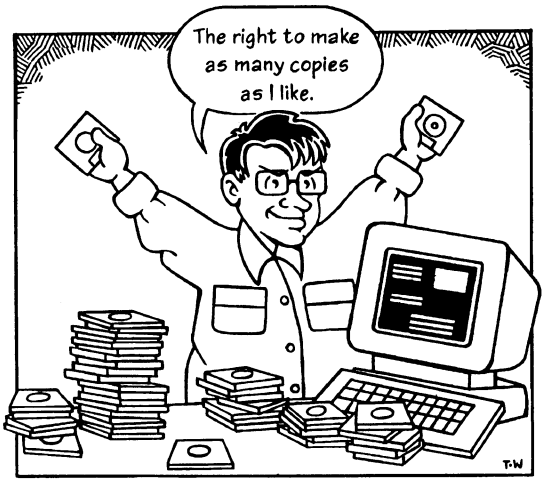
COPYRIGHT IN cyberspace

Melissa de Zwart

Is copyright dancing on its own grave and singing 'hallelujah'?



Copyright on the Internet !

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Ho hum, another article about how difficult it is to be a copyright lawyer in the age of the Internet. Hasn't everyone been saying for years that copyright is dead or at least that it is completely irrelevant to the regulation of the cyber environment manifested by the Internet? Most notably anyone who has been even remotely interested in the free speech campaigns that have been raging in the United States, which understandably regards itself as the 'Electronic Frontier', knows that in the new Wild West the old rules cannot, and therefore do not, apply. It has become trite for copyright lawyers to bemoan the impossibility of dealing with digital technologies in the light of traditional copyright concepts, yet there has been little action to redress this technological impairment. Are we letting the cyberians get away with too much? Should we just take our (digitally generated) bat and ball and go home?

Maybe it isn't necessary to give up hope just yet. A recent decision of the Federal Court of Australia, *Trumpet Software Pty Ltd v OzEmail Pty Ltd* (1996) 34 IPR 481, has sent a timely message to the cyber community that copyright is not dead. It is alive and well and flexing its muscles on the very frontier that pronounced its death, the Internet.

Trumpet Software Pty Ltd, an enterprising Tasmanian company, for some years produced and distributed as 'shareware' a computer software program called Trumpet Winsock. Trumpet Winsock is an extremely successful program, both in Australia and overseas, which enables the user to establish a connection to the Internet through an Internet Service Provider. The conditions upon which Trumpet Winsock were distributed provided that the user had a period of time, usually 30 days, to evaluate the program. After the expiration of that evaluation period the user was required to forward a registration fee to the owner. The registration fee is small, in the order of $20 to $30.

In 1995, OzEmail Pty Ltd, one of a number of Internet Service Providers which use programs such as Trumpet Winsock to interface between the user and the Internet protocol (TCP/IP), arranged for two diskettes to be distributed as a promotional give-away attached to the cover of the April issue of *Australian Personal Computer* magazine. The diskettes contained a version of the Trumpet Winsock software which had been downloaded from the University of Tasmania's FTP site, and which contained certain additions, alterations and deletions from the original Trumpet Winsock software. Approximately 60,000 copies of the magazine were distributed. A similar distribution took place in the August issue of *Australian PC World* magazine.

The promotion was undertaken to encourage users to connect to the Internet via OzEmail by providing five hours free access to the Internet. The distributions took place after OzEmail had been unable to negotiate successfully with Trumpet regarding the promotion.

The Trumpet Winsock software included in the promotional package had been modified in such a way that the user was connected immediately to the OzEmail network, a significant change from the original program which did not specify the use of any particular

Internet Service Provider. The README.MSG file, which directed the user's attention to the fact that the package was shareware, had been entirely omitted. The copyright notice and the disclaimer of liability had been deleted and a number of other modifications had been made by OzEmail. The court found that the effect of these exclusions and modifications (whether they were deliberate or inadvertent) altered the usual set up of the software program, leaving the user without any clear indication that Trumpet Winsock was shareware or that the user would be required to register with Trumpet after the expiration of the 30-day evaluation period.

