THE TRUE HISTORY OF COPYRIGHT

The Australian Experience 1905-2005

Benedict Atkinson

Introduction by Brian Fitzgerald

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Benedict Atkinson
BA (Hons) LLM (Hons I)
University of Sydney

Solicitor Supreme Courts of ACT and NSW

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You act like a man who being in a theatre, and having seized upon the places that others might have taken, seeks to prevent everyone else from entering, applying to his own use that which should be for the use of all.

St Basil the Great

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Foreword

In 2004 – the year of the Australian-US Free Trade Agreement – I was asked by a number of people whether anyone had looked at the history of Australian copyright law and policy. While there were bits and pieces available I could not point to any sustained and conceptual analysis of the path of copyright law in this country. It was my good fortune in 2005 (via a lead from my sister Anne Fitzgerald) to stumble upon the excellent work Ben Atkinson had undertaken as part of his LLM at the University of Sydney. Ever since that time I have recommended it to anyone who is interested in the topic.

Ben is an outstanding scholar and this book is testament to his ability. In it he manages to blend his passion for history with the thorny topic of copyright politics and law, managing to paint a fascinating picture of Australian history. I found it interesting to see the role different people had played in this story and hope one day with Ben's help we might be able to assemble a number of these personalities together in old Parliament House in Canberra to recreate and repurpose some of the debate.

At a deeper level Ben challenges us to consider the very rationale of copyright law. Ben's experience in working with government policy on copyright, his passion for history and the context of the AUSFTA provides the framework for understanding what has occurred in the past and what we face in the future. His work could have simply been a descriptive account of the history of the legislation but he has chosen to confront us with his ultimate conclusion that copyright law is fuelled by a volatile mix of ever–increasing vested interests. Ben's scholarly analysis, along with the fine detail of the history of the 1905, 1912 and 1968 Copyright Acts provides any student, policy maker, practitioner or user of copyright law with a tremendous platform on which to build understanding, argument and ultimately policy direction.

For me this book highlights the need for us to remain vigilant about the boundaries of copyright law and to find the balance that will prosper social and cultural as well as economic life. In this regard it is interesting to note the rise of large access corporations like Google Inc and Yahoo! Inc that are driven by their business models to provide greater access. They will provide a serious challenge and counterweight

to the interests that currently dominate copyright politics. In highlighting – in a "public choice" methodology – the rent seeking actors over the last 100 years, Ben opens our minds to the possibility of new rent seekers that may fundamentally change the way we view copyright into the future. A history written in 100 years time (with the benefit of hindsight) will no doubt talk about the Internet era and how new interests influenced the law making process to provide us with a new type of law around networked information relations and access.

I commend Ben on his excellent work and anticipate the future volumes. Like any good historian he must realise that he has only just begun his long journey into the history and politics of Australian copyright law. But in doing so he has unlocked a box that has been closed for far too long. My hope is that other researchers will follow him in this field of endeavour and provide a truly Australian perspective on the past, present and future of copyright law and policy.

Professor Brian Fitzgerald

Director of the Intellectual Property Research Program
Faculty of Law
Queensland University of Technology

Preface

This book grew out of my wish, when working for the Australian Commonwealth government, to find out whether copyright laws were made to encourage the production of copyright material. According to lobbyist after lobbyist visiting Canberra departmental offices, without the protection of more and more proprietary rights, creators would cease to produce. Without more laws and better enforcement, producers would have no reason to continue production because free riders, or "pirates", would destroy their margins. Arguments made in favour of more copyright regulation applied equally to other forms of intellectual property protection.

Maximum property rights, according to the lobbyists, provided producers of non-rivalrous goods with the incentive to continue production. However, the incentive theory of intellectual property regulation, accepted uncritically at large as the inspiration for past regulators, seemed to me to be a counterfeit rationale that disguised price discrimination. I wanted to know whether policy makers and legislators really were, as the theory implied, disinterested and farsighted creators of optimal regulation. Did they make copyright laws to encourage efficient production and dissemination?

