In any event, such enquiries about the deaths of authors are part of the 'reasonably diligent search' problem discussed later. Another related problem is when it cannot be determined whether a work has been published during an author's life, because if it has not, then copyright will be perpetual (Copyright Act 1968, s33(3)²⁹).

So there are a number of related problems here: identifying authors/creators; determining if and when they have died; locating them or their estate representatives, unless copyright in the work has expired; and determining whether a work has been published, and if so when. These are all aspects of the 'orphan works problems'.

There is significant evidence available on the adverse effects of the orphan works problem on the Australian publishing industry, cultural institutions, and other creative industries (Hudson and 2007: 207; McDonald, 2006: 157). Australia's Copyright Law Review Committee (1999: 113-115) found considerable support for an orphan works scheme, particularly from the libraries, archives and educational bodies.

There are no easy or inexpensive ways in Australia of finding the information needed. There are some limited facilities in other countries which do provide publisher contact details for the representatives of some live or recently dead authors, but they are of limited use concerning Australian works. No Australian authors' organisations, collecting societies or government bodies provide such facilities. These are significant problems which adversely affect the operations of cultural institutions, publishers and collecting societies, among others.

A right to adopt orphan works - Alternative approaches

The US Copyright Office held an enquiry prompted in part by the extension of the copyright term in the US and concluded (US Copyright Office 2006) that, provided potential users first carried out a 'reasonably diligent search for the copyright owner', they should have a right to use the work, with attribution, subject only to a potential liability to pay reasonable compensation for use if the owner did subsequently emerge. Owners would also lose their right to injunct the publication of such derivative works (or obtain destruction of copies), provided the new author had added an original contribution to it. This US approach can be described as a compulsory licence after reasonable enquiry, but it is not one which would involve a collecting society, nor would it involve the payment of fees in relation to all works used.

The UK Gowers Review (2006: Recommendation 13) recommended that the UK government should propose an orphan works provision to the European Commission, as an amendment to the 'Info-Soc Directive'³⁰. The Copyright Board of Canada is empowered to issue licenses on behalf of copyright owners in cases where the owner cannot be located. In its reports on simplification of the Copyright Act, the Australian Copyright Law Review Committee did not recommend amendments

²⁹ In some countries such as Canada and the UK, the duration of copyright of unpublished works is limited.

³⁰ Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society

to create a right to use orphan works, but did recommend further investigation of whether the Copyright Tribunal should operate some type of licensing scheme (as in Canada), or whether collecting societies should be able to represent unknown authors and licence their works in such cases (as in Scandinavia) (CLRC 1999: para 7.97). In Australia, a further government enquiry was supposed to occur but does not seem to have proceeded.

Rimmer (2006) has identified six different structures or models that can be used to deal with the orphan works problems. He argues that there is a risk that any scheme involving compensatory payments will 'keep the orphans in the orphanage' because the uncertainty involved in the level of compensatory payments which may be required will deter use (Rimmer, 2006, citing views of Gigi Sohn of Public Knowledge and Lawrence Lessig). Even more potential models are possible depending on combinations of: (i) whether orphan works can be used without formal application; (ii) what constitutes 'diligent search'; (iii) whether the search must involve publication of a notice; (iv) whether use of the orphan work must carry a notice that it is being used, or be registered; (v) whether allowed use of an orphan work should be payment-free, or carry some payment liability; (vi) whether any payment should only arise if a rights-holder comes forward; (vii) whether any payment upon use is required; and (viii) whether collecting societies are involved in payments. This is one of the more important unresolved problems in relation to innovation in Australia.

Whatever approach is taken providing a right to use orphan works in Australia, it should be coupled with more effective methods of locating existing authors.

5.4. Enabling open content licensing to thrive

Voluntary licences over content (texts, photos, videos etc) made by Australians, or made under Australian law, which purport to give a conditional licence of works to the public at large have become increasingly numerous since 2000. Greater government and academic use of such licences creating public rights could stimulate innovation by creating a faster and less costly transfer of knowledge.

Some work has been done on identification and quantification of the use of open content licences in relation to Australia (Bildstein, 2007; Coates, 2007). The two most widely-used open content licences in Australia are Creative Commons licences and the AShareNet licences. Bildstein shows that, in early 2007, Australians were using both the US³¹ and Australian Creative Commons licences. This was early in the life of the Australian licences, so it can be expected that, over time, there may be relatively more use of the Australian licences. Some major user-generated-content (UGC) websites only provide facilities to assist users to use the generic licences, not the Australian licences. It seems likely that both sets of licences will continue to be used in relation to Australian content. Bildstein's analysis also shows that usage of CC licences (of either type) which include the 'non-commercial' (nc) attribute is by far the largest category of usage. The high usage of the two licences that use the viral 'share alike' (sa) attribute is significant.

