

# Copyright and the Regulation of the Australian Publishing Industry

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## [1] Introduction

Copyright law and the publishing industry have a long, complex and intertwined history. Both were shaped by similar circumstances including the development of the printing press, the decline of the Stationer's Company, and changes in state censorship (Johns, 1998). In the late sixteenth century, the Stationer's Company (who was the London based Guild of printers, binders and booksellers) lost the statutory monopoly that it had previously exercised over the printing of books in England. To overcome this loss, the Stationer's Company successfully lobbied the British Parliament for the introduction of the first copyright statute, the 1711 *Statute of Anne*. Since then publishers have continued to use the copyright regime to further their interests. By lobbying for reform and by pushing the limits of existing rules, publishers have played a key role in the development of copyright law. For example, it has been suggested that the author was effectively invented by the publishing houses in the eighteenth century in an attempt to extend the duration of copyright protection (Rose, 1993). Whether or not one agrees with this, it is clear that the publishing industry has played a key role in the development of copyright law. It is also clear that copyright law has played a central role in regulating many aspects of the publishing industry.

While there have been many changes in the three or so centuries in which the law had been engaging within the publishing industry, copyright is as important an issue for the Australian publishing industry today as it was for the Stationer's Company in eighteenth century Britain. Indeed, copyright plays a key role in protecting markets for books, as well as providing an important and growing revenue stream from photocopying and digital copying. In developing the legal framework to regulate the publishing industry, the law has had to balance the interests and concerns of publishers with those of authors, readers and the public more generally. For example, in setting the duration of copyright protection, the law has had to balance the interests of publishers – who have always argued for longer protection – with those of the public more generally – who have an interest in the duration being more limited. Similar problems have arisen in setting the scope and nature of the rights to be granted to copyright owners, as well in shaping the specific defences that protect copyright users from the excesses of copyright protection.

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Over time, the law has set in place a series of rules and procedures that balance these competing interests, only to find that the arrangements set in place have been upset by external events, such as changes in technology. The last decade or so has seen a number of events in Australia that have upset the balance that previously existed between publishers, authors, readers and the public more generally. The aim of this chapter is to look at these changes, focusing in particular on the way that they have impacted on the Australian publishing industry.

## **[2] Control of Digital copyright**

While copyright law in Australia has been dealing with computer technologies since the 1960s, the question of the scope of digital copyright began in earnest in the mid 1990s, when the Commonwealth Government's so-called Digital Agenda reforms to the 1968 Australian *Copyright Act* got under way. This set in place several years of heated and often vitriolic debate about the shape that copyright law should take in the digital environment that reached a conclusion, of sorts, when the *Copyright Amendment (Digital Agenda) Act* 2000 came into operation in March 2001.

One of the greatest successes that the publishers achieved in the literary property debates of the eighteenth century, where publishers unsuccessfully argued that copyright protection was perpetual, was the widespread acceptance of the idea that copyright was a public good that was a necessary part of cultural policy making. (Sherman and Bentley, 1999, 40-42). Drawing upon this lineage, there was little, if any, serious discussion in Australia during the Digital Agenda reforms about whether copyright should apply in the digital environment. That is, it was simply taken as a given that digital works would be protected by copyright. To this end, a new right to communicate works to the public was introduced in 2001. This new right was given to copyright owners so that they could control the use that was made of their works on-line, for example the digitising and uploading of material onto an internet server. In part, the new right was introduced to appease copyright owners who were concerned that their then existing rights (under the 1968 *Copyright Act*) did not provide further protection for digital works, particularly those available on the Internet. While the Government described the new right of communication as the center piece of the Digital Agenda reforms, it is unlikely to have much of an impact on the creation or consumption of books, articles and other published works. This is because the activities covered by the new right were arguably already protected by the pre-existing rights. Nevertheless copyright owners and publishers were pleased that the scope and nature of their rights in digital works were clarified.

While there was little debate over whether copyright should be recognised in digital works, this was not the case in relation to the copyright defences available in the digital environment, nor in

relation to the way digital copyright to be protected and enforced. Historically, copyright law has long provided a number of defences that allow works to be used without payment in certain circumstances. These defences play an important role in demarcating the boundary between public and private domains and thus help to ensure a proper balance is drawn between owners and users of copyright works. For example, fair dealing allows individuals to use a work without payment for the purposes of criticism or review, reporting the news and judicial proceedings or professional advice. Where a work is used for the purpose of research or study, only a 'reasonable portion' of the work may be used without payment. A 'reasonable portion' is defined to mean no more than 10% of the number of pages of a work or one chapter of a work (if the work is divided into chapters). In essence, the defence helps to promote and encourage the creation of new works. It also overcomes market failure as the dealing is so small that the transaction costs of formulating an agreement outweigh the value of any licence that may be negotiated between the parties (Bently and Sherman, 2004, 190).

