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Territorial copyright for books in Australia: a real-world analysis informed by the theory of impure public goods

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CONTENTS

1 INTRODUCTION

June 1999 was the dawn of a new era in the general public's attitude to copyright. Around the USA, a flood of low quality MP3 music files was flowing onto the computers of students along the high speed Internet connections of college campuses.

Napster had launched the digital age of music and, in fact, of all digital content. The access to music was unprecedented. It was Good. Clearly, it was breaching copyright laws but somehow this needed to be made 'ok'. Arguments soon appeared:

- the record companies unreasonably limit access to back catalogues and obscure material
- they package weak songs with the good ones on overpriced albums
- students can't afford to pay for music
- downloading will lead to increased CD sales anyway so artists will benefit
- the MP3s were only low quality etc.

The proponents of free music soon discovered that their rallying cry was already in place, first uttered by Stewart Brand at the inaugural Hackers Conference in California in 1984 – *information wants to be free*. Now it was not only ok to get free stuff but at the same time one could occupy the intellectual and moral high ground. Not only was 'free' desirable, it made society better off as well.

Like all ideas that spread and persist, this slogan contains a grain of truth. The theoretical well-spring of that grain of truth is to be found in the economic theory of public goods.

A public good is one which is both non-rivalrous and non-excludable. Non-rivalrous means that if one person consumes the public good, there is no less of it available for another to consume: a television broadcast is an example – if it tune in, it doesn't cause you to get a weaker signal. Non-excludable means that once the public good is made available to one consumer, it is not possible to exclude any other consumer from enjoying it, for example, national defence or a fireworks show. In economic theory, public goods are clearly delineated from private goods which are both non-rivalrous and excludable – once I have eaten that hamburger, there is none left for you and the guy behind the counter won't hand over the hamburger until he is pretty sure you are going to pay for it.

In the digital world, a catalogue of music can be shared at near zero cost and perfect copies can be endlessly made – economists say that the marginal cost of provision is zero. Critics of copyright argue that production or 'first copy' costs are sunk costs and should be disregarded because "one of the basic principles of welfare maximisation is that individuals should be permitted to consume a good whenever the benefits they would derive from consuming the good exceed the costs of permitting them to do so"[1]. In other words, since consumers are made better off by consuming music they like to listen to, society will be made better off if it is made available to as many consumers as possible at a cost that reflects its cost of provision, that is zero.

This is a simplistic statement of the nature and implications of public goods. Public goods that are *both* rivalrous and non-excludable are said to be *pure* public goods. A television broadcast, however, can be encoded and access controlled: this means that although it is still non-rivalrous, it is now excludable and is described as an *impure* public good. Further, the characteristics of non-excludability and rivalry are not absolute but rather can vary continuously. Impure public goods have characteristics and carry policy implications that differ from pure public goods. In addition, some economists suggest that perhaps the public goods framework is not the best way to think about copyright goods. These issues will be examined in Section 3.

One of the glaring problems with the idea that *information wants to be free* is that it is based on a static perspective. It implicitly dismisses the future, in particular, the responses of the creators of future copyright works and the benefits that society may enjoy from the flow of future works.

It is true that widely dispersing current works benefits society. This is obvious. But the 'zero marginal cost' argument is partial and misleading. Perhaps the proponents of copyright could regain some footing on the moral high ground by pointing out their opponents want 'free stuff' now even at the cost of imposing a more impoverished world of copyright works on future generations.

Finally, we do not live in the limited abstraction of economic theory. Economics is a thinking tool and, where the world meaningfully departs from its models (which is, it should be said, often), we should be prepared to disregard its formulaic prescriptions in favour of pragmatism or the pursuit of goals other than those accounted for in its fundamental assumptions. In Section 4, such considerations in relation to arrangements for territorial copyright in books in Australia are examined.

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[1] Yoo, Christopher S., "Copyright and Public Good Economics: A Misunderstood Relation" (2007). Faculty Scholarship. Paper 780. http://scholarship.law.upenn.edu/faculty_scholarship/780

2 COPYRIGHT, ECONOMICS AND PUBLIC GOODS

Proponents of more liberal copyright arrangements frequently use economic terms to argue their case. As one should probably expect, debate suffers from simplistic and opportunistic use of key economic concepts and jargon. This section will examine the use of the terms monopoly, exclusivity and property rights in copyright debate as a prelude to a discussion of the contributions of Christopher Yoo, of the University of Pennsylvania Law School, to the use of public goods theory in copyright debate.

