PROPERTY ON THE LINE: LIFE ON THE FRONTIER BETWEEN COPYRIGHT AND THE PUBLIC DOMAIN

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This article is an edited transcript of Professor Graeme W Austin's Inaugural Lecture, delivered in the Council Chamber of Victoria University of Wellington on 15 November 2012. Professor Austin was appointed Chair in Private Law in the Faculty of Law in November 2010. This lecture explores claims that in copyright law, the public domain is necessarily in opposition to proprietary rights, and suggests that in many contexts the incentives offered by copyright contribute to the vibrancy and volume of material that is available for downstream creativity and innovation. Drawing on his earlier work on the relationship between human rights law and intellectual property, Professor Austin's lecture advances the idea that cognisance of the human rights dimensions of intellectual property, including creators' human rights, should inform our understanding of the appropriate scope of the rights of copyright owners. The lecture concludes with a warning against the "Walmartization" of copyright.

I INTRODUCTION

The metaphors in the title of this talk – "property on the line" and "life on the frontier" – try to capture something about the craft of lawyering, and perhaps something especially salient about the work of academic lawyers. As lawyers, we are very often on the frontier. Whatever the subject area, lawyers occupy an uneasy space where claims and concepts are constantly contested – and where different normative visions, different ideas about what ought to be, vie for attention.

Legal regimes of course benefit from certainty and predictability.[1] But disputes over the "oughts" in the legal order reflect at least two important truths about the human condition: first, that

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1 See for example RH Coase "The Problem of Social Cost" in RH Coase *The Firm, The Market, and The Law* (University of Chicago Press, Chicago, 1988) 95; reprint of RH Coase "The Problem of Social Cost" (1960) 3 J of L and Economics 1. See also *Commonwealth Reserves I v Chodar* [2001] 2 NZLR 374 at 384 per

we are disputatious; and, second, that we are constantly striving to improve things. In the legal discipline, we're all frontiersmen and women: peering beyond the boundary of (relative) legal certainty into a much more contested territory. And sometimes, especially so in pluralistic societies, part of the challenge is that others might have got there first. This makes it harder to take tried-and-true ideas for granted. But if our minds and hearts are open, we can learn from the ways that others see things.

The specific boundary on which I shall focus this evening is that between property – or, more specifically, *copyright* (a particular, even peculiar, type of property) – and *the public domain.* In broad terms, copyright law concerns whether, and to what extent, creative expression can and should be privatised (that is, be made the subject of property rights). The public domain is said to be across the border, as it were, from this kind of property. The public domain is thus that area that belongs to no one and to everyone, from which we all can draw in our own creative efforts.[2] Ideas about the public domain can be highly relevant to technology entrepreneurs' views about their freedom to operate – whether, for example, firms marketing distribution platforms need to factor copyright licences into their operating costs, or whether they are entitled to use others' creative outputs as seed capital.[3]

The boundary between copyright law and the public domain provokes vigorous debate. There is a lot at stake here. Privatise too far upstream, lock up too much of the materials of culture, and downstream we'll be left with desert – nothing with which our creative juices can mix. For the intellectual property rich – both firms and nations – there is also much to provoke anxiety. Copyright owners are already labouring under technological assaults of various kinds.[4] Over the border from copyright, in the public domain, there might not be dragons, but there are certainly uncompensated uses. Moving the line further toward the public domain would add legal insult to technological injury. Alternatively, some see copyright and the public domain as being locked in

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Glazebrook J: "Reliability and certainty are primary considerations of any system of property rights, and the unprovoked alteration of those rights is to be avoided where possible".

2 Professors David Lange and Jessica Litman authored two of the seminal articles on the public domain. David Lange "Recognizing the Public Domain" (1981) 44 Law & Contemp Probs 147; Jessica Litman "The Public Domain" (1990) 39 Emory L J 965.

3 This point was discussed, for example, during oral argument in the United States Supreme Court's decision in *Grokster v MGM* 545 US 913 (2005) (Transcript 04-480, 29 March 2005 at 36 per Justice Kennedy):

> … what you want to do is to say that unlawfully expropriated property can be used by the owner of the instrumentality as part of the startup capital for his product. … [J]ust from an economic standpoint and a legal standpoint, that sounds wrong to me.

4 For an insightful survey of technological challenges to copyright, and technological and legal responses by copyright owners, see Jessica Litman *Digital Copyright: protecting intellectual property on the Internet* (Prometheus Books, New York, 2001) at 151–165.

battle. Copyright means to vanquish the public domain – but the "free culture movement" might turn out to be copyright's Achilles' heel.[5]

How can we improve the way that we talk about the boundary between copyright and the public domain? Or to prod the metaphor once more, how can we live better on this frontier? First, I shall frame this discussion by considering some of the justifications for copyright. Second, I'll explore some of the legal principles that are relevant to our understanding of the copyright/public domain divide. Toward the end, I'll suggest that *how* we think about the copyright/public domain divide says something about the kind of society to which we aspire, perhaps even about who *we* want to be.