In so far as the copyright defences allow copyright works to be used without payment, they undermine the scope of the copyright owner's interests. Given this, it is not surprising that Australian publishers, along with copyright owners more generally, saw the extension of copyright protection to digital works as a opportunity to unsettle the arrangements that had been built up in relation to analogue works over the previous three hundred years. While copyright owners raised objection to most (if not all) of the copyright defences, their main target was the existing fair dealing defence.

During the drafting of the *Digital Agenda Act*, copyright owners adopted the extreme position and argued that the fair dealing defence should not exist where a work was in a digital form. In particular, they argued that if the copyright defences developed in the analogue era were transferred without alteration into the on-line environment, it would erode their rights in on-line works. More specifically, copyright owners were concerned that if fair dealing was translated into the digital environment it would undermine new and emerging on-line markets for single chapters of books, single articles from periodical publications, and parts thereof. If fair dealing was allowed, so the argument went, users would be able to copy a chapter, a journal article, or smaller parts thereof without having to pay a licence fee to the copyright owner (MacDonald, 1999, 11-12). Copyright owners and their representatives also argued that Australian authors and publishers were reluctant to make content available on-line because digital technologies enable users to make unfair use of the digital fair dealing exceptions, thus eroding potential markets (Accenture, 2001, 20).

To add weight to their position, publishers argued that if the fair dealing defence was extended to digital works it would breach

Australia's obligations under international copyright treaties. The relevant international treaties provide that the exceptions to the copyright owner's exclusive rights must not 'unreasonably prejudice the legitimate interests of rights holders or conflict with the normal exploitation of the work'. (*Berne Convention* 1886, Art 9(2), TRIPS 1994, Art 13). Copyright owners, particularly publishers, argued that the way they exploited their works had changed in an on-line environment. More specifically, copyright owners said that the selling or licensing of *parts* of works on-line was a normal mode of exploitation (Crawford, 1999). In line with this, they argued that if the fair dealing defence was applied to digital works, individuals would be able to copy one chapter or an article for the purpose of research and study: a practice that would have conflicted with what had become a normal mode of exploitation.

Despite intense lobbying by publishers and their representatives, the government extended the fair dealing defence to works in an electronic format. In doing so, the government rejected these arguments for what they were: an attempt by publishers to further erode the interests of users and readers and in so doing extend their control of the publishing industry. To adapt the fair dealing defence to electronic works, the definition of 'reasonable portion' was amended to mean no more than 10% of the number of *words* of a work, or no more than one chapter (if the work is divided into chapters). As a result, the digital fair dealing defence now allows copyright works in a digital form to be used for the purpose of research and study, criticism or review, reporting the news, professional advice or judicial proceedings. As such, it plays an important role in ensuring that copyright owners are not able to use their rights to censor the use that is made of digital publications. It ensures the free use of copyright material in the digital environment for purposes that are socially desirable, especially as digital technology has the potential to restrict such use. Fair dealing also avoids the transaction costs associated with small uses of small parts of works (Cohen, 1999, 239-240)<sup>2</sup>.

Another area of copyright law that impacts upon the publishing industry that has been re-opened in recent years relates to the enforcement of rights. The trigger for this grew out of the fear publishers had that they would not be able to protect their rights in an on-line environment (Stretfield, 2001, 4). In particular, publishers were concerned that digital technologies enabled consumers to access, copy, and download electronic works with the simple click of a mouse. Because of this, publishers feared the loss of potentially

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<sup>2</sup> To some extent the concerns raised about the operation of the digital fair dealing defence have been superseded by the fact that copyright owners are now able to use on-line contracts as a way of controlling how digital works are used. These contracts restrict the uses that can be made of a work, including uses that may otherwise have been allowed under the fair dealing provisions. This issue is discussed in more detail below.

lucrative on-line markets, principally for e-books and on-line journals. These fears were reinforced by the rise of peer-to-peer share networks, such as Napster and Gnutella, which enabled millions of songs to be freely swapped between users on the Internet. Publishers were worried that the same fate would befall them if books, journals and other works in which they had copyright were made available in an on-line format without some form of additional legal protection. Concerns that the illegal downloading of books could become as big a problem as Napster were reinforced by studies, such as those carried out by the Internet monitoring firm, Envisional, which found 7,300 copyright titles (including more than 700 copies of J K Rowling's Harry Potter books) freely available through file-sharing networks such as Gnutella. In most cases, the books had been scanned and converted into downloadable text. In a few instances, hackers had cracked the copyright protection codes to e-books and made them available to the public (Lynch, 2001, 17).