2.1 Misusing 'monopoly'

One of the most important economic terms that is regularly misused in copyright debate is 'monopoly'. Critics of copyright arrangements argue that authors and publishers are granted a monopoly in the sale of their works by copyright law. The word carries baggage and negative connotations that are misleading in the context of copyright works.

The simplistic literal meaning of the word monopoly is 'a single seller'. And it is trivially true that the seller of a particular literary work has a monopoly in the sale of that particular work. But the more substantive economic definition of the term is: a single seller of a product or service for which there is no close substitute. Economists argue that substantive monopolies damage consumer interests because they are the only sellers of products that can't be had elsewhere, a situation which gives the monopolist the market power required to restrict supply, force price rises and extract 'monopoly rents' from consumers. If there is only one company selling petrol in a particular city, then that is something to worry about. If by way of contrast, if I decide to sell my home, it could be said I am a monopolist in the sense that I am the only seller of that particular product – there is no other home that is exactly like mine. But clearly, there are many other homes that have similar characteristics, that is, there are many close substitutes for my home in the marketplace for homes. Because of these many close substitutes, the monopoly I have in the sale of my home is a trivial one which confers no market power. It is the existence of market power that is the substantive issue not monopoly per se.

To use the term monopolist for an author and publisher who have the exclusive rights to sell a particular title is at best disingenuous and at worst misleading. Yes, each title is unique but there are many titles.