Clarifying the Australian legal status of voluntary commons licences

Such licences will normally be effective for those needing permission to do acts otherwise within the exclusive rights of the copyright owner. Even those who question aspects of the enforceability of Creative Commons licences such as Foo (2007) consider that, if they are not valid as contracts, then

[they] effectively represent the permission required under contract law by the owners for the user to reproduce, adapt or communicate the material without infringing the copyright in the work.' (Foo, 2007, citing Kumar, 2006)

³¹ The US ones were then called 'generic' and have now been split into the 'unported' and 'US' sets of licences.

However, some have expressed uncertainty concerning the exact status, and enforceability, of some aspects of these licences under Australian law on the basis of failure to satisfy 'requirements for consideration and common intent' (Foo 2007). Others, such as Fitzgerald, argue that such problems may be resolved by resort to doctrines of equitable estoppel³². However, it does seem that the position is more uncertain with those CC licences which do not contain a viral element (ie the by, by-nd, by-nc and by-nc-nd licences), but is weaker in relation to the viral or 'copyleft' CC licences (ie by-sa and by-nc-sa). It is difficult to estimate the practical significance of any possible problem here: it is possibly only a theoretical limit. There are no Australian judicial decisions directly relevant to Creative Commons licences.

These licences have now been in use for over five years with few practical problems, however legal uncertainty remains. This is unsatisfactory. The overall purpose of the CC and similar licences is socially beneficial (particularly from the perspective of enhancing innovation): they aim to provide a uniform method, with low transaction costs, by which copyright owners can permit others to use some of their exclusive rights in relation to works. They expand the choices available to licensors, and the transfer of intellectual goods to licensees. There is substantial and growing use in Australia of the main types of such licences (those from Creative Commons Australia, the Creative Commons generic licences, and those from AShareNet), including use by our major public institutions in government, academia and the cultural sector, and by a growing proportion of Australians through their use of user-generated-content (UGC) websites.

It is in the public interest to put such licences on as clear a legal footing as possible, rather than to wait for any lingering legal doubts to be resolved by court decisions. A Public Domain Review should ask what uncertainties are there in the enforceability of these licences under Australian and what amendments to the Copyright Act could make voluntary commons licences more clear in their legal effects, if any additional certainty is needed.

Similarly, where authors or other copyright owners wish to voluntarily place their works completely in the public domain, it will normally be in the public interest, and in the interests of innovation, for copyright law to make this possible. The *Copyright Act* could specify a formal means to make a public domain dedication³³. There is also uncertainty in Australian copyright law concerning revocability of licences. A Public Domain Review should ask whether the *Copyright Act* should also underwrite the effectiveness of other more limited permanent abandonment of rights, such as 'no commercial use' or 'no derivatives' (at least until the copyright term expired when such restrictions would also expire).

5.5. Maximising value of open source software

Examples of the numerous contributions of Australians to the development of open source software innovation have been given above. They are important to Australia for a number of reasons. Due to our small market size and exposure to the products and services of almost every national and international IT industry, we have not yet developed a home-grown global scale IT company or established global industry standards, however we do have many smaller IT businesses and experts, capable of contributing to the leading edge of global-scale projects. Such smaller contributors depend, more than larger players, on the access to a range of licensing models, and low cost compatible tools to use in providing competitive services that open source licences can provide.

Recent research by Bildstein using the Google Code Search facility indicates that the General Public Licence (GPL), with nearly 9 million licensing instances on the web, is by far the most

³² See <www.aprs.edu.au/Open_Repositories_2006/brian_fitzgerald.ppt>

³³ If the Berne Convention imposes any constraints on this (particularly in relation to the copyright term), then the Act could specify formalities for a licence to the public closest to a public domain dedication achievable under Australian law.

popular open source licence. It is followed by the 4.6 million instances of the Lesser GPL (LGPL), the difference being that 'using the Lesser GPL permits use of the [software] library in proprietary programs; using the ordinary GPL for a library makes it available only for free programs'. The fact that the GPL accounts for nearly 50% of all open source licensing worldwide makes it important to know whether that licence is enforceable at law, even if adherence to its norms are primarily social rather than enforced. These statistics do not distinguish between GPLv2 and the recently-introduced GPLv3, which may have significant differences in validity in some countries. These figures are global, and it is not possible at this stage to estimate which licences are most commonly used in Australia³⁴. I know of no reason why the Australian percentages of use would differ markedly from the global pattern.