As with the arguments made in relation to fair dealing, there was a sense in which copyright owners used the opportunity created by the shift to a digital environment as an opportunity to extend the control they had over literary works. Prior to the introduction of the *Digital Agenda Act* in 2001, copyright owners had begun to use technological measures 'to envelope their e-books with digital locks to prevent transferring, copying and printing' (Stretfield, 2001, 2). These locks provided support to copyright owners in their attempt to prevent themselves being 'napterized' (Stretfield, 2001, 2). While technological locks or technological protection measures provided publishers with some relief against on-line piracy, they were not infallible because users were able to circumvent the locks and decrypt the encoded works. In order to buttress the technological protection measures, publishers lobbied the Government for legal means to reinforce the existing technological protection systems. In particular, they wanted the technological protection measures that they had adopted to be legitimised through statutory sanctions that would prohibit users from circumventing the locks. The Government accepted the publishers' arguments and introduced a raft of enforcement provisions to enable copyright owners to enforce their rights in the digital environment.

Two technological protection measures were introduced in the *Digital Agenda* reforms that are particularly important to the publishing industry. These are the provisions dealing with circumvention devices and services and the provisions in relation to rights management information. These new provisions go some way towards making publishers feel more secure about their ability to monitor and enforce their rights in an on-line environment. By enabling copyright owners to lock their works up behind technological barriers, these provisions also provide owners with much greater control over how works are used.

In relation to attempts to circumvent technological protection measures, Australian copyright law now prohibits the manufacture, marketing and supply of a device or service that is used to circumvent technological protection measures, such as program locks. This new regime provides legal support to the growing use of technological protection measures such as encryption, passwords and digital watermarks used by copyright owners to protect works in a digital format. The technological protection measure provisions were reinforced by changes made to Australian copyright law by the *US Free Trade Implementation Act 2004* that came into operation on 1 January 2005 (Cain and Weatherell, 2004).

The second technological protection measure introduced in the *Digital Agenda Act 2000*, which was extended and strengthened by the *US Free Trade Implementation Act 2004*, makes it an offence for someone to intentionally remove or alter 'electronic rights management information'. Electronic rights management information is electronic information such as a digital watermark that is attached to or embodied in a copy of a work. It also includes numbers or codes which represent such information in an electronic format. Rights management information typically includes details about the copyright owner and the way the copyright material may be used. One of the main advantages of rights management information is that it acts as a footprint that helps copyright owners to track the uses of their works on-line. This information effectively acts as a moral right of attribution, not for the author, but for the work itself. The practical effect of the protection of rights management information is that copyright owners are better able to police the use that is made of their works on-line. As such, rather than the Internet being an unregulated domain where 'information is free', digital technologies enable copyright owners to more readily track use than they have been able to do with other technologies, such as the photocopier.

Despite copyright owners claiming that they are unable to control the uses that are made of copyright works on-line, the use of anti-circumvention devices, combined with the provisions in relation to digital rights management information, allows publishers to exercise more, not less, control of digital works. As one commentator explained:

“[N]ew technologies can prevent the making of some legal copies, and certainly of many copies of ambiguous legality. Rights holders felt no obligation to deploy technology that is liberal in its willingness to permit the making of copies. There's no reason why technical protection systems have to facilitate even the making of clearly legal copies. This isn't a legal matter, at least the way the law is being interpreted today. It's purely a question of how restrictive the content suppliers can be while still gaining consumer acceptance”. (Lynch, 2001, 21; Laidler, 2001, 222).