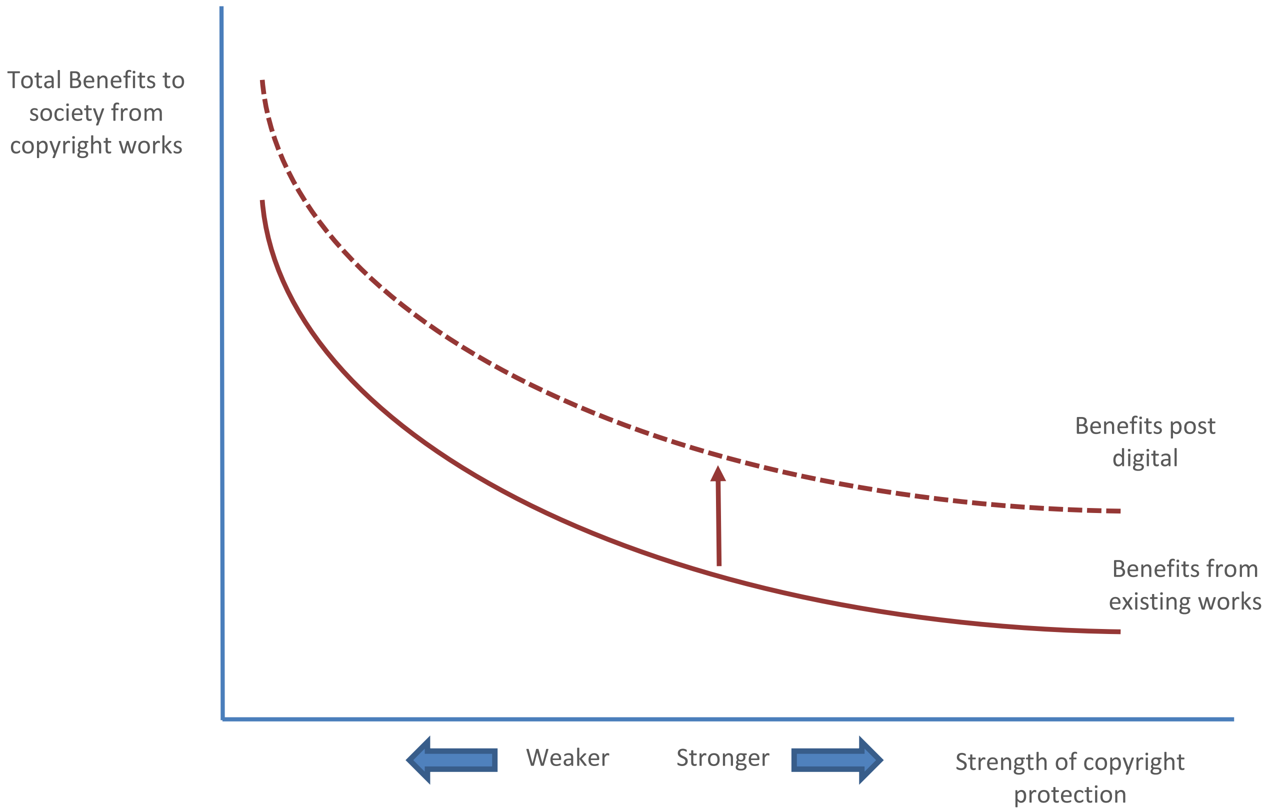
2.2 Copyright property

The exclusive right to sell a particular title is a necessary component of the definition of authors' property rights in their creations. The right needs to be explicitly 'exclusive' because of the inescapable characteristic of these products – that they are easily copied and sold by other parties. This granting of an exclusive right is, in effect, the same as the right the owner of a piece of real estate has to sell the property. The difference is, in the case of real estate, exclusivity is a fait accompli because of the physical nature of the property – it can be held by only one owner at a time there is no possibility of copying and selling.

It is the characteristics of intangibility and the zero or low costs of copying and distribution that makes the formation of copyright policy and the specification of exclusivity necessary if the owner of copyright works is to have control of their creations. This principle conflicts with the principle of widespread distribution of zero marginal cost products described above. Copyright policy is further complicated by the many important relationships between copyright works, culture, education, knowledge and innovation and therefore long term social welfare.

2.3 Using copyright to balance access and incentives

The high level objective of policy, including copyright policy, is generally to make society better off. As we have noted already, if an existing literary work can be copied and distributed at near zero cost, then why shouldn't it be made freely available to all who may enjoy or benefit from consuming it? Clearly, society will be made better off by making access to a particular literary work as cheap as possible. The more restrictive is copyright policy, the higher the price of literary works are likely to be and therefore fewer people will consume them and society will be commensurately worse off. The figure below illustrates this idea. The downward sloping 'benefit curve' shows that, as the strength of copyright protections increases, society is worse off as a whole because the price of copyright goods goes up and fewer people get access to copyrighted works. Note that authors and publishers will likely be better off under stronger copyright but this, of itself, is not the primary concern of policy which seeks the greatest good for the greatest number.



It's worth noting that, logically speaking, the near zero costs of copying and distribution in the post-digital world, is only a peripheral concern in the argument that weaker copyright protections will make society better off via higher levels of consumption of cheaper copyright works. The essential point is that without copyright protections copyrighted works are cheaper for consumers because copyright income is not generated and is therefore not paid to the creators. This is true whether the copyright goods are digital or not. The move to digitisation means that the benefit curve shifts upwards because it measures net benefits to society from consuming copyright works, and in the digital world the lower costs of distribution (at least for digital products) will mean lower prices and higher consumption levels but this effect is separate from the effects of changing copyright regimes.

In the digital world where the costs of distribution are zero and where payment to copyright creators can relatively easily be avoided, many consumers are strongly attracted to the idea that copyright content should be available 'for free'. It seems logical and consumers always want lower prices and zero is even better. The popular argument goes that, because distribution is free and the content is already available, all content should be free, including free of copyright payments. A host of other justifying arguments such as 'artists will produce the content anyway' or that artists can find other ways to earn money other than copyright (for example, musicians by live performance) are used to support the general proposition that 'copyright is dead' in the digital age.