Mr Justice Heerey found that OzEmail had infringed the copyright of Trumpet in the Trumpet Winsock program by distributing the Trumpet software via the magazine promotions because in undertaking the promotions, it did, or authorised the doing of, an act comprised in the copyright of that program pursuant to s.36(1) of the *Copyright Act 1968* (Cth) without, or alternatively in breach of, any licence from Trumpet.[1] In addition, Heerey J held that OzEmail's conduct was in contravention of ss. 52 and 53 of the *Trade Practices Act 1974* (Cth) as conduct that would 'mislead or deceive readers of the magazines into believing OzEmail had the permission, licence or authority of Trumpet to publish the software' and that the readers or users of the diskettes would be likely to be misled or deceived into believing that 'users of the software did not need to obtain a licence from Trumpet in order to use the software' (at 502).

The decision in itself is unremarkable, relying as it does upon traditional copyright concepts. What is important about the decision is that it sends a clear message to the computing industry that producers of software distributed via the Internet can and will rely upon copyright to enforce their rights. In other words, the decision confirms, contrary to the bold pronouncements that copyright has no place on the Internet, that copyright does operate effectively in a digital environment.[2]

Information wants to be free!

We are beginning to hear more and more in Australia that 'information wants to be free' and that any form of regulation of the Internet, be that through the enforcement of intellectual property laws, defamation or censorship, will weaken the value of the new digital medium. However, this simplifies the issue of how the Internet may be used and further, demonstrates a misunderstanding of the role that copyright may effectively play in encouraging creation and dissemination of new material. It also requires the universal acceptance of an ethos that the Internet is a brave new world where all participants will be equally enthusiastic about creating and sharing their creations via the digital medium, with a new understanding of what rewards may be expected as part of such a process.

The argument that copyright is dead is voiced particularly strongly in the United States by advocates of the 'blue ribbon' free speech on the Internet campaign. Advocates of this campaign, such as John Perry Barlow (a foundation member of the Electronic Frontiers Foundation and a lyricist for the Grateful Dead), assert that the enforcement of intellectual property rights in a digital environment cannot be justified on the traditional ground that it encourages creation and dissemination in return for fair reward, because traditional requirements of creation, that is, reduction to material form, no longer occur. Rather, Barlow considers that enforcement of copyright on the Internet will be used as a tool to limit freedom of speech. He argues that copyright has no relevance in an environment where expression is no longer reduced to material form and that any attempt to enforce copyright in such an environment will lead to a restriction upon the free flow of information. He stated in an influential article in *Wired* magazine that as 'it is now possible to convey ideas from one mind to another without ever making them physical, we are now claiming to own ideas themselves and not merely their expression'.[3]

Of course, this argument goes to the very heart of copyright theory, which makes a clear distinction between ideas, which are not protected, and the form in which those ideas are expressed, which is protected, provided that it satisfies certain criteria of authorship and originality.

It is important not to become too distracted by the strong emotive arguments which are voiced primarily to ensure that the Internet does not become subject to stringent monitoring and content regulation when considering the copyright implications of the new technology. It is therefore essential to have an understanding of the context in which these arguments are raised. Copyright legislation in various countries has sought to balance the need to encourage the creation and dissemination of works for the public benefit, on the one hand, with the private rights of the author in the work, on the other hand, through a system of ensuring a reward for the author. That reward, copyright protection, is limited in duration to a specified period of time, after which the work falls into the public domain. It is also limited in Australia by provisions allowing 'fair dealing' and in the United States by concepts of 'fair use'. Thus copyright is perceived to balance public good with private interests.[4] How this balance is achieved is a matter for the applicable legislation in the relevant jurisdiction.

In her comparative examination of the development of copyright laws, Gillian Davies noted that the United States has traditionally placed a higher emphasis on the role of copyright in fostering 'the growth of learning and culture for the public welfare. The grant of exclusive rights to authors for a limited time is seen to be a means to that end'.[5] In other words, the United States strongly favours the public interest over the natural rights of creators. This may illuminate the particularly strong arguments being advanced in the United States advocating the abolition, or at least the non-recognition, of copyright protection in respect of digital material.