The new anti-circumvention provisions enable copyright owners to move copyright works outside the domain of copyright into a domain where they are able to control who is able to access a particular work, the conditions of access, and how much must be paid for using the work. In so doing, copyright works are placed in a sphere where the checks and balances used in copyright law to protect broader social and cultural goals, such as expression, access and the dissemination of works, do not operate. By ensuring that users are only able to access works on terms set out by the provider, the anti-circumvention measures also mean that copyright owners are able to exercise more control over *how* works are used than is given to them by copyright law. For example, where a book is technologically protected, owners can specify how many times the book may be read and by whom: practices which until recently ordinarily fell outside the owner's control (Forsyth, 2001, 86).

To some extent, the potential of the anti-circumvention provisions to lock up digital works is alleviated by the fact that there are situations<sup>3</sup> where copyright users are able to circumvent a copyright owner's technological protection measures.<sup>4</sup> In particular, libraries and educational institutions are able to circumvent technological protection measures if the copying is carried out under the library copying provisions or the educational statutory licence. While this may appear to be an important limitation on the control that owners are able to exercise over digital works, in practice libraries and educational institutions have had difficulty in accessing the passwords and keys that would enable them to circumvent the locks placed on works. As such, even though libraries or educational institutions are authorised to use a work protected by a technological lock in a way that falls within the scope of the permitted purposes, they may be prevented in practice from circumventing the locks.

The upshot of these changes is that the balance of control has been shifted in favour of publishers at the expense of authors and users. The heightened control that has been given to publishers qua copyright owners by the new technological protection provisions has been reinforced by the growing use of on-line contracts to regulate the use of digital works. After the American decision of *Pro Cd v Zeidenberg* legitimised on-line contracting, publishers have increasingly used these contracts alongside technological protection measures as a way of controlling their works on-line. (*Pro CD v*

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<sup>3</sup> These limited exemptions are referred to as 'permitted purposes': section 116A(7) *Copyright Act* (1968) Cth as amended. See more generally Div 2A of Part V Remedies and Offences of the *Copyright Act* 1968 (Cth) as amended.

<sup>4</sup> The actual *use* of circumvention devices or services is not specifically prohibited. This is because it was the Government's intention to prevent the *commercial dealing* in circumvention devices, rather than an individual's *use* of circumvention devices. A 'circumvention device' is defined in 10 of the Copyright Act.

Zeidenberg, 1996). The use of on-line contracts increases the control that copyright owners are able to exert over copyright users. While the new provisions in the *Digital Agenda Act* were designed to balance the interests of users and owners, the particular terms of an on-line contract depends on the negotiating power of the parties involved. This is because in drawing on the basic principles of freedom of contract, copyright law allows the parties relatively free reign to decide the terms on which an information service may be offered. In practice, the inequality of bargaining power that exists between providers and users of information means that users are often confronted with a 'take-it-or-leave-it' situation. With on-line contracts, copyright users are led through a series of on-line screens that require them to click 'yes' to proceed. In clicking yes, the user might agree to terms of access to a work that would be totally unacceptable in an analogue world.

On-line contracts are often drafted in favour of copyright owners allowing very few, if any, of the normal uses that are allowed under copyright law. For example, before readers are able to access the e-book Adobe Glassbook reader version of Lewis Carroll's classic *Alice in Wonderland*, they must agree not to copy, print, loan or give the book to someone else, nor to read the book aloud. One of the consequences of copyright owners being able to determine the terms on which a work can be used is that on-line contracts can be overly restrictive of the public's right to access and use copyright works. For example, a copyright owner is able to use a contract to restrict access to a work beyond the term of copyright protection. Moreover, as Samuelson argues, on-line contracts can take away a user's right to access or browse works (Forsyth, 2001, 134). The Attorney-General admitted as much when he said that while the *Digital Agenda Act* allows 'free browsing ... this is not to say that copyright owners may not charge for the browsing of their copyright material made available online under specific licensing arrangements' (Williams, 1999, 62).

An important issue that arises in this context is whether contracts entered into between owners and users are able to override the operation of copyright defences. If this is the case, it will further shift the balance away from users and authors of copyright to owners and publishers. As was mentioned above, copyright law gives the parties free reign when deciding the terms of a contract. It is becoming increasingly common for on-line contracts to include terms that stipulate that the user will not exercise rights such as fair dealing. (This is referred to as 'contracting out' of copyright defences.) If this is allowed, the policy objectives of the copyright defences, such as ensuring that the public is able to freely access and use copyright works for certain purposes, would not be achieved (Hugenholtz, 2000, 77). To ensure that individuals are unable to use their bargaining position to override the policy aims of copyright law, Parliament should legislate to ensure that the parties cannot contract