This book tries to answer that question. Hopefully, it will serve as a reference work for those who debate the purpose and function of copyright laws specifically and intellectual property laws generally. The work is intended to help resolve theoretical questions by supplying a detailed history of copyright law-making in Australia, and (though not comprehensively) the United Kingdom. I intended to make it readable. I tried to bring the actors in the drama of copyright history to life on the page and let their words and actions shape the book. Inevitably my opinions and prejudices influenced the narrative.

My view, arising out of my findings, is that the copyright term is grossly excessive. Possibly the simplest way – in theory – to cure the ills of copyright over-regulation is to cut the term of protection. A short term promotes dissemination and still provides plenty of opportunity for the producer to profit. What is the optimum period? No-one knows and no-one can know. I favour 18 years from the date of production – the age of legal majority. Intrinsically, a copyright work is no more the property of its creator than a child is the property of its parent. Its

identity and existence are things distinct. The creator, like the parent, should have legally enforceable parental rights over the work. But 18 years from production (birth), the work (child) should be legally free from its creator's control.

I don't wish to obtrude my views on readers. I hope this book allows them to understand how copyright laws were made and to draw some conclusions about how they might be made better in the future.

Benedict Atkinson

Introduction

Aim

The purpose of this book is to examine the historical record, concentrating on the development of copyright law in Australia, to determine the truth of modern assumptions about the origins and function of copyright law. Modern governments espouse a uniform theory of copyright regulation. This is that intellectual property laws provide would-be creators and producers with the incentive to create, produce and disseminate subject matter or information that society consumes for entertainment, education, business activity and other private and public purposes.

According to the theory, optimum innovation means optimum diffusion of information,[1] and governments today assert that securing both is the object of regulation. But the modern theory of copyright espoused by government – the "copyright orthodoxy" – is untested, however obvious its conclusions may seem. Scholars have examined aspects of the history of copyright law in the 18th and 19th centuries, as well as international copyright law-making, but none seems to have looked closely at the historical record – especially the archives of government and newspapers, and parliamentary debates – of the pivotal period of copyright law-making, the 20th century.

As a result, we have little knowledge of the motives of the legislators who made the laws of copyright and we have even less knowledge of what non-legislators, their views often expressed in the opinion and correspondence columns of newspapers, thought of regulation. Copyright theory exists in an evidentiary vacuum. Until the empirical task of looking at the record is complete, theories about why and how copyright works remain speculation. And the official explanation embraced by government remains problematic.

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[1] According to the *Review of Intellectual Property Legislation under the Competition Principles Agreement*, AGPS, 2000, ("the Ergas Report") prepared for the Commonwealth govenment in 2000: "[b]alancing between providing incentives to invest in innovation on one hand, and for efficient diffusion of innovation on the other, is a central, and perhaps the crucial, element in the design of intellectual property laws."(P5).

In summary, economic theory – or any other theory – concerning copyright is unverified, and until now, has been untested.[2] Insofar as current assumptions can be tested empirically, the best approach must be to consider the historical record to determine what was in the minds of makers of copyright law. If what they asserted the purpose of regulation to be turns out to differ from what theorists say the purpose of regulation is, then copyright orthodoxy must be admitted to present a deficient account of copyright's purpose and function. More importantly, if faced with a crisis of orthodoxy, government policy-makers ought to reconsider their assumptions.[3]

The aim of this book is to shed a clear light on Australian copyright law-making in the 20th century, and expose to daylight the motives that created modern copyright law. It presents detailed evidence about copyright law-making that allows the reader to make judgments about the extent to which the reality of law-making matches the theory of copyright's function.

Method

The premise of the book is simple: as regulation is created by humans, the best method of determining why and for what purpose laws were

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[2] Empirical evidence adduced in support of copyright regulation consists of impressive industry statistics. The US International Intellectual Property Alliance releases annual reports which in recent years have shown that the US copyright industries continue to grow rapidly, generate nearly US$1 trillion in revenue and earn more from exports than any other industrial sector.