II COPYRIGHT JUSTIFICATIONS

It is quite obvious that justifications for copyright are under siege. Figuratively and commercially the "buy in" is increasingly absent. Difficulties with copyright are nothing new, however. The case for copyright has long been characterised as "uneasy".[6] Viewed through a utilitarian lens, justifications for intellectual property seem thinner than for other kinds of property.[7]

Justifications for the general institution of private property are ambitious indeed, explaining nothing less than society itself. The very reason people entered society, it is claimed, was to secure their property rights.[8] Within the utilitarian skein, property has two intertwined justifications: first, property rights prevent overgrazing – the wasteful overuse of resources, sometimes described as the tragedy of the commons;[9] second, and relatedly, property facilitates the internalisation of the investment in creating and maintaining resources.[10] There is also a natural rights flavour to all of this: Locke sought to persuade us[11] that the institution of private property was justified by mixing

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5 For a graphical representation of this metaphor, see Christopher Dombres "The Battle of Copyright" (2011) <www.christopherdombres.fr>, where the artist depicts copyright as Achilles, vanquishing Hektor (the public domain), but with an arrow in copyright's heel representing "free culture".

6 Stephen Breyer "The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs" (1970) 84 Harv L Rev 281.

7 For an exploration of these ideas, see Carol M Rose "Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age" (2003) 66 Law & Contemp Probs 89.

8 John Locke (Peter Laslett (ed)) *Two Treatises on Government* (Cambridge University Press, New York, 1988) Second Treatise at 286; William Blackstone (Robert Malcolm Kerr (ed)) *Commentaries on the Laws of England in Four Books* (John Murray, London, 1862) vol I at 121. In *Entick v Carrington* (1765) 19 How St Tr 1030, 95 ER 807 (KB) at 818, Lord Camden drew on Locke's justification for property in the following passage: "The great end, for which men entered into society, was to secure their property."

9 Garrett Hardin "The Tragedy of the Commons" (1968) 162 Science 1243.

10 One of the classic statements on this point is Harold Demsetz "Toward a Theory of Property Rights" (1967) 57 Am Econ Rev 347.

11 See Jeremy Waldron *Law and Disagreement* (Clarendon Press, Oxford, 1999), where it is suggested that Locke's recourse to the language of natural rights was a rhetorical or persuasive device.

our labour (that which is peculiarly our own) with the commons. The leading example he gave was the labour expended in gathering apples.[12] He also mentioned acorns and ambergris, to some alliterative effect, but we tend to remember the apples. As the utilitarian take on this story goes, our motivation to hang on to those apples (without having to rely only on force) and to find functioning markets in which to sell them, encouraged us to join together to form societies under the rule of law.

For intellectual property, however, utilitarian claims can really be grounded only in the second set of justifications.[13] The first concern, with inefficient overuse, doesn't work. Copyright protects cultural productions that are non-rivalrous.[14] My enjoyment of a digital file containing a movie can occur simultaneously with that of myriads of others. The resource survives undiminished. Hence, the utilitarians are left only with the economic incentives copyright provides to create and disseminate. So, the first English copyright statute, the Statute of Anne 1710, was an "Act for the Encouragement of Learning",[15] a phrase echoed in the United States Constitution's invitation to the legislative branch to "promote the Progress of Science … by securing for limited Times to Authors … the exclusive Rights to their … Writings."[16] Neither was directed at the overgrazing problem.

If that's all there is, then our justifications for copyright need, at the very least, to account for the rise of amateur content. A wonderful new book on amateur media,[17] co-edited by distinguished alumna Professor Megan Richardson, discusses in impressive detail the large and vibrant array of amateur content that is produced today: YouTube videos, flash mobs, blogging, pastiche audio-visual works – some of which are known as "mash ups" – even Minecraft. The ready availability of the means of creation, reproduction and dissemination of cultural products, seemingly independently of copyright's traditional incentives, increases the pressure on copyright law to improve its cover story.

Secondly, utilitarian justifications for copyright are just failing to capture the imagination of large sectors (and young sectors) of the population. For many kids alone in university hostel rooms, the idea that there might be *property rights* in the material that they are downloading for free, and the idea that doing so causes harm, must seem like a decidedly abstract concept, or just plain

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12 Locke *Two Treatises on Government*, above n 8, at 287–291.