out of the defences set out in the *Copyright Act* (CLRC, 2001). There is precedent for this in the *Copyright Act* which overturns any attempt to contract out of the provisions that allow parties to make a back up copy of a computer program. It is yet to be seen whether this rationale will be applied in other circumstances. Until changes of this nature are made, the only legal relief available to copyright users is provided by the so-called vitiating factors of contract law, such as the equitable ground of unconscionability. It is also possible that overly restrictive contractual terms, like those in the Adobe e-book version of *Alice in Wonderland*, contravene consumer protection legislation such as the *Trade Practices Act*. While contract law's vitiating factors and the safeguards of the *Trade Practices Act* may provide copyright users with some relief, nonetheless the obligation falls upon the user to initiate legal actions to seek relief, which may be an expensive and time consuming process.

Another aspect of copyright law that impacts upon the Australian publishing industry that has recently undergone a number of changes relates to the ability of publishers to control the importation of copyright protected books legitimately purchased overseas. Traditionally, one of the rights given to the copyright owner is the right to control the importation of the copyright work. This ensures that a person cannot legally import copyright material into a country without the agreement of the copyright owner. For a long time, publishers used these rights to divide the world into self-contained market segments. This enabled publishers to limit competition and thus to maximize the sale of copyright works within national boundaries (McKeough, Stewart and Griffith, 2004, 239). The power to prevent the parallel importation of non-infringing copies of works confers a 'significant advantage on copyright owners and can be seen as a corresponding serious disadvantage to consumers and users of copyright material' (Ricketson, 1999, 39). This ability to control geographic markets allowed publishers to restrict or prevent competition in the sale of copyright products. This can also impact on the authors' remuneration. As McKeough, Stewart and Griffith noted 'exclusive rights over the Australian market have traditionally been the preserve of British publishers, even in relation to works originally published in North America. So long as Australian booksellers were unable to import in competition with these publishers, readers in this country were often forced to wait months for books long since published abroad, and to pay higher prices into the bargain' (McKeough, Stewart and Griffith, 2004, 239).

To remedy some of the problems that had arisen as a result of the way copyright owners controlled the importation of books into Australia, the Government amended the *Copyright Act* in 1991. These amendments changed the law to allow the free importation of non-infringing copies of books from abroad where there was a failure to supply the Australian market (Ricketson, 1999, 39). Under the scheme, the copyright owners' ability to control the importation of

works into Australia is restricted in two situations. Firstly, the importation provisions do not apply to books that are published overseas but never released in Australia, and to books not published in Australia within 30 days of being published overseas. In these circumstances, non-pirated copies may be imported from overseas without the approval of the copyright owner. Secondly, in relation to books first published in Australia (whatever the date) and books first published overseas but subsequently published in Australia within 30 days, these books can only be imported where it is necessary to 'satisfy local orders which have remained unfulfilled for at least 90 days.' (McKeough, Stewart and Griffith, 2004, 241).

While anecdotal evidence suggests that the changes made in 1991 provided some benefits to consumers, there were still a number of problems. One of the concerns was that there was still a significant difference in the price charged for books sold in Australia and overseas, particularly for bestseller titles in paperback form, denying consumers reduced prices and improved product range. As the Attorney-General said in 2002, 'the current outdated copyright law creates a lucrative distribution monopoly for foreign multinationals and prevents local retailers from sourcing cheaper copyrighted materials from overseas, even though individuals can make purchases directly over the Internet' (Alston and Williams, 2002). These concerns were reinforced by research that found that the 1991 amendments had not improved competition (Prices Surveillance Authority Report, 1995). More recent studies showed that the price of books in Australia is significantly higher than overseas. For example, from July 1988 to December 2000, Australians paid around 44% more for fiction paperbacks than United States readers and around 9% more than UK readers for best-selling paperback fiction (Alston and Williams, 2002). A survey carried out by the Australian Competition and Consumer Commission in 2002 found that a selection of technical and professional books was around 23% more expensive in Australia than in the USA, and 18% more expensive than in the UK (Alston and Williams, 2002).