The free speech campaign is specifically directed against the measures outlined in the *National Information Infrastructure White Paper* and other regulatory mechanisms such as the *Communications Decency Act 1996*, which seek to make provision for copyright protection of material transmitted by digital means and to impose strict controls over the type of information which is accessible over services such as the World Wide Web. In addition, there have been attempts (both successful and unsuccessful) to make network providers, such as CompuServe and Prodigy, responsible for the material which is made available via their service (and it appears inevitable that litigation on this issue will continue).

Clearly content control is a contentious issue when you are contemplating stringent regulation of a medium that has arisen in a largely unregulated and unplanned manner. Different users have over time developed their own philosophy regarding the purpose of the Internet and how it should be used. This philosophy will vary according to the nature of their primary usage — social, recreational, educational or commercial.

Internet regulation

The Internet as we know it today, is a development of Arpanet, a computer network created at the University of California in the late 1960s for the US Department of Defense, funded by the US Advanced Projects Research Agency. Its purpose was to ensure the stability of military communications in the event of loss of sections of the network, particularly in the event of nuclear attack. In 1983 the National Science Foundation took over the management of the system's 'backbone', that is, the system's hardware, and made access available to universities, research and development companies and government agencies, thereby creating an educational and research network. Access was granted to commercial users in the early 1990s. Thus the Internet was born and it has been growing out of control ever since.

Along with increased access to the Internet has come a demand for increased regulation as consumers begin to view the Internet as any other service provider. The difficulty with this perception is that no longer does any one organisation have the control or the responsibility for the supervision of the network.

The issue of regulating the content of Web sites has arisen recently in Australia over the availability of decisions of the Family Court on the Australasian Legal Information Institute (AustLII), an on-line service operated by the University of New South Wales and the University of Technology, Sydney for the purpose of providing free access to Australian legal materials to anyone who has access to the Internet. In May of this year, the *Sunday Telegraph* newspaper ran an article stating that 'intimate Family Court secrets of hundreds of Australians' were available 'at the touch of a button' on the Internet. Indeed, selected judgments of the Family Court were made available via the AustLII service, but this is a far cry from the sensationalist claim of the *Sunday Telegraph* which implied that juicy details of the family lives of ordinary Australians were being broadcast in glorious technicolour as an alternative to *Melrose Place*. The sensation led to the temporary suspension of the service pending further consideration of the issues raised in the article by the Attorney-General's Department. The service has now been resumed, carrying a clear statement that the cases are published primarily for use 'by persons engaged in professions and by students' and are published with the authority of the Family Court (as was always the case).

Censorship

The concern that copyright may be used as a form of censorship is understandable when that concern is considered in the historical context of the development of copyright laws. In England, the earliest form of copyright regulation, the system of Crown patents and licences to stationers, served the dual purpose of censorship and enforcement of the monopoly of the Stationers' Company. It was not until the Statute of Anne in 1709 that copyright was expressly recognised as a means of encouraging learning (and even this is questionable in terms of truly representing the motivations of the legislators). However, there has been a divergence of laws dealing with content regulation (defamation, obscenity etc.) and copyright since that time, a divergence which is clearly desirable in terms of fostering creation and dissemination if ideas. It would therefore be preferable to keep the debate regarding regulation of content and the debate regarding applicability of intellectual property to the Internet strictly separated to ensure that each issue is given full and appropriate consideration. The need for creators to get reward for their endeavours is of clear importance in the increasingly commercial domain of the Internet.

Shareware or freeware?

The decision in *Trumpet* is also important because it provides judicial pronouncements on concepts such as shareware and freeware. The use of this jargon is not new; it has been in familiar use across the computing community for several years. However, there has been little consensus regarding the meaning and legal effect of such terms, with the end result being that users interpret the terms to suit their preferred intention (or user philosophy). Understandably, they have been terms which lawyers treat with some trepidation.