13 Rose "Romans, Roads, and Romantic Creators", above n 7.

14 This observation is almost ubiquitous in intellectual property theory. For an early exposition of the theme, see Paul A Samuelson "The Pure Theory of Public Expenditure" (1954) 36 The Review of Economics and Statistics 387. For a recent iteration, see Herbert Hovencamp "Antitrust and the Movement of Technology" (2012) 19 Geo Mason L Rev 1119 at 1120.

15 Statute of Anne 1710 (GB) 8 Ann c 19.

16 Constitution of the United States of America, art I.8.8.

17 Dan Hunter and others (eds) *Amateur Media: Social, Cultural and Legal Perspectives* (Routledge, London, 2012).

weird.[18] Equally weird is the idea that there should be legal sanctions imposed for this kind of thing. As an aside, my doctoral supervisor, renowned copyright scholar Professor Jane Ginsburg, is currently involved in a project examining papal printing privileges from the 16th century – some of which purported to extend throughout Catholic Christendom. Infringers could be punished by excommunication.[19] Perhaps this puts sanctions in our current law into clearer perspective.

The internationalisation of copyright seems to make things worse. Domestic copyright law is buttressed on all sides by powerful public international law demands. And there is constant pressure to up the ante even further. All of this challenges whatever might remain of the social contract that undergirds utilitarian justifications for copyright. Within a specific domestic polity, the societal bargain – granting of rights in exchange for creative output – might make some intuitive sense.[20] This all gets more than a little abstract, however, when it is *other* nations' authors, but *our* legal system's rights, and *our* citizens' dollars. And this all seems especially troubling when the socio-economic policy calculus that gets reflected in the minutiae of our domestic copyright laws has been exported to us, even imposed upon us, from abroad. Different nations' lobbyists, different politicians, different policy compromises. With intellectual property, we might be provoked to say, with due apologies to Jean-Paul Sartre, that the "public choice hell is other peoples'".

But the international trade game has a much wider playing field. The underlying exchange is not just about intellectual property. It is sometimes characterised as: "give us access for our agricultural products and we'll better protect your copyrights".[21] There are immediate beneficiaries other than Viacom. Some of them live in the Waikato and South Canterbury. But it says something about the reputational deficit with which intellectual property is currently burdened that these dots are seldom connected in populist commentaries. Whether the exchange is fair is of course a different matter – but that's a political and economic problem, not a copyright problem.

All of this contributes, I think, to a cluster of current anxieties about copyright. As my former University of Arizona colleague, prominent United States property scholar Professor Carol Rose, points out, almost *all* property can provoke dispute and anxiety.[22] Think of our current engagement

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18 Graeme W Austin "The Metamorphosis of Copyright in the Digital Era" (2004) 28 Colum J L & Arts 397.

19 Jane C Ginsburg "Proto-Property in Literary and Artistic Works: 16th-Century Papal Printing Privileges" (paper presented to Columbia Law School Faculty Workshop Series, Columbia, 6 September 2012).

20 Michael H Davis "Extending Copyright and the Constitution: 'Have I Stayed Too Long?'" (2002) 52 Fla L Rev 989 at 1005. But see Graeme W Austin "Does Copyright Mandate Isolationism?" (2002) 26 Colum J L & Arts 17 at 44–51 (advancing a number of critiques of bargain theory in copyright).

21 See Graeme B Dinwoodie "The Architecture of the International Intellectual Property System" (2002) 77 Chi-Kent L Rev 993 at 1004.

22 Carol M Rose "The Moral Subject of Property" (2007) 48 Wm & Mary L Rev 1897 at 1902. See also Emily Sherwin "Three Reasons Why Even Good Property Rights Cause Moral Anxiety" (2007) 48 Wm & Mary L Rev 1927.

with issues surrounding rights to water.[23] Reasons for this include the ambiguities and uncertainties that cluster around property questions, as well as the *ubiquity* of our engagement with private property. If this is true in the tangible world, it is now very much the case with copyright. As a child, I went to the movies, watched television, read books, listened to music on a state-of-the-art Phillips radiogram. But this was nothing compared to the *incessant* use (technically licensing) of copyright-protected material that now occurs in our daily lives.

Recently, I needed to write a conference paper while visiting at another university. I had my laptop, but nobody had organised wireless Internet access for me. No JSTOR, no SSRN, no HeinOnline, no Westlaw: I didn't know quite what to do with myself. I had to go and find the library. Or consider new devices such as the Apple TV that give us seamless access to copyright-protected material throughout our homes. Or the iPhone that enables me to listen to BBC and PBS podcasts during my walk home from the office. Or technologies that enable space shifting of my music collection. As an aside, it's perhaps useful to remember the extra value for money we now get when we purchase individual copies of copyright-protected works. Once upon a time, that individual copy was a vinyl record that sat in a record rack, and could only be played on that radiogram. Many of us now wander around with our music collections in our pockets. We're often told that copyrights are expanding. But it's perhaps salutary to bear in mind that, with these kinds of space shifting technologies, consumers nowadays probably get much more bang for their copyright buck.