To remedy problems of this nature, the Government introduced the *Parallel Importation Bill* into Parliament in 2001. The Bill aimed to improve access on a fair, competitive basis to a wide range of products, including books, periodical publications and printed music. It also aimed 'to prevent international price discrimination that exists under present arrangements to the detriment of Australian consumers and facilitate efficiency in the Australian book publishing industry, while protecting copyright.' (Explanatory Memorandum, 2001). To do this the Bill proposed to allow the commercial importation of non-pirate electronic books and printed books without the permission of the Australian rights holder. The Bill also proposed to place the onus on defendants who had imported or commercially dealt with imported articles to prove the legitimacy of the copyright materials. This was intended to act as an incentive for importers and distributors

to ensure the legitimacy of the material they acquired. It was argued that the removal of the parallel importation restrictions would reduce prices, improve product range for consumers, and provide an ‘impetus for local suppliers to seek greater operational efficiencies, with consequent flow-on effects in terms of reduced costs and prices and improved service levels.’ (Explanatory Memorandum, 2001).

Unsurprisingly, publishers and (certain) author groups were opposed to the removal of the parallel importation scheme. Their major concern was that if copyright owners were unable to prevent the parallel importation of books that this would have displaced the sales of books by Australian authors and books generated by Australian publishers. As the Australian Society of Authors said ‘any move that weakens the positions of copyright owners now will be seen as incredibly short sighted in a few years time. At a time when Australia is being criticised for being out of step with the burgeoning knowledge-based economies of the world, it will be seen as remarkable that we should even contemplate undermining our home grown copyright creating industries’ (McMullan, 2001).

After considerable debate, the *Copyright (Parallel Importation) Act* 2003 was passed by Parliament. The new Act repealed the 1991 provisions on the parallel importation of books, periodical publications, and printed music in an *electronic* format. As a result, it provides consumers with improved access to digital copyright works. However, earlier proposals to allow the parallel importation of books, periodical publications, and printed music, which would have provided the Australian reading public with cheaper copyright works did not appear in the final Act. Thus, while the final amendments did improve the position of readers (at least in relation to literary works in an electronic format), the position in relation to books and publications in a hard copy form, which still constitute the bulk of the income for publishers, did not change.<sup>5</sup>

### **[3] Duration of Copyright Protection**

One of the recurring themes of copyright law over the last three centuries has been the efforts by publishers and other owners of copyright to extend the period of protection. Unperturbed by their failure to have the British courts recognise perpetual common law copyright in the middle of the eighteenth century (*Donaldson v Beckett* 1774; Rose, 1993)), publishers have constantly lobbied to have the period of protection extended. Their success is reflected in a recent comment that ‘copyright law now provides greater protection for a longer period of time than at any moment in recent history.’ (Langenderfer and Kopp, 2004, 18).

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<sup>5</sup> The total sales of books in Australia in 2002-2003 amounted to \$814.5 million, of this sales of electronic books only amounted to \$7.1 million. (Australian Government, Bureau of Statistics), 2004.

Until recently the duration for copyright protection for literary works in Australia was the life of the author plus fifty years. However, as a result of the 2004 US-Australia Free Trade Agreement, the period of protection now lasts for the life of the author plus *seventy years*. This now means that if an author dies in 2007 that their works will remain in copyright until 2077. The new life plus 70 year rule only applies to material still in copyright on 1 January 2005, or which is created after that date.

Extending the copyright term will have a number of consequences for the Australian publishing industry. Perhaps the most obvious change is that it will provide longer protection for authors and copyright owners. While longer protection will benefit copyright owners, it will also have adverse consequences for some sectors of the publishing industry, particularly for consumers. An obvious consequence of the longer period of protection is that consumers will have to pay copyright fees for an extra 20 years. Another problem is that a number of works that were due to fall out of copyright in the next few years will now remain under copyright protection. For example, the works of A.A. Milne – the author of the Winnie-the-Pooh books – which would have fallen into the public domain in 2006, will now be protected by copyright until 2026. Similarly, the scientific and non-scientific writings of Albert Einstein would have fallen into the public domain in Australia in 2005. As a result, schools and scientific institutions will have to negotiate permission to use the work and pay royalties for another 20 years (Rimmer, 2004, p 6). The extension of term will also impact on the ability of cultural institutions to provide access to copyright works. As fewer copyright works will fall into the public domain, the extension of term will also jeopardize free literature initiatives, such as the Project Gutenberg (Australia), Eric Eldred's Eldrich Press and the Internet Archive, who specialize in the republication of works that are out of copyright.