Validity and enforcement of open source licences

The open source model has been widely adopted and integrated into substantial investment streams, which indicates confidence in its validity and enforceability. Nevertheless, questions persist about the enforceability of the terms of licences, such as the General Public Licence (GPL), similar to some of the issues already discussed in relation to CC licences. As discussed in reference to open content licences, there is more likelihood of viral licences being held to constitute a contract by virtue of consideration than those which are non-viral.

The paucity of litigation, both globally and in Australia, has produced no significant case law on the questions of validity and enforceability. For instance, the basis on which voluntary licences to the world are enforceable – as a contract, or as a defence to infringement, or under some other mechanism – is still untested, at least in Australia. Fitzgerald and Suzor (2005: Part V B) present a case for the enforceability of the GPL based in part on its being either a licence or a contract, and in part on there being a vigorous developer community in relation to most open source software which use informal pressure to ensure that licence terms are observed.

Whereas quite a few terms and concepts in GPLv2 seem to be primarily derived from the US legal systems, a considerable effort was made with GPLv3 to ensure that its terminology was more neutral, based on the terms used in international agreements where possible, and able to take its meaning in some parts from the jurisdiction in which it was being applied. Software licensed under both GPLv2 and GPLv3 are likely to co-exist for some time.

The question 'Is the GPL valid in all respects under the law of country X?' does not seem to be a trivial enquiry, though there is little evidence of significant problems arising in any legal systems. Nevertheless a detailed analysis by a Public Domain Review to establish whether any legislative changes could assist in ensuring that the GPL and perhaps other open source licences have the greatest possible compatibility with Australian law would be beneficial, especially as, unlike the Creative Commons licences, there is no 'porting' of the GPL to the Australian legal system: it is a 'one size fits all' jurisdictionally universal licence which is not going to be changed to fit the Australian legal system. It is worth asking whether changes to the *Copyright Act* could remedy any potential problems.

5.6. Moving toward open standards

Standards are an important part of the public domain. Where they exist, anyone must be able to follow them without breaching copyright, or other intellectual property. For example, if a standard includes a two dimensional diagram, a person who makes a three dimensional reproduction of that diagram in order to implement the standard in electrical wiring or some other tangible medium must not be considered to breach copyright. This aspect is of new significance with 'covenant not to sue' in relation to patent infringement risks, as mentioned below.

³⁴ Google Code Search does not make it possible to use measures of Australian location like a search for 'site:au'.

There is general recognition that most variants of 'Open Standard' offer significant value to a wide range of stakeholders, in limiting costs of entry and participation in the markets for various products and services, and claims of their capacity for improving the financial and practical viability of competition and innovation in such markets. Much innovation on the Internet is based on open standards. The World-Wide-Web Consortium (W3C) is one of the main sources of open standards. The other Internet standards system, upon which most of the modern cyberspace platform is built, is the RFC (Request for Comment) de facto collaboratively developed standards collection of over 5,000 specifications describing protocols.

Whether Australian governments make sufficient or appropriate use of open standards in Australian government-funded work, or need to make changes to the law to allow this, needs more investigation.

5.7. Coexistence of open content and compulsory licences

'Compulsory' or 'statutory' licences under Australia's *Copyright Act* create rights in the public as a whole, or in particular classes of the public, to make use of otherwise proprietary content, on conditions and often for a fee. Collecting societies administer these compulsory licences, and their practices therefore have a significant impact on the health of Australia's public domain.

With the many changes to the use of open content licences in the past decade, particularly with the rise in importance of the Internet, tensions have arisen. This older form of public rights, by which the public use rights of creators in relation to all their works were often administered on their behalf (often via compulsory schemes), now has to co-exist with new forms of public rights whereby creators voluntarily act through open content licences to allow some no-fee uses to be made of particular works. This raises a number of potential problems.

'Some rights reserved' from collecting societies?

The membership conditions of some Australian collecting societies have made it difficult for their members to licence any of their works under Creative Commons licences or other licences with public rights. For example, the Australian Performing Right Association (APRA) requires its members to assign all present and future copyrights to it, arguing that it cannot legally collect fees until this occurs (Ian Oi in Fitzgerald, 2007:63) The difficulties APRA members faced in trying to use Creative Commons licences to permit use of some of their works resulted in Creative Commons International unsuccessfully arguing that APRA was involved in anti-competitive conduct (see Creative Commons International, 2005, 2006). The Australian Competition and Consumer Commission (ACCC) re-authorised APRA's licensing arrangements, but directed APRA to modify its arrangements to allow APRA members to require APRA to re-assign rights back to them. Neither of the two mechanisms adopted allows a member to licence an individual work under a Creative Commons licence or provide it via MySpace or iTunes or similar commercially significant channels³⁵. The ACCC is now more involved in copyright matters and can become a party to hearings before the Copyright Tribunal. It has indicated that it considers arrangements which prevent 'direct negotiation between copyright owners and users' can indicate anti-competitive detriment (Willett, 2007).