Our incessant engagement with copyright, combined with the perception that some of the conventional economic rationales for this kind of property are pallid, if not entirely infirm, might account for the intensity in the *moral* discourse that now surrounds copyright.[24] Moral claims are made on all sides. Two recent examples: a United Kingdom-based online "television catch up" service recently disabled its links to torrent files containing proprietary content. The site had adopted a so-called "non-commercial content" stance – it refused access to television programmes that were available commercially. Confronted by a cease and desist letter, it sent a message to all its subscribers:[25]

> Whilst we believe that they are wrong both legally and morally on account of the strong 'no commercial content' stance that we have always taken, we are not in a position to be able to risk lengthy and costly court battles to prove this.

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23 *New Zealand Maori Council v Attorney-General* [2013] NZSC 6.

24 Rose "The Moral Subject of Property", above n 22, at 1902.

25 The 1709 Blog "C&D letter causes UKNova to take down links to television content" (27 August 2012) <http://the1709blog.blogspot.co.nz/2012/08/c-letter-causes-uknova-to-take-down.html>.

Or consider a recent observation by another alumna, Stella Duffy, now working as a London-based novelist, who was provoked to write this in her blog when she found two of her novels on a downloading site:[26]

> … these pirates who like to see themselves as the Captain Jack Sparrow of the high seas (and seem rather more like modern-day pirate-thugs to me) have no problem paying Apple or Microsoft or Dell or whoever for the hardware. They have no problem paying the site that is hosting the theft. The ONLY person they mind paying is the originator of the work, the writer.

She ends: "Nice going guys, that's the way to change the world."

III COPYRIGHT AND THE PUBLIC DOMAIN

Copyright is a huge and fascinating topic, and these issues are variously engaged right across this body of law. But one area where the debate is truly intense is in the discourse surrounding the boundary between copyright and the public domain.

Those who valorise the public domain sometimes appeal to history, and seem to yearn for some kind of golden age: "In the beginning there was the public domain."[27] By erecting fences in this primordial paradise, copyright represents a kind of fall from grace. Alternatively, it is suggested that the familiar narrative explaining the rise of property systems has, in the copyright context, morphed into a tragedy of the *anti*-commons. Too much private property, too many fences in that primordial paradise, too much acquisitiveness about those apples: with the result that the rest of us are locked out of those Arcadian fields of freely-available cultural detritus.[28]

One answer is said to be turning back the clock. In the United States, for instance, there has been no small amount of pining for the "framers' copyright" – that is, the *modest* copyright envisaged by the framing generation. In the beginning, copyrights had an initial term of 14 years; they could be forfeited for failure to comply with formalities; the adaptation right did not reach translations and so on.[29] In the past decade in the United States, these general ideas catalysed a number of constitutional challenges to domestic copyright laws.[30] To me, this always seemed to make for

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26 Stella Duffy "Copyright Theft – Robin Hood it Ain't" (20 March 2012) Not Writing But Blogging <http://stelladuffy.wordpress.com/2012/03/20/copyright-theft-robin-hood-it-aint/>. (Emphasis in original.)

27 Jane C Ginsburg "'Une Chose Publique'? The Author's Domain and the Public Domain in Early British, French and US Copyright Law" (2006) 65 CLJ 636 at 637 (critically scrutinising these claims).

28 Copyright is sometimes likened to a new enclosure movement, whereby ordinary folk are locked out of the *jus publicum*. See James Boyle "The Second Enclosure Movement and the Construction of the Public Domain" (2003) 66 Law & Contemp Probs 33.

29 Lawrence Lessig "Copyright's First Amendment" (2001) 48 UCLA L Rev 1057 at 1072.

30 Most prominently: *Golan v Holder* 565 US (2012) (forthcoming); *Eldred v Ashcroft* 537 US 186 (2003).

strange bedfellows with constitutional originalists – or, perhaps more accurately, postulant bedfellows. For the most part, the originalists aren't signing on to *these* appeals to history.[31]

Others take a more metaphysical turn, seeking to describe the essence of the public domain *in opposition to copyright*. As one leading scholar wrote: "We need to understand the delicate and subtle balance between property and the opposite of property, the role of rights, but also of the public domain and the commons."[32] Grow copyright: shrink the public domain. Copyright hypertrophy: public domain atrophy – these are the yin and yang of contemporary copyright politics.