[3] Government occasionally declares itself willing to reconsider copyright assumptions. In Australia in 1996, the Copyright Law Review Committee published a paper *Copyright Reform: A Consideration of Rationales, Interests and Objectives* (Office of Legal Information and Publishing, AGD), the purpose of which was "to stimulate debate on the arguments made in support of the modern copyright regime." The CLRC's subsequent reports on simplification of the Australian Copyright Act did not appear to have been influenced in any way by the 1996 paper. In 2002, the British Government published the report of the International Commission on Intellectual Property Rights, which considered the application of intellectual property rights in Third World countries. The report, *Integrating Intellectual Property Rights and Development Policy*, in the words of the *Economist* (14 September 2002) delivered a "central message [that] is both clear and controversial: poor places should avoid committing themselves to rich-world systems of IPR protection unless such systems are beneficial to their needs. Nor should rich countries, which professed so much interest in 'sustainable development' … push for anything stronger."

made is to examine what those who participated in the process leading to legislation wrote or said about the subject matter of regulation.

This means looking at parliamentary records, government departmental records and reports (the archives of the Commonwealth Attorney General's Department, from 1904 to 1968, as well as records of the Prime Minister's office), and reports in, and correspondence to, British and Australian newspapers in the periods 1909–1912, 1947–1956 and 1967–1969. The emphasis of research in on the Australian primary record, but as Australian legislation depended on British legislative precedent, the book pays considerable attention to events and debates in Britain at relevant times.

In this book, the participants in the legislative dramas that created the modern law of copyright in Australia speak for themselves. From their collective voice, it is hoped, something of the truth about how and why our copyright law came to be emerges.

The thesis

Once the *claims* made about the function of copyright regulation are examined in the context of how the laws *actually* came to be passed, a simple and dramatic thesis emerges: the copyright law was not actually made according to the design attributed to it by some theorists. Official orthodoxy about the purpose of copyright regulation and the function of copyright regulation is not supported by historical evidence.

The historical record – *Hansard*, government archival records and contemporary newspaper accounts and correspondence – tell a story not at all similar to that posited by copyright advocates. The economic success of the copyright industries is put forward as evidence of the necessity for copyright laws. But all copyright industries flourished without copyright protection. The radio broadcasting industry operated successfully without copyright protection for nearly 40 years.

Copyright orthodoxy tells us that without copyright laws granting creators and producers multiple rights to control production and supply, they will cease to produce. But in the period when the phonographic industry could make unauthorised recordings of musical works, music creators composed music. The absence of copyright protection did not affect the productive incentive of copyright industries. The record shows that without protection the recording, broadcasting and software industries grew like the green bay tree.

Orthodoxy also tells us that the corollary of creators and producers declining to produce is drastically reduced dissemination of copyright material, leading to a precipitous decline in social welfare. But the historical record informs us that most legislators were indifferent to fine questions about disseminating information. If regulation works to disseminate the output of creators and producers, it does so by accident rather than design.

In short, the research explained in this book overturns long-held assumptions about copyright regulation and illustrates that the official consensus about the purpose and function of copyright law relies on a false interpretation of history.

Narrative and counter-narrative

The sway of copyright orthodoxy is partly explained by a process of immanence: the official mind absorbed the lessons taught by writers like Charles Dickens and Victor Hugo (prominent in the activities leading to creation of the Berne Union), accepted generalisations about authors' rights, and came to accept unswervingly the principle that property rights are just reward for the ingenuity, effort and investment that turns abstractions into products.

Why does it matter whether the historical record supports copyright orthodoxy? Because copyright is property and property relations play a paramount role in creating social equality, and, more particularly, reducing inequality – in and between nations. To create property means to define and expropriate subject matter. The act of expropriation is exclusionary – for one person to possess property, another person must be excluded. The more that people are excluded from the benefits of property, or the more that subject matter is expropriated for the benefit of a few, the more inequality grows. The more that governments increase the scope of intellectual property rights – by, for example, extending the term of protection – the more people they exclude from freely reading, viewing, copying or otherwise dealing with the subject matter protected.