One of the key issues in the case concerned what legal rights and obligations attached to 'shareware'. Heerey J described shareware as:

> a form of software marketing which gives the user an opportunity to evaluate the product; in other words, try before you buy. The owner of the software makes it available to users without charge for the purposes of evaluation. If users wish to acquire the software they must forward a registration fee to the owner. [at 485]

He conceded that the success of the shareware concept depended on the honesty of users in forwarding the registration fee, while noting that recent technological developments enable the inclusion of a 'timelock' which renders the program unusable after a given period of time unless registration is effected. Heerey J went on to state explicitly that 'shareware is to be distinguished from freeware, which means software supplied with no charge and no expectation of remuneration' (at 485).

The attitudes and statements of those involved in the case, which were discussed in the judgment, reveal the dissent and perhaps the misunderstanding among the computer community regarding what concepts such as shareware entail and the legal obligations that attach to certain products. Whether this is a genuine confusion or a wilful ignorance is a question which shall be left to one side. In his judgment, Heerey J noted the evidence given by members of the computer industry regarding whether shareware did, or did not, involve particular restrictions or obligations, but found that no legal 'custom' had been established. The evidence before the court provides a telling illustration of how concepts can be manipulated or interpreted to give weight to a particular point of view.

In his affidavit to the court, the OzEmail project manager stated that upon his consideration of the Trumpet Winsock licence provisions contained in the program he 'remained of the view that OzEmail was entitled to distribute Trumpet Winsock 2.0 in the manner intended' (at 487). Similarly, in correspondence with the solicitors acting for Trumpet, the solicitors acting for OzEmail stated that there was no need for OzEmail to have sought permission from Trumpet to distribute the software via the magazine promotions:

> The rationale behind shareware is that distribution of the software concerned is maximised by permitting third parties to distribute the software. If the proprietor of software wishes to control the distribution of it, then the software would not be released as shareware. [at 492]

Heerey J rejected this high-handed assertion which attempts to impose many of the misconceptions of the computer industry onto copyright law. He refused to accept the argument that because a program has been distributed as

shareware there came into effect a licence which could not be revoked at all and found that the licence could be and had been revoked by Trumpet, who was free to do so at any time. The distribution by OzEmail had been conducted not for the purposes of evaluation of the Trumpet Winsock product, either by OzEmail or other users, but with the intention of encouraging use of OzEmail's own products.

OzEmail was not alone in seeking to prove that shareware should be considered part of the public domain. Anecdotal evidence suggests that confusion abounds regarding how the licence comes into effect and who should be responsible for its registration, if anyone. In the article discussed above, John Perry Barlow argued that copyright rewards should not even be necessary any more to encourage creation. He proposes an alternative system, more akin to patronage, whereby through giving away a product (such as a software program) you can increase the popularity and hence the value of the product and develop repeat business and the ability to sell ancillary services (although he acknowledges that this argument has some problems with respect to shareware).

A creator of a program may choose to make his or her program freely available by posting it on the Internet or may decide, as Trumpet did, to allow people to use it by way of payment of a small licence fee, after having been given an opportunity to evaluate the product. This should be a marketing decision of the producer, made in the full knowledge of the protection mechanisms available and with the full knowledge that it relies on the honesty of users, who will not always oblige. If this mechanism is reduced by users (or the courts) to a free right of unlimited free access it is likely to result in less information being made available rather than more.

It is noteworthy in the light of this discussion regarding the interpretation and effect of copyright principles in this environment that Trumpet was reluctant to authorise distribution of Trumpet Winsock 2.0 (the then current version of the program) which did not contain a timelock. According to the judgment of Heerey J, the managing director of Trumpet:

> was concerned that the mode of distribution proposed by OzEmail could lead to many people using the software without paying Trumpet the registration fee. However, he believed Trumpet would be substantially protected against that misuse if the distributed version of the software was timelocked. [at 487]

Trumpet accordingly decided to consent to the distribution of the timelocked version by OzEmail, although this permission was withdrawn in the light of concerns by Trumpet about OzEmail's conduct during the negotiations.