Another issue that arises with the extension of term relates to so-called 'orphaned works'. Orphaned works are works that are protected by copyright but whose owners are difficult to locate, either because the creator has died, lost interest, or if a work is owned by a company, has been wound up. The problem with orphaned works is that even though an owner may no longer have any interest in controlling the works, the works are unable to be used, archived or preserved. The problem of orphaned works, which has been exacerbated by the extension of term, could have been overcome through the introduction of a provision that allows a party to use a copyright work if they have unsuccessfully made reasonable efforts to find the owner (Varghese, 2004, 14). Unfortunately, however, no such provisions were introduced into Australian copyright law to ameliorate the problems of extension of term.

#### **[4] Moral rights**

The final noteworthy change that has taken place in recent years that impacts upon the publishing industry in Australia occurred with the introduction of two new moral rights in 2000. Moral rights are non-economic rights, which serve a fundamentally different purpose from copyright (which are economic rights given to authors to exploit their works commercially). A key feature of moral rights is that they are inalienable, which means that they remain with the author even though copyright in a work may have been assigned to a third party (Van Caenegem, 2001, 83). The duration of moral rights protection is tied to the copyright in the work given the extension of term, this means that moral rights in a work now last for the life of the author plus 70 years.

The two moral rights introduced into Australian copyright law were the right of attribution and the right of integrity. The existing right relating to false attribution of authorship is still recognised. While symbolically important, the limits placed upon when and how moral rights are used means that it is unlikely that the new regime will have much of an impact upon publishing practices in Australia.

The right of attribution provides that authors have an express right to be identified as author of the works that they create. With literary works, the right applies where the work is reproduced, published, performed, communicated to the public, or adapted. Any reasonable form of identification may be used to identify the author of a work, so long as the attribution is clear and reasonably prominent. Given the important role that the name of the author plays in shaping the way readers interact with books and articles (what Foucault referred to as the author-function (Foucault, 1979, 141) it is usually in the publishers' interests to acknowledge and promote the author. As such, it is unlikely that the right of attribution will have a significant impact on existing publishing practices.

Even if the potential did exist for the right of attribution to change publishing practices, this is ameliorated by the fact that there are a number of exceptions which greatly restrict the scope of the right. The key limitation is that authors are able to consent to their moral rights being infringed in the contracts they sign with publishers. That is, it is possible for authors to agree not to take legal action if their moral rights are infringed. In relation to literary works, it is not an infringement of moral rights to do, or omit to do, something, if the act or omission is within the written consent given by the author or by a person representing the author. Another limitation is that the right of attribution is not infringed if it is reasonable in the circumstances not to identify the author. The *Copyright Act* provides a list of factors that are to be taken into account when determining whether it was reasonable not to identify the author. These include the nature of the work, the purpose, manner and context in which the work is used, any industry practices or voluntary codes in place, any difficulty or

expense that has been incurred as a result of identifying the author, and whether the work was made in the course of the author's employment. The breadth of these factors suggests that there may be many circumstances where it will not be necessary to identify the author. To allow authors to consent to an infringement of their moral rights in advance subverts the underlying purpose and function of moral rights protection. Anecdotal evidence suggests that more and more publishing contracts being signed by Australian authors contain a moral rights consent clause (Wiseman, 2005).

The second moral right introduced into Australia in 2000 was the right of integrity. This gives authors the right not to have their works subjected to derogatory treatment. Derogatory treatment of a literary work means 'the doing of anything that results in the material distortion of, the mutilation of, or a material alteration to the work that is prejudicial to the author's honor or reputation'. It also means 'the doing of anything to the work that is prejudicial to the author's honor or reputation'. One situation where the right of integrity may impact on the publishing industry is where publishers tailor books for specific purposes (such as a university course). This is the practice whereby publishers combine parts of existing chapters and articles from different sources into a collection of readings. In some cases, parts of chapters and articles and even specific paragraphs are combined together. The collection of readings is then licensed to an institution at a rate agreed between the institution and the publisher. In these circumstances, publishers effectively provide a course pack service to academics and their institutions. Where the publisher owns copyright in the works that are cut-and-pasted into a collection of tailor-made readings, they do not need to consult with the authors. This is because if an author assigns copyright to a publisher, they lose the ability that copyright offers them to control the uses that are made of their works. In these circumstances, the right of integrity provides authors with some measure of control. The reason for this is that if an author can show that the way their work is used is derogatory (that is, if it is prejudicial to their honor or reputation), they may be able to prevent the publisher from using works in this manner. This may occur where part of a work is taken out of context in such a way that it changes its meaning or where a work is inappropriately placed alongside another work in a manner which is deemed to be derogatory, for example, where an article written by a Jewish author is placed in a collection of Neo-Nazi writings.