A Public Domain Review would need to ask whether there is a need for some or all collecting society members to have greater rights to opt-out from collecting society coverage for (a) some works or (b) some uses, and whether any such changes should be made through the Copyright Act or the code of conduct of the collecting societies?

³⁵ Jessica Coates, Creative Commons Australia (personal communication)

Are collecting societies charging for the public domain?

Where creators do choose to use open content licensing, they often do not wish fees to be collected for uses of their work that fall within the licence terms. One of the clearest examples is the AShareNet 'Free for Education' (FfE) licence, where it is most unlikely that any user of that licence would want Copyright Agency Limited (CAL) to be collecting fees from any educational institutions for the use of their work. A Spanish case involving a collecting society attempting to claim fees for public domain works being played in a club is an example of these issues starting to arise in practice, even in the Courts.

These issues may be affecting Australian collecting societies. Copyright Agency Limited (CAL) may be collecting fees in relation to authors and copyright owners who do not wish to receive CAL payments. The New South Wales government has published standard letters which it recommends that its agencies send to CAL stating that it does not wish CAL to collect fees in relation to any of its publications (NSW Toolkit, 2006) to ensure 'that public sector information is freely available to educational institutions and other government bodies.' Most organisations pay APRA a flat licence fee, and there is no provision for rebates where an organisation decides to use some material which is licensed under Creative Commons licences for commercial use³⁶. This has two effects: (i) the public, via licence fees, continues to pay for material for which the copyright owners do not intend there should be payment and (ii) there is no incentive to organisations to play such material. These issues are not explored fully in this article, but if these practices are occurring, the obligations imposed on collecting societies should be reviewed.

5.8. Re-usable government works

The Berne Convention leaves it to individual jurisdictions to determine whether "official texts of a legislative, administrative, and legal nature" are to be protected under national copyright law (Article 2(4)). How individual countries have addressed these issues varies. At one end of the spectrum is the United States, where a range of government works, including legislation and case law, attract no protection. In the middle are jurisdictions that may provide some protection for legislation or case law, or other government-created works. At the other end of the spectrum all government-produced materials, including primary legal materials, are protected by copyright, or some other type of proprietary right.

Australia falls into this third category. Crown copyright places government-generated works (often called 'public sector information' or PSI) out of the public domain and into the hands of the Crown as copyright holder. Permission for re-use of information must then be sought from the relevant office in each jurisdiction. The report of the Copyright Law Review Committee on Crown Copyright (CLRC, 2005) recommended little change. There are no consistent policies governing the re-use of PSI across Australia or an equivalent to the general availability of US government works for re-use or the European Union's *Directive on the re-use of public sector information*.³⁷ There are no consistent policies governing the re-use of PSI across Australia or an equivalent to the general availability of US government works for re-use or the European Union's 'Re-Use Directive'. The Australian Federal government has a *Statement of IP Principles for Australian Government agencies*, which refers to the 'desirability' of PSI being available to create commercial opportunities, and that non-exclusive provision is preferable. There are some significant developments at State level in Australia, particularly in Queensland where the Spatial Information Council has recommended that Queensland state government agencies move to an information licensing framework for PSI, based on Creative Commons (CC) licences (Qld Spatial Information Office, 2006; Queensland Government, 2007). The New South Wales Government has also moved

³⁶ Jessica Coates, Creative Commons Australia (personal communication)

³⁷ http://ec.europa.eu/information_society/policy/psi/docs/pdfs/directive/psi_directive_en.pdf

towards a more permissive stance on the reproduction of Crown copyright-protected materials, but NSW statistics (NSW Toolkit, 2006: 5) still show that 52% of NSW PSI provided via its websites cannot be used for any purposes, and a further 45% only for non-commercial use. Only 3% can be used for some commercial purposes. Victoria is also reviewing access to its PSI.

The Innovations Review Report (2008) recommended that 'to the maximum extent practicable' PSI should be made freely available over the internet as part of the global public commons'.

A Public Domain Review needs to re-consider this issue, probably on the assumption that there will not be a general repeal of Crown Copyright in PSI but rather to see what can be done to align Australia with best international practice in relation to access to and use of PSI.