What can be deduced from this concern was that Trumpet felt it was unwise to rely upon its rights in copyright alone, that copyright is somewhat of a blunt instrument in dealing with the issue of appropriation of software.

Trumpet's reluctance to rely solely on its legal rights can be understood again in the context of the debates that are raging in the US regarding regulation of the Internet. To quote Barlow again:

> Software piracy laws are so practically unenforceable and breaking them has become so socially acceptable that only a thin minority appears compelled, either by fear or conscience, to obey them.

He advocates a new community in which piracy and 'freebooting' are the norm and eventually in which no legal structure will apply. One cannot help but feel that this view of 'social acceptability', expressed often enough and loudly enough by the cyberians, may become a self-fulfilling prophecy if it is allowed to go unchallenged.

Copyright in traditional works

The problems that can arise where a culture is allowed to develop which considers that certain classes of works are not a proper subject of copyright protection and hence are freely available for use by anyone without the permission of the creator or payment of any remuneration to the creator, are clearly demonstrated by the widespread disregard for the rights of indigenous creators. A good example of this is found in another decision of the Federal Court, *Milpurrurru and others v Indofurn Pty Ltd and others* (1994) 30 IPR 209. In this case, the appropriators of the works of a number of Aboriginal artists were strongly criticised by the court for their failure to observe copyright.The infringement action was brought on behalf of eight Aboriginal artists in respect of reproduction of their artwork in carpets manufactured in Vietnam and imported into Australia. There was evidence that the designs were copied from publications of the Australian National Gallery and the Australian Information Service, including a catalogue and a calendar in which the artists' work appeared.

In what Mr Justice von Doussa described as 'an extraordinary tactical stance' the respondents refused to admit that the artists owned copyright in the relevant artworks until late in the second week of the trial (at 224). No justification for this stance was given, although it is typical of arguments raised in any case dealing with traditional artworks. Von Doussa J noted:

> Pirating of Aboriginal designs and paintings for commercial use without the consent of the artist or the traditional owners was common for a long time. The recognition of the sacred and religious significance of these paintings, and the restrictions which Aboriginal law and culture imposes on their reproduction is only now being understood by the white community. [at 216]

It is interesting to note that Barlow highlights the deficiencies of the copyright system in dealing with traditional forms of music, artwork and medicine, with its insistence on concepts of authorship which lead to denial of intellectual property rights protection to these products. He believes a similar treatment will be imposed on digital creations, stating that:

> soon most information will be generated collaboratively by the cyber-tribal hunter-gatherers of cyberspace. Our arrogant legal dismissal of the rights of 'primitives' will return to haunt us.

Alternatively, we could recognise that both are the proper subject matter for copyright protection.

As the decisions in *Trumpet* and *Milpurrurru* demonstrate in very different contexts, there is still a lack of perception in the community that copyright is an important property right that owners can and will enforce. The courts in both cases found the infringers had shown a lack of respect for the rights of the copyright owners and what they were trying to achieve by regulating access to their works. Whilst this comes as no revelation to people working in the copyright sphere, the lack of general public awareness of copyright issues has been of concern to creators for some time. As Trumpet's concern with developing a timelock demonstrates, creators are still concerned with protecting their intellectual endeavours and will employ any means available. However, often such devices act only as incentives to computer crackers to undermine the security devices. A more rigorous legal penalty is required.

In rejecting the need for the introduction of moral rights, the majority view in the 1988 'Report on Moral Rights' by

the Copyright Law Review Committee was that many of the problems perceived to arise from the lack of moral rights in Australia could be remedied by an increase in the understanding by both authors and the public of matters with which moral rights are concerned.[6] A similar reasoning could be applied to issues affecting Internet copyright.

Where to from here?

So we may ask in the light of recent Australian and US experience what is the future of copyright in cyberspace? We must first have a clear understanding of what the Internet is and what we, as a society, want it to do for us.

Barlow has painted a very exciting picture of the Information Age as lived through the Internet:

> all of the expressions once contained in books or film strips or newsletters will exist either as pure thought or something very much like thought: voltage conditions darting around the Net at the speed of light, in conditions that one might behold in effect, as glowing pixels or transmitted sounds, but never touch or claim to 'own' in the old sense of the word.