The argument against orthodoxy is not necessarily an argument against intellectual property. It points simply to an unwelcome truth: if governments wish to discourage the growth of inequality and more inequality, then intellectual property rights must be circumscribed not enlarged. This proposition is validated by the outcomes of international trade politics. The United States is, with resolve and far-sighted

calculation, entrenching its comparative productive advantage through the export of intellectual property products. Countries trading with the US must make themselves safe havens for the sale of US IP exports in exchange for partial access to US markets.

But the trade highlights their inferiority – the US IP hegemony, and the secondary hegemonies of lesser IP exporters, such as the United Kingdom, guarantee in perpetuity the sway of rich countries over poorer. Continuing inequality is the sure outcome of international trade in IP products because the rich countries are owners and the poor renters. As IP rights spread across the globe, the US and some other rich countries own more, demand more and give less. The littoral valleys of California possess the world more totally than ever the Romans did. Inequality also pertains within rich countries. The wealth of successful entertainers reflects the wealth of copyright industries. The extraordinary riches of software barons testify to the efficacy of copyright laws as a guarantor of profits. Property rights that generate wealth also create poverty – the poverty of opportunity to read, watch and listen, to learn and understand. For this reason, it is important to examine closely the justifications for copyright laws, to determine how much they are validated by history or how much they constitute a self-serving narrative.

The facts of history – what legislators said, what the correspondents to newspapers wrote, and what government departments were instructed to do – support a counter-narrative of copyright. According to this counter-narrative, individuals, acting for institutions or corporations, made the modern law of copyright, for their own gain and for the benefit of the coteries they served or identified with.

Public choice theory

The counter-narrative of copyright accords with what public choice theory tells us about government behaviour. The theory, originated by James Buchanan and Gordon Tullock in the *Calculus of Consent*[4], holds that governments, like private individuals, act in a self-interested way, misusing authority for financial and other gain. Public choice

[4] University of Michigan Press, 1962. See also the work of Noam Chomsky, especially in *Manufacturing Consent, The Political Economy of the Mass Media* (with Edward Herman), Pantheon Books, 1988, in which he argues that the media radically distorts the flow of information at the behest of private commercial interests.

theory has revolutionised the way economists think about government behaviour and gives a pessimistic account of how much regulation reflects broad public interest as opposed to sectional. Many economists now take for granted that legislation is made not by government consulting the mass of the public, but rather organised public groups – industries for example.[5]

Public choice principles buttress Edwin Hettinger's observation that *the justifiability of our intellectual property institutions is not settled by the facile assertion that our system of patents, copyrights and trade secrets provides necessary incentives for innovation and ensures maximally healthy competitive enterprise. This argument is not as easy to construct as one might think; substantial empirical evidence is needed.*[6]

If public choice theory takes a pessimistic view of government behaviour, it also postulates that the solution to misgovernment is to expose official decision-making to critical scrutiny by creating a flow of information about how and why decisions are made. This book supplies some of the empirical evidence needed to determine how effective and equitable our copyright laws are.

Some theoretical considerations

What, then, does the theoretical literature of copyright say? The theory adopted by government – that regulation creates a dynamic connection between output and dissemination by creating the conditions that encourage innovation and production – is one thing. But to what extent is it supported by the work of the independent analysts of the academy?

The first explanations for copyright law came from lawyers, not economists. They tended to function more as ideologues than disinterested theorists, and justified copyright a priori as a species of

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[5] Australia's polity has responded to some of the issues raised by public choice theory by introduction of the so-called "competition reforms", which led, among other things, to the formation of the Ergas Committee in 1999. However, review of the kind undertaken by the Committee, while important and useful, is made on the government's terms and government is not a disinterested analyst of the merits of regulation. If we decline to assume that the government, as legislator, automatically represents the public interest, if instead we assume the possibility that various third parties interpose between government and public, it becomes crucial to identify *how* legislation is made.