5.9. Public rights in publicly-funded research

Research is at the heart of innovation. There are at least three aspects of the rights that the public (including other researchers) should have to access and to use publicly funded research: access to research outputs such as articles in journals; the ability of Universities to communicate the theses and dissertations of its students; and access to and use of the data underlying research outputs.

Free access to publicly-funded research outputs is an important part of any broad notion of public rights in works to support the type of technology diffusion advocated here. The Australian Research Council's current policy encourages researchers to 'consider the benefits of depositing their data and any publications arising from research projects in appropriate repositories', and if they do not do so then requires them to "include the reasons in the project's Final Report' (ARC 2007). The Productivity Commission received numerous submissions on the role that funding bodies should play in relation to dissemination of research outputs (2007: 236-8). It concluded that a stronger approach than that proposed by the ARC and NHMRC was needed (2007: 240). It seems likely that some form of compulsory open access to academic outputs in Australia will soon develop.

The Innovations Review Report (2008) recommended that 'to the maximum extent practicable, information, research and content funded by Australian governments – including national collections – should be made freely available over the internet as part of the global public commons'.

Any Public Domain Review needs to ask whether the Australian Research Council and other Australian government bodies providing research grants from public funds should require all research outputs to be available in a free access repository as a condition of the grant? Beyond that, however, are a series of more complex questions about whether merely access or some type of re-use licence should be required, whether there should be more liberal 'fair use' conditions, and whether some type of 'safe harbor' scheme is needed to protect University and other repositories which implement these public policies. Merely requiring deposit may achieve too little.

Similar issues also apply to postgraduate research outputs, a major source of innovative ideas. Since 1996 there have been many declarations supporting sharing of and/or free access to research data (see Fitzgerald and Pappalardo 2007: 236 for details). Funding bodies in Australia such as the ARC currently apply similar policies to research data as to research outputs.

5.10. Indigenous culture and the public domain

Australia's indigenous cultures have been a major source of innovation in Australian cultural practices. Both proprietary rights in copyright and the narrow concept of the public domain (ie term expiry) pose considerable problems for indigenous cultural practices, and therefore to innovation and the nature of our public domain. Bowrey and Anderson (2006) point out that on the one hand there is considerable tension between the 'humanist goals' of the access to knowledge movement

(A2K) and the exclusion of indigenous people from participation in the numerous studies of them in 'early governing projects of progress and improvement'. Much of this content is either in the public domain (in the narrow sense) or will be in due course, irrespective of the wishes or interest of indigenous people. There are considerable efforts to find multilateral answers to these issues. Some developing countries are seeking to negotiate through WIPO an international instrument on the protection of traditional knowledge, but there is considerable opposition from developed countries. Palombi (2008) notes that in 2007 when the UN General Assembly voted on a resolution to adopt the *UN declaration on the rights of indigenous peoples*, Australia and the United States were two of only four countries to vote against it. Various proposals in Australia for Indigenous Communal Moral Rights and for *sui generis* legislation for Indigenous Cultural and Intellectual Property (ICIP) have not yet progressed.

The relationship between the protection of minority indigenous culture and the public domain is obviously still not resolved in Australia. A Public Domain Review would need to pay special attention to indigenous culture. Where copyright applies to traditional knowledge and other cultural expressions of indigenous peoples, should the same rules relating to the public domain (such as term expiry) also apply?

6. Holistic (re-)views of national public domains

This article has raised many questions³⁸ which need to be answered before we sufficiently understand Australia's copyright public domain, and the role it can play in stimulating innovation, supporting Australian culture and meeting the public interest. A series of themes recur, including what latitude the Berne Convention and other international agreements allow for further exceptions to copyright protection; the roles of a copyright register or deposit schemes in giving practical support for the public domain; the roles that voluntary licensing can play; whether the foundations for such licences in Australian law need strengthening; and the need for further copyright protections for institutions, including Universities, engaged in increasing access to research and research data.

I argue that, in Australia, the significance of these issues justifies a law reform review of the copyright public domain as a whole, rather than small aspects of the public domain seen through a focus on some other copyright or public policy issue. Whether this 'Public Domain Review' should be carried out by Australian Law Reform Commission or by some other body is a discussion for another day.

Similar issues and themes may arise in relation to the public domain of any country. The particular copyright laws, and the particular institutional arrangements, to be found in each country will make the precise issues that need to be addressed distinctive for each country. International copyright agreements, and the global impact of the Internet, mean that some of the issues will be the same everywhere, but their precise formulation is a product of local institutions and national copyright laws.

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³⁸ Greenleaf *Innovations Submission* (2008) more than 100 questions.

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