Lance Rose, another contributor to *Wired*, paints a less glamorous view of the Internet and hence a more optimistic view of the role of copyright. He notes that piracy on a mass scale is not new, highlighting the availability at markets and street stalls of 'bootleg' music, videos, software, T-shirts and watches. He stresses that:

> copyright succeeds at maintaining public markets for copyrighted products — markets where the owners can charge and receive a price for those products. It is irrelevant whether any given infringement goes unpunished — as long as it is kept outside the public marketplace.[7]

His view is that the rules of the marketplace should be allowed to operate and that copyright remains a valid and valuable right.

The Internet provides a very important, perhaps soon to be the most important, forum for the exchange of ideas. It is clear that a balance of philosophies is needed. Law cannot operate in a vacuum divorced from the developments taking place in the (virtually) real world. However, one should not be blinded by the wonder of the new technology and abandon all that has gone before. The Internet is a new medium for transmitting information but the content remains words, sounds, images. They just happen to be conveyed to us as noughts and ones. Copyright has adapted in the past; it will again. Copyright cannot be blamed for the attempts of regulators to rein in the uses (and excesses) of the Internet.

Of course, the fact that the infringement in *Trumpet* was a wholesale appropriation makes the case a straightforward one. Much greater difficulties are going to arise where the copying is only part of a digital work, particularly where that part has been manipulated in some way. Digital technologies do pose a particular challenge to copyright law in terms of detection and proof of copying of parts of works but these can be dealt with as they arise in accordance with existing principles.

There is no excuse for complacency on the issue of copyright's relevance to the Internet. It is not only a narrow legalistic concern. We cannot have an informed debate about the future use and regulation of cyberspace if many of the participants have only a limited grasp of intellectual property law. The information superhighway will be of little use if there is no traffic on it because the absence of traffic police, or copyright protection, has meant the dangers of travelling the Net are too great for copyright creators. We must be wary of being too willing to view cyberspace as a new world requiring different rules, when the ones we already have seem to work reasonably well.

References

1. Subsection 36(1) of the *Copyright Act* provides that copyright in a literary work (such as the Trumpet Winsock software) is infringed by a person who, not being the owner of the copyright in that work, does or authorises the doing of, in Australia, an act comprised in the copyright of that work, without the licence of the owner of the relevant copyright. Such 'acts' are defined in s.31, in relation to literary works, as reproduction, publication, performance of the work in public, broadcast, causing the work to be transmitted to subscribers to a diffusion service, making an adaptation of the work or doing any of the above acts in relation to an adaptation of the original work (other than adaptation).
2. See for example, the articles published in *Wired* magazine (and via its online counterpart, *Hotwired)* by Pamela Samuelson and John Perry Barlow canvassing the validity of old law in a new environment.
3. Barlow, John Perry, 'The Economy of Ideas', *Wired* 2.03 (http://www.hotwired.com/wired/2.03/ features/economy.ideas.html).
4. See Davies, Gillian, *Copyright and the Public Interest,* IIC Studies, Max Planck Institute, Munich
5. Davies, G., above, p.68.
6. Copyright Law Review Committee, 'Report on Moral Rights', January 1988, p.21.
7. Rose, Lance, 'The Emperor's Clothes Still Fit Just Fine or Copyright is Dead. Long Live Copyright', *Wired* 3.02 (http:///www.hotwired.com/wired/3.02/departments/rose.if.html).

Virtual law and crime
artwork by Julian Wong

Julian Wong is a Melbourne-based digital artist currently studying electronic design and interactive media at RMIT.

The following images and the work on the cover present a visual netscape based on internet references of virtual law and crime.

A micro-photo montage depicting the unhygienic intersection of data; where information becomes both viral and corruptible; virtual yet influential; where opposing theories, philosophies, social and political positions, extreme aspects of (sub) culture share a powerful communication outlet in an orgy of unbridled exhibitionism.