The potential that the right of integrity has to change publishing practices is limited by the fact that the right is not infringed if the derogatory treatment was 'necessary in the circumstances'. In deciding whether it was reasonable not to identify the author, a number of factors are taken into account. These include the nature of the work, the purpose, manner and context in which the work is used, any industry practices or voluntary codes in place, any difficulties or expenses that have been incurred as a result of identifying the author,

whether the work was made in the course of the author's employment, or where the treatment was required by law or otherwise to avoid a breach of law.

The breadth of these factors suggests that there may be many circumstances where a work may be subject to derogatory treatment and not infringe the right of integrity. The potential of the right of integrity to change publishing practices is further limited by the fact that, as with the right of attribution, it is possible for authors to consent to their right of integrity being infringed. While the granting of consents in publishing contracts is not yet widespread, there is evidence that the practice is growing. As commentators recently noted, 'the reality is that many publishers ... will be able to insist on limiting (if not entirely eliminating) the exercise of moral rights, through carefully drafted consent provisions. But in practice, it will generally be superior bargaining power and control over the fine print of contracts that can deliver the necessary consents, not threats or deception' (McKeough, Stewart and Griffith, 2004, 146). One publishing contract recently presented to an academic for an edited collection with a large publishing company contained the following consent provision:

'The editor acknowledges and agrees that the Publishers may in developing electronic or other editions of the works, whether for sale or for publicity purposes, need to carry out some or all of the activities listed below provided that the Publishers shall wherever practicable consult the Editor:

- Adaptation of the form or structure of the works to enhance its use;
- Publication of the work in whole or part in combination with other works;
- Maintenance of the works' accuracy by producing supplements and new editions;
- Preparing of abridgements and other adaptations of the work.

[T]he editor on written request from the publisher undertakes to waive his/her right to object to derogatory treatment of his /her work ... where such a waiver is an essential condition of the exercise of any of the rights granted to the publisher hereunder...' (Cavendish Publishing, 2004)

While moral rights hold out the promise of enhancing the interests of authors, the limitations on the exercise of moral rights are such that it is unlikely that they will have any notable impact upon authors' interests nor the publishing industry more generally.

## **[5] Conclusion**

The last few decades have seen a number of important changes in the way copyright regulates the publishing industry in Australia. When

thinking about the impact of these changes on the publishing industry, it is important to note that the legislative framework does not exist in a vacuum. Ultimately, the bearing that these recent legislative reforms will have on the publishing industry in Australia will depend on the way the law operates in practice, how the provisions are interpreted, and the way copyright owners and users respond to the new circumstances.<sup>6</sup> While it is too early to determine the full impact of these developments, early indications suggest that the amendments made under the *Digital Agenda Act* and the *US Free Trade Implementation Act* have placed copyright owners in a position whereby they are able to exercise more control over the way digital works are used than they were previously able to exercise over analogue works. The extension of duration also means that the publishers are now able to exercise longer protection over copyright works. While many of the recent changes have benefited publishers at the expense of readers, there have been some positive changes for users of copyright works. In particular, changes to the laws regulating parallel importation offered consumers some advantages albeit that these were limited to electronic books. While the new moral rights potentially provide authors and users with additional relief, they are unlikely to have much of an impact on the publishing industry in Australia. As authors are able to consent to their moral rights being infringed, this effectively neuters any impact that the moral rights regime may have. While moral rights are unlikely to have much of an impact, the combined effect of the *Digital Agenda* and *Free Trade Agreement* reforms (particularly the technological protective measures and the extension of term) and the growing use of on-line contracts are having a profound effect on the way copyright law regulates the publishing industry in Australia. In particular, they mark a fundamental change in the nature of copyright from being primarily a means of controlling copying, to a regime that also enables owners to control the ability of users to access copyright works (Hugenholtz, 2000, 77; Litman, 2001; Samuelson and Opsahl, 1999; Rifkin, 2000). This represents a significant transformation in the nature of the relationship between copyright owners and users, and thus the role that copyright law plays in regulating the publishing industry in Australia.

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<sup>6</sup> One development may be the possible introduction of database legislation. For a discussion of the database directive in Europe, see Bently L., and Sherman B., *Intellectual Property Law*, (Oxford 2001) 300-305.

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