A Copyright's "Give and Take"

I worry that conceiving of copyright and the public domain as having a hard-line border between them, or as being in *opposition* to each other, might not project the most useful vision of their relationship. As Clifford Geertz admonished us, in all legal activity, it is incumbent upon us to be attentive, intelligent, reasonable and responsible in the "stories [we] tell" and the "visions [we] project."[33] For one thing, this characterisation risks overlooking copyright's ability to *expand* the public domain. An example of what I mean is provided by the very famous 1930 decision of Judge Learned Hand in the United States' Second Circuit Court of Appeals, *Nichols v Universal Pictures Corporation*.[34] The plaintiff was the American playwright Ann Nichols, who penned the extraordinarily successful play *Abie's Irish Rose*. Set in early 20th century United States, the play concerns an Orthodox Jewish family, the patriarch of which hopes his only son will marry an Orthodox Jewish girl; and an Irish Catholic family, the daughter of which has secretly married the Jewish boy. When discovered, this situation only serves to intensify the religious animosity between the patriarchs of each family, with much Broadway-esque fun along the way. The families are reconciled when the young couple produces offspring – that tried and true passport to goodwill. Critics panned the play, one commenting that "people laugh at this every night, which explains why democracy will never be a success"[35] and that the play was "[j]ust about as low as good clean fun

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31 On this point, see generally Thomas Nachbar "Intellectual Property and Constitutional Norms" (2004) 104 Colum L Rev 272 at 344–345.

32 James Boyle *The Public Domain: Enclosing the Commons of the Mind* (Yale University Press, Durham, 2008) at 238.

33 Clifford Geertz *Local Knowledge: Further Essays in Interpretive Anthropology* (Basic Books, New York, 1983) at 175. See also Mary Ann Glendon *Abortion and Divorce in Western Law* (Harvard University Press, Cambridge, 1987) at 141–142.

34 *Nichols v Universal Pictures Corporation* 45 F 2d 119 (2d Cir 1930).

35 Robert Benchley *Life* (New York) cited in Dorothy Herrmann *With Malice Toward All: The Quips, Lives and Loves of Some Celebrated 20th-Century American Wits* (G P Putnam's Sons, New York, 1982) at 41.

can get."[36] Despite or perhaps because of this, the play was a hit. One of the longest-running plays on Broadway of its time, it spawned a radio series and two Hollywood movies.

It also seemed to attract imitators. Ann Nichols brought proceedings against Universal Pictures, claiming that United's movie, the *Cohens and the Kellys*, which, suffice to say, also concerned a Jewish and a Catholic family whose relationship is also characterised by perpetual enmity, breached her copyright. (In the film it apparently extends to pets: neither family's dog appears to have much time for the other). But again the adult children of each house are in love. The *Cohens and the Kellys* was actually a successful series of films, including the follow-ups *The Cohens and the Kellys in Scotland* and *The Cohens and the Kellys in Africa*. The last in the series, perhaps presaging the end of the franchise, was apparently titled *The Cohens and the Kellys in Trouble*.

Nichols lost, both in the District Court and on appeal to the Second Circuit. In the Court of Appeals, Judge Learned Hand accepted, at least for the sake of argument, that Nichols was the first to develop the theme of racially motivated disputants reconciled in the melting pot of America by the fecundity of the next generation – and that this same vein also yielded much gold for others, or, at least, successful Hollywood movies. Indeed, the District Court found that there was "a fairly strong inference that the authors of the film gained some of their ideas from *Abie's Irish Rose*,"[37] – but the former took *only* ideas, and copyright does not protect ideas. So assuming that this general idea was original in some sense, copyright granted to Ms Nichols (and took from us)[38] copyright in her play – *Abie's Irish Rose* – but, at the same time, copyright took from her (and gave to us) her apparently lucrative idea, consigning it to the public domain for others to use.

Ann Nichols was a commercial playwright. She was not one of those Johnsonian blockheads: she wrote for money.[39] The case illustrates how copyright's commercial motivations actually grow the area *beyond* copyright – the public domain adds to the raw materials of culture available for free for all of us on the non-property side.

B Thin Copyright for Functional Works

Copyright doctrines are especially solicitous of the public domain when it comes to functional works. The most useful examples involve computer programs. Rightly or wrongly, international law

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36 At 41.

37 *Nichols v Universal Pictures Corporation* 34 F 2d 145 (SD NY 1929) at 150.

38 Professor Waldron insightfully pursues a Hohfeldian analysis of copyright law, requiring simultaneous cognisance of the burdens imposed by copyrights. Jeremy Waldron "From Authors to Copiers: Individual Rights and Social Values in Intellectual Property" (1993) 68 Chi-Kent L Rev 841 at 844.