[6] Edwin C Hettinger, "Justifying Intellectual Property", *Philosophy and Public Affairs* (1989) 18, p51.

property. Lawyers were active in expounding rationales for copyright law from the literary property debates of the 18th century and through the 19th century. For instance, Thomas Scrutton, who advised the British Government in matters of copyright policy in the first decade of the 20th century, and sat on the Law of Copyright Committee in 1909[7] wrote *The Laws of Copyright: An Examination of the Principles which Regulate Literary and Artistic Property in England and Other Countries* (John Murray, 1883) and *The Law of Copyright*, (William Clowes and Sons, 1896).

Economists were active in the 19th century in academic examination of the patent system, first as supporters, then critics.[8] The *Economist*, the mouthpiece of British economic liberalism said in 1851, "patents are artificial stimuli to improvident exertions … they cheat people by promising what they cannot perform … they rarely give security to really good inventions, and elevate into importance a number of trifles … no possible good can ever come of a Patent Law, however admirably it may be framed."

As the legislature progressively extended the scope of copyright regulation, the natural law narrative that underlies property discourse came to dominate official thinking. As it applied to copyright law, and stripped of rhetoric, this account expounded a simple proposition: copyright laws are justified because authors and producers deserve to profit from their work.[9]

To this simple formula, lawyers at the end of the 19th century added a utilitarian hypothesis attractive to the Victorians as well as moderns: copyright protection, by rewarding labour and investment, stimulated production.[10] The problem with this account, which formed a bridge between the 18th century view of copyright as the natural perquisite of authorship, and the 20th century idea of copyright as the reward for investment, is that it justified rather than explained.

The move away from partisan assumptions about the necessity for copyright law began with the eminent English economist Arnold Plant

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[7] The Gorrell Committee. Most of its recommendations were implemented in the British Copyright Act of 1911.

[8] See Lionel Bently and Brad Sherman, *The Making of Modern Intellectual Property Law,* Cambridge University Press 1999, p149, fns30–31.

[9] See Hettinger, *supra*, for an explanation of why the lawyers' explanation proved so influential. As Hettinger noted: "Perhaps the most powerful intuition supporting property rights is that people are entitled to the fruits of their labour." (At p36).

[10] See Bently and Sherman, *supra*, pp174–5.

in 1934[11] and continued with the still more eminent American economist, Kenneth Arrow, in 1962.[12] In the 1960s, a growing number of economists began to subject copyright regulation to economic analysis, extending the process begun one century earlier, when utilitarian theorists turned their attention to patent law.[13]

Plant, unequivocally, and Arrow, indirectly, were critical of copyright laws. The former, who argued unsuccessfully before the Gregory Committee in 1951 for a radically circumscribed term of copyright, declared regulation to be socially inefficient.[14] The latter concluded that while monopoly rights may provide a producer with the incentive to produce, the offsetting desire to maintain monopoly profits is more likely to create a conservative rather than innovative approach to production. An inference could be made from Arrow's work that if copyright law provides an incentive to produce, it does not automatically provide an incentive to maximise either production or dissemination.

Soon after Arrow's intervention, another economist, Dan Lacy, published an article on the economics of publishing, in which he argued that the "communications industries" – the intermediaries between the creators and consumers of copyright material – dictated

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11 A Plant, "The Economic Aspects of Copyright in Books" (1934) *Economica*, 1, pp 167–95.

12 "Economic Welfare and the Allocation of Resources for Invention" (1962) *The Rate and Direction of Inventive Activity*, Princeton NJ: National Bureau of Economic Research, Princeton University Press, pp609–26.

13 For a discussion of the optimising trend in patent law towards the patenting of business methods, see Michal Likhovski, Michael Spence and Michael Molineaux, "The First Mover Monopoly: A study in patenting business methods in Europe", *Oxford Intellectual Property Research Centre*' (2000) WP 05/00. It is not difficult to discern a pattern of copyright optimisers imitating the example of patenting optimisers, the process perhaps explaining the progressive departure from strict adherence to the idea that copyright applies only to expression, not ideas.