39 Attributed to Samuel Johnson is the observation: "No man but a blockhead ever wrote except for money." James Boswell (George Birkbeck Hill (ed)) *Life of Johnson: Including Boswell's Journal of a Tour to the Hebrides and Johnson's Diary of a Journey Into North Wales* (Bigelow Brown & Co, New York, 1921) vol VI at 307.

demands that computer programs be protected by copyright.[40] But the international law obligations are vague, to say the least, as to the scope of protection required. In many jurisdictions, important parts of the intellectual input that goes into producing proprietary software are consigned to the public domain. In New Zealand, as in many other jurisdictions, there are, for instance, specific defences for copying computer programs in order to develop certain kinds of interoperable products.[41] And our law, like that of a number of other nations,[42] voids contracts that purport to override this provision.[43]

In the decisional law and policy discussion, there is also a tendency to "thin" the protection afforded by copyright to computer software. Across the Tasman, for instance, both the Full Federal Court and the High Court of Australia have restricted the scope of copyright in, for example, lists of computer commands.[44] And, as early as 1995, the Australian Copyright Law Review Committee on Computer Software Protection[45] cited with approval a seminal decision of the United States Court of Appeals for the Second Circuit,[46] *Computer Associates International Inc v Altai Inc*, which significantly limited the strength of copyright in cases of non-literal infringement – again, consigning to the public domain key aspects of program architecture, especially when these aspects are dictated by the function of the program.

C Copyright Duration

Of course, when copyrights do eventually expire, more goes into the public domain. If one is solicitous of the public domain, therefore, one should also be a copyright enthusiast. But the objection is that copyrights last too long. Certainly, the term of "life of the author plus 70 years", the term increasingly being adopted, does seem dismayingly long. New Zealand has so far, and admirably, held the internationally-mandated line[47] of life plus 50 years for many works. It has been

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40 Agreement on Trade-Related Aspects of Intellectual Property Rights 1869 UNTS 299 (signed 15 April 1994, entered into force 1 January 1995), art 10 (requiring that computer programs be protected as literary works under the Berne Convention for the Protection of Literary and Artistic Works 828 UNTS 221 (opened for signature 14 July 1967, entered into force 29 January 1970) [Berne Convention])). The Berne Convention dates from 9 September 1886, was revised on 24 July 1971 and amended on 28 September 1979.

41 Copyright Act 1994, s 80A.

42 Directive 2009/24/EC on the legal protection of computer programs [2009] OJ L111/16.

43 Copyright Act 1994, s 80D.

44 *Powerflex Services Pty Ltd v Data Access Corporation* (1997) 37 IPR 436 (FCA).

45 Copyright Law Review Committee *Computer Software Protection* (Office of Legal Information and Publishing, Attorney-General's Department, 1995) at [9.10]–[9.22].

46 *Computer Associates International Inc v Altai Inc* 982 F 2d 693 (2d Cir 1992).

47 Berne Convention, above n 40.

suggested that the intensity of the modern populist outrage at the copyright system seems to date from the decision in the United States in the late 1990s to increase copyright terms by 20 years.[48] Greed has consequences.[49]

It is useful to recall, though, that even New Zealand's "life of the author plus 50 years" term does not tell the whole story. Our law significantly shortens the term of protection for a category of works that are applied in industrial contexts.[50] These are often functional products. Cutting off the copyright term early in this way helps ensure that more "important" kinds of copyright-protected works are consigned to the public domain sooner. The length of protection is more or less in line with industrial designs and patents. Here, I mean "important" in a very specific sense. Works with longer terms, such as songs and movies, are "important", but they are, in a sense, more fungible than functional products. Gifted as Lady Gaga might be, there are limits to the extent to which she can leverage her copyright monopoly. If copies of her work were priced too high, consumers would move on to the next pop diva, and many are doubtless waiting in line. With functional products, however, the array of ready substitutes is smaller. Hence the determination that the copyright monopoly must end sooner for works of a functional character. Of course, it is questionable whether copyright should attach at all. In the United States, for example, copyright consigns many useful aspects of products to the public domain from the get-go.[51] The viability of the United States approach is something we might consider carefully in this country.

D Unexamined Assumptions

But back to the main theme. There is, as Professors Madhavi Sunder and Anupam Chander have pointed out, a kind of "romance" about the public domain.[52] Part of the normative heft accompanying the valorisation of the public domain comes from the idea that the externalities of copyright protection are more burdensome when technological developments make downstream innovation easier. The claim that copyright does not, for instance, inappropriately burden speech when it merely privatises expression and not ideas, perhaps looks a little different in the era of the mash up. New technologies facilitate creativity *using protected expression*, not *just* ideas, and to the extent that copyright prohibits this kind of activity, it intolerably burdens creativity.

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48 Jane C Ginsburg "How Copyright Got a Bad Name for Itself" (2002) 26 Colum J L & Arts 61.

49 Ginsburg, above n 48.

50 Copyright Act 1994, s 75.

51 In broad outline, the Copyright Act 17 USC §§ 101–810 consigns to the public domain utilitarian pictorial, graphic and sculptural works or aspects of these works that cannot be separated, conceptually or physically, from the aesthetic aspects of these works. See (3 September 1976) House Report No 94-1476, 94th Congress, 2d Session at § 105. This aspect of United States law has distilled a rich, and not entirely consistent jurisprudence. See for example *Carol Barnhart Inc v Economy Cover Corp* 773 F 2d 411 (2d Cir 1985); *Pivot Point International Inc v Charlene Products Inc* 372 F 3d 913 (7th Cir 2004).

52 Anupam Chander and Madhavi Sunder "The Romance of the Public Domain" (2004) 92 CLR 1331.

One difficulty with the argument is that it treats the downstream creative community like a "black box" – as if everyone has equal access to technological tools of derivative creativity. But the externalities story is a hopeless description of life in many nations. Often, access to electricity cannot be taken for granted, let alone fancy digital media tools.[53] Quite appropriately, people often object that our copyright laws are Eurocentric. But I worry that assumptions about the capacity to enjoy and exploit the public domain also betray a first-world bias. I don't decry the importance of amateur creativity.[54] That said, we should perhaps be more attentive to the class issues that lurk below the surface of our celebrations of amateurism. Really good amateur content takes talent, to be sure. And, if the blessings of talent are not evenly distributed, the time and the money that are also required for amateur creative activity certainly are not. More empirical work is needed on this point – but I would hazard a guess that, at least in terms of sheer volume, rather more amateur content is produced by the kid in the United States college dorm room, with ready access to bandwidth, hardware and software, than by the solo mum holding down two, sometimes, three jobs to put food on the table for her family. Surplus time and money for amateur creativity probably sit somewhere near the top of the Maslovian hierarchy. Not all of us ever reach those toney heights. To champion amateur user-generated content uncritically, without interrogating these class implications, seems like an irresponsible basis for the formulation of social policy. And as for that solo mum: we do have one famous example that perhaps reminds us that if she does eke out time to write, *she* might appreciate the income that might one day provide *her* with the kind of economic freedom that some dorm-room occupiers at fancy United States universities seem already to take for granted.

Finally, the recent Wai 262 report[55] – the so-called Māori Intellectual Property claim – provides a further reminder that the ideas that mark out the boundary between property and the public domain can betray cultural biases. Many indigenous peoples are contesting the culturally-specific foundations of property rights, including in the intellectual property field.[56] Property systems can be elaborate and some are highly bureaucratised, but property is also a language, a symbolic economy.[57] The Wai 262 report reminds us of the importance of trying to understand different languages of property, something we've not been very good at in the past. Unthinking adoption of

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53 *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue* A/HRC/17/27 (2011) at [61].

54 For a more sceptical view, see Andrew Keen *The Cult of the Amateur: How Today's Internet is Killing our Culture* (Nicholas Brealey, London, 2007).

55 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011).

56 Laurence R Helfer and Graeme W Austin *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, New York, 2011) at 432–502.

57 Carol M Rose "Introduction: Property and Language, Or, The Ghost of the Fifth Panel" (2006) 18 Yale J L & Human 1.

other nations' ideas about the scope of copyright is certainly a problem. But, as indigenous peoples' claims in the intellectual property space persistently underscore, unthinking importation of foreign ideas about the public domain – about the materials of culture that should be *un*owned – may be similarly problematic.

IV LIVING WELL ON THE FRONTIER

How we map this frontier says something, I believe, about the kind of society to which we aspire. A 2003 United States Supreme Court decision, *Dastar Corp v Twentieth Century Fox Film Corporation*,[58] helps to illustrate what I mean. The *Dastar* case arguably expanded the public domain or, at least, shrank the rights of authors. I have long been fascinated by this decision, especially for what it says about creative labour.[59] It concerned a documentary series produced by the plaintiff that was based on the wartime memoirs of President Eisenhower. Due to some peculiarities of United States copyright law that need not detain us, copyright in the films fell into the public domain. Recognising that popular interest in World War II was increasing, another production company reissued the documentaries, but this company failed to acknowledge the plaintiff's original authorship of the films. Now, under United States copyright law, this was perfectly lawful. Despite its international law obligations, the United States has never enacted a full-blooded authorial attribution right.[60] To partially fill this gap, United States litigators had cleverly developed domestic trademark law, so that misinformation about authorship was often considered to be a breach of unregistered trademark rights, or, technically, a form of reverse passing off. So this case reached the Supreme Court on the issue of whether trademark law could continue to provide an attribution right. The Court said no.