14 The Board of Trade Copyright Committee 1951 chaired first by Lord Reading and then Lord Gregory. The Committee expressed some sympathy for Plant's arguments but declared itself unable to accept them following the decision of the Berne Union at its 1948 Brussels Conference to make a 50 year compulsory term mandatory for ratifying countries. In his 1934 article on copyright, *supra,* Plant argued for a compulsory licence in publishing operative five years after first publication. His argument traced the history of publishers securing legislative privileges in Britain from Tudor times onwards.

the flow of information according to criteria that might not promote optimum dissemination.[15]

Then in 1966, Hurt and Schuchman, in an article titled "The Economic Rationale for Copyright",[16] identified the central, and continuing, problem of copyright theory: the evidence to demonstrate that copyright regulation provides an incentive to produce is lacking from the literature. In the same period, the transaction-cost theory of Ronald Coase, like Arrow a Nobel Prize winner (and strongly influenced in his early career by Arnold Plant) provided the grounds for an argument that copyright regulation increases transaction costs, thereby distorting the allocation of resources to the detriment of social welfare.

Coase's ideas, expounded most famously in two articles, *The Nature of the Firm*, published in Britain in 1937,[17] and *The Problem of Social Cost*, published in the United States in 1961,[18] focused on the economic cost of transactions. His research supported the view that regulation tended to increase transaction costs (and detract from social welfare) while the market, unfettered, tended to allocate resources efficiently. Coase's work tends to buttress the arguments both of advocates for intellectual property regulation and copyright sceptics. On the one hand, his work supports the view that property laws designed in very close consultation with industries are likely to create economic inefficiency. But Coase, like Arrow, made clear his belief that property rights are necessary if transactions are to take place efficiently. Coase's work provided the framework for the work of theoreticians of the law and economics movement, such as Harold Demsetz. Coase also did substantial research into broadcasting policy in Britain and the United States (see *British Broadcasting: A Study in Monopoly*, Longmans, 1950) and concluded that granting property rights to broadcasters solved problems of market failure.

Non-economists also began to undermine the natural law argument that copyright is a just reward for individual merit. In 1971, the philosopher John Rawls in *A Theory of Justice,*[19] posited that native endowments – including the ability to expend effort – and chance,

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[15] "The Economics of Publishing or Adam Smith and Literature" (1963) *Daedalus* 92, p.42.
[16] R Hurt and Schuchman in *American Economic Review* (1966) May, pp421–432.
[17] Collected in O Williamson and S Winter, *The Nature of the Firm: Origins, Evolution and Development*, Oxford University Press, 1991.
[18] *Journal of Law and Economics*, 3, pp1–44.
[19] Harvard University Press, 1971.

rather than objectively determined merit, determine individual rewards. Applying this theory in modified form, Edwin Hettinger, after affirming that effort (though not talent) *should* be rewarded, observed that intellectual property regulation does not reward effort equitably: a copyright product derived from little effort may yield substantially greater return than one resulting from significant investment.[20]

Copyright laws, if they reward effort, also permit owners to recoup many times more than the cost of effort or investment. According to Hettinger, the argument that intellectual property regulation provided incentive to innovate is facile until it is verified by "substantial empirical evidence".[21] Writing in 1989, he pointed out the sterility of debating the merits of intellectual property law without reference to empirical evidence. Debate, it might be said, had not advanced in 23 years: in 1989 Hettinger drew exactly the lesson from his investigations as that adduced by Hurt and Schuchman in 1966. In the intervening two decades, however, the weight of opinion concerning copyright regulation had shifted, and current orthodoxy – that it promotes production and dissemination – became predominant.