There is a very strong theme in Justice Scalia's opinion that creating a "mutant copyright law" out of trademark law would be contrary to a legislative policy that firms should be entitled to market public domain works free of any kind of impediments, including attribution rights. Tellingly, the Court's analysis rested heavily on a line of cases limiting the scope of trade dress protection in consumer products.[61] Authors' rights were suspect, therefore, if they got in the way of lower prices. Whatever claims authors might have had, they were overridden by the imperative logic of the public

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58 *Dastar Corp v Twentieth Century Fox Film Corporation* 539 US 23 (2003).

59 "'[H]ow does the creative worker get paid?' can itself be characterized as a human rights issue." Helfer and Austin, above n 56, at 195. See also Graeme W Austin and Amy Zavidow "Copyright Law Through a Human Rights Lens" in Paul L C Torremans (ed) *Intellectual Property and Human Rights* (Kluwer, The Netherlands, 2008) 257.

60 See Graeme W Austin "The Berne Convention as a Canon of Construction: Moral Rights After *Dastar*" (2005) 61 NYU Ann Surv Am L 111, discussing obligations imposed by article 6*bis* of the Berne Convention, above n 39 (entered into force in the United States 1 March 1989).

61 For example: *Bonito Boats Inc v Thunder Craft Boats Inc* 489 US 141 (1989); *Sears, Roebuck & Co v Stiffel Co* 376 US 225 (1964).

domain. This is a logic that, in seeing us only as consumers demanding cheaper stuff, obliterates the creative worker almost entirely. I believe that *very* similar logic underlies quite a lot of the valorisation of the public domain – which is animated by a desire to get stuff cheaply or even for free, so that the efforts of the creative worker do not need to be factored into the bottom line. These kinds of ideas also inform some strands of so-called liberal copyright scholarship, especially in the United States, which in turn is grounded on a commitment to the idea that tinkering with the ambit of property rights (which mostly means reducing their scope), dismantling those fences in that public domain paradise, points the way to salvation.

In my view, the critique must be much more radical. To live well on the frontier between copyright and the public domain requires us to examine what *we* are like, and what we value – whether we are merely consumers wanting cheap stuff. It involves asking if protections for the creative worker have any moral or political salience, or whether the universe of concerns informing our copyright laws should only be informed by a drive to get prices down as close as possible to the marginal cost of production. I call this the "Walmartization" of copyright.

This is partly why in the last few years, I've become so interested in the relationship between human rights law and intellectual property.[62] Human rights certainly provide compelling reasons for being concerned about the public domain, reasons *that go beyond* getting more stuff more cheaply. Human rights law draws attention to a broader set of values: educational rights, environmental rights, the right to food, an adequate standard of health, indigenous peoples' rights – with which any decent intellectual property system, and any decent society, must contend. And human rights lawyers have crafted a powerful lens through which to analyse these issues. These are not just ad hoc distributive justice claims du jour. At the same time, however, human rights laws recognise the importance and the *rights imperatives associated with* functioning markets. Hence the recognition in many human rights instruments of the right of property.[63]

In the *intellectual property* context, no less venerable document than the Universal Declaration of Human Rights demands protection of the right of "[e]veryone … to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author."[64] The 2005 General Comment[65] on the equivalent article in the International Covenant on Economic, Social and Cultural Rights[66] emphasises the link between this right and the

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62 See Helfer and Austin, above n 56.

63 Helfer and Austin, above n 56, at 212–220.

64 *Universal Declaration of Human Rights* GA Res 217A (III) (1948) at art 27.

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

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

idea that authors should enjoy an adequate standard of living, and that they are entitled to just remuneration. Amongst other things, the document invites us to take seriously the idea that liberty interests can be furthered by participation in functional markets for creative work.

One of the many themes that Professor Larry Helfer and I develop in our book on human rights and intellectual property is that the right to participate in private markets for creative work helps to carve out for authors "a zone of personal autonomy in which authors … control their productive output, and lead independent, intellectual lives."[67] These are things any free society needs, and they are nurtured by a system that enables authors to derive at least some of their income from a paying public (assuming they can find one) rather than depending entirely on political or other forms of patronage.[68] In other words, if the public domain were *all* we had, if property in creative outputs were dispatched over the line, we risk creating a new kind of thraldom.

There is, therefore, a lot at stake in these urgent, sometimes fractious, often dismayingly impolite, discussions about the future of copyright. Like all interesting legal issues, they implicate questions about the kind of society we want, and who we want to be. And the disputed terrain is quite large. Mapping the boundary between copyright and the public domain puts much that is important on the line.

One might conclude by saying: "get over it". Better, I think, is to say: "live with it". Better yet: "live well with it".

Thank you.

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67 Helfer and Austin, above n 56, at 189 and 194–196. See also Laurence R Helfer "Toward a Human Rights Framework for Intellectual Property" (2007) 40 U C Davis L Rev 971 at 996.

68 Neil W Netanel "Copyright and a Democratic Civil Society" (1996) 106 Yale L J 283.