The change may partly be ascribed to the rise of the law-and-economics movement and the proselytising work of two of its chief proponents, Harold Demsetz, who developed Coase's ideas in the 1967 paper *Towards a Theory of Property Rights*, and Richard Posner. Demsetz placed particular stress of the need for strong, enforceable property rights in a liberal society while Posner emphasise the role played by property rights in giving individuals the security to engage in productive activity.[22]

Out of their work grew the idea that the creation of property rights is a necessity, not an option, for policy-makers. In the schema they mapped for government, primacy is given to needs of property owners and their rights may be qualified only to the extent that limitations do not harm their economic interests. As Posner made clear in his analysis of the fair use doctrine, which involved comparing the needs of consumers with those producers, government may strike a "balance" between the needs of owners and consumers of copyright material,

[20] "Justifying Intellectual Property", *Philosophy and Public Affairs* (1989) 18, pp 31-52.
[21] At p51.
[22] *Economic Analysis of the Law*, Little, Brown, 1973.

but it must also give priority to promoting production rather than dissemination.[23]

The law and economics movement created the conditions for government policy-makers to delineate a countervailing dichotomy between the perceived interests of owners-producers and public-consumers. Posner has declared himself uncertain how to strike an equitable balance between the interests of these two groups,[24] but government betrays few doubts, or chooses to let the judiciary determine the scope of public access to copyright material. Governments around the world seem unshakeably attached to the idea that "balance" is the key to creating optimum production and dissemination. Implicitly, stimulating production remains their fundamental objective.

A 2000 study of copyright and economic theory[25] makes a qualified case for copyright regulation but the qualifications are greater than those allowed by copyright orthodoxy. The study does not, for instance, discriminate between the interests of producers and consumers[26] and does not recommend an expansionary approach to regulation: it argues that while rights should be clearly defined, their scope ought to be determined by consulting the needs of *all* groups in society, and alternatives to copyright regulation explored.

The study also argues that thinking on copyright regulation has been strongly influenced by studies between 1969 and 1990 on the optimal scope of patent law.[27] So far as theory is concerned, however, it does

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[23] See e.g. W Landes and R Posner, "An Economic Analysis of Copyright Law" (1989) *Journal of Legal Studies*, 18, pp325–363.

[24] Interview in *Reason*, 36, 1 April 2001, University of Chicago Law School.

[25] Richard Watt, *Copyright and Economic Theory: Friends or Foes?* Edward Elgar, 2000. After a comprehensive survey of the economic literature on copyright, Watt looks at Pareto modelling of the benefits of copyright. According to Pareto theory, if regulation benefits some and disadvantages none, it should be introduced. Similarly, if its removal benefits some and disadvantages none, it should be removed. However, the Pareto modelling studies of the 1980s and 1990s allow for no solid conclusions to be drawn concerning the efficacy of copyright regulation.

[26] Although it points out the difficulty of determining the efficacy of regulation as arguments for and against copyright are predicated on subjective determination of what constitutes "social welfare". (See p123). According to Watt, social welfare is "impossible to measure empirically".

[27] Watt cites as the most significant influences, Nordhaus, *Invention Growth and Welfare. A Theoretical Treatment of Technological Change* (1969) Cambridge MA, The MIT Press, Scherer, 1972, "Nordhaus' Theory and Optimal Patent Life: A

not seem that the polarities of debate are exercising a continuing influence on government thinking. Even the middle ground, perhaps best represented by Stephen Breyer,[28] who observed that neither regulation nor its absence has a noticeable effect on social efficiency, seems to be ignored.

Bjorn Frank crystallised the dilemma of modern regulators in 1996: in framing copyright laws, he said, government must solve the problem of "the Scylla of underutilisation … [and] the Charybdis of underproduction".[29] It is not certain that theory nowadays offers much that government wants to hear. Copyright orthodoxy seems to be an impermeable doctrine uninformed by theoretical scepticism or knowledge of history.

Geometrical Reinterpretation" (1972) *American Economic Review*, 62, pp428–430, Tandon, "Optimal Patents with Compulsory Licensing", *Journal of Political* Economy (1982) 90, pp 470-486, Gilbert and Shapiro "Optimal Patent Length and Breadth" (1990) *RAND Journal of Economics*, 21, pp 106–112, Klemperer, "How Broad Should the Scope of Patent Protection Be?" (1990) *RAND Journal of Economics*, 21, pp 113–130.

[28] "The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs", *Harvard Law Review* (1970) 84, p281–351.

[29] "On an Art Without Copyright", *Kyklos*, 49, pp 3-15.