2.4 The need for a dynamic analysis

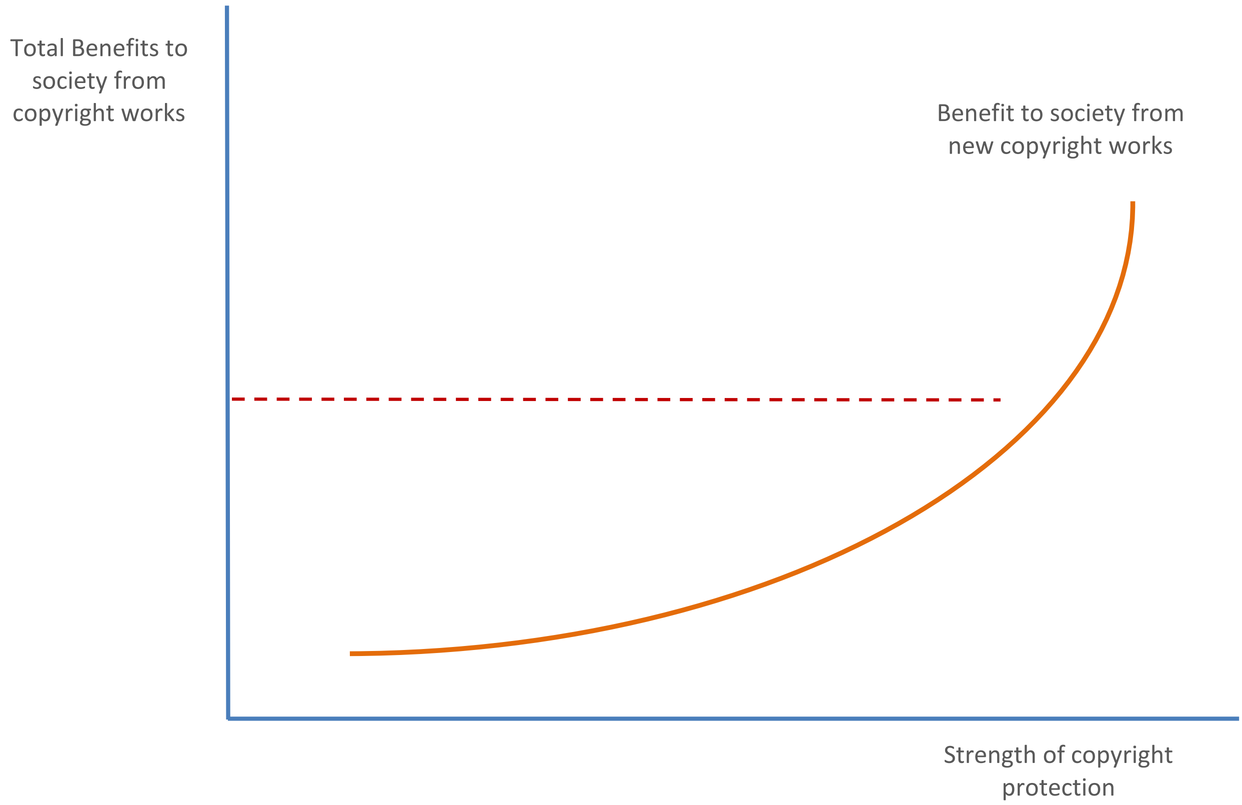
The argument that society is made best off by eliminating copyright protections is partial and incomplete. This kind of analysis is called 'static analysis'. Unlike dynamic analysis, static analysis takes no account of changes over time, it simply considers a snapshot of the world and investigates how policy and the current set of resource available to society can be reallocated to make society better off.

The point is, we need a dynamic analysis as well in order to maximise society's welfare over time. Better copyright protection will result in higher incomes for authors and publishers which will, in turn, induce them to produce more copyright works and society will benefit from a greater number of works as illustrated below by the green line. It is worth pointing out that, even the opponents of copyright acknowledge that the flow of new works is a concern but asserting that artists will 'do it for the love of it' is simply wishing the problem away.

Arguing that creators are not motivated by copyright returns is proposing the view that the relationship between the level of copyright protection and the flow of new creative works is shown by the red dotted line in the figure below – no matter what the copyright regime is, artists produce the same level of output.

Ultimately, the extent to which creators are motivated by financial returns is an empirical question. While it is no doubt true that some creators are indifferent to financial rewards, it is likewise doubtlessly the case that some creators (and publishers) are highly motivated by the prospect of such returns. In the uncertain world of copyright products, however, this does not mean that creators actually do get paid or, at least, get paid as much as they anticipate. Copyright creators who seek financial returns face very high risks but this does not mean that the *prospect* of returns is not a motivation. The risks faced by the purchasers of lottery tickets is probably higher than those faced by copyright creators but the demand for them, nonetheless, remains high.

As long as some nontrivial proportion of content creators is motivated by financial return, as the strength of copyright protection increases more creative works, in aggregate, will be drawn into the marketplace and so society will benefit from a greater quantity of new works that result from stronger copyright protection. The upward sloping line in the figure below illustrates this relationship.[2]



2.5 The optimum level of copyright protection

Thus, policymakers face a complex, empirically driven trade-off. If the only consideration was the stock of existing copyright works, then the solution would be clear: remove copyright protections and make works available as freely as possible. Society also benefits, however, from the flow of new copyright works. Weak copyright protections will lead to a reduced flow of new creative works. These competing social objectives suggest that social welfare will be maximised at some optimum level of copyright protection that balances the benefits to society from access to existing works with the benefits to society from future copyright works. Exactly what that level of copyright protection should be, is a highly complex empirical question. It is clear, however, that this optimum level of copyright protection is not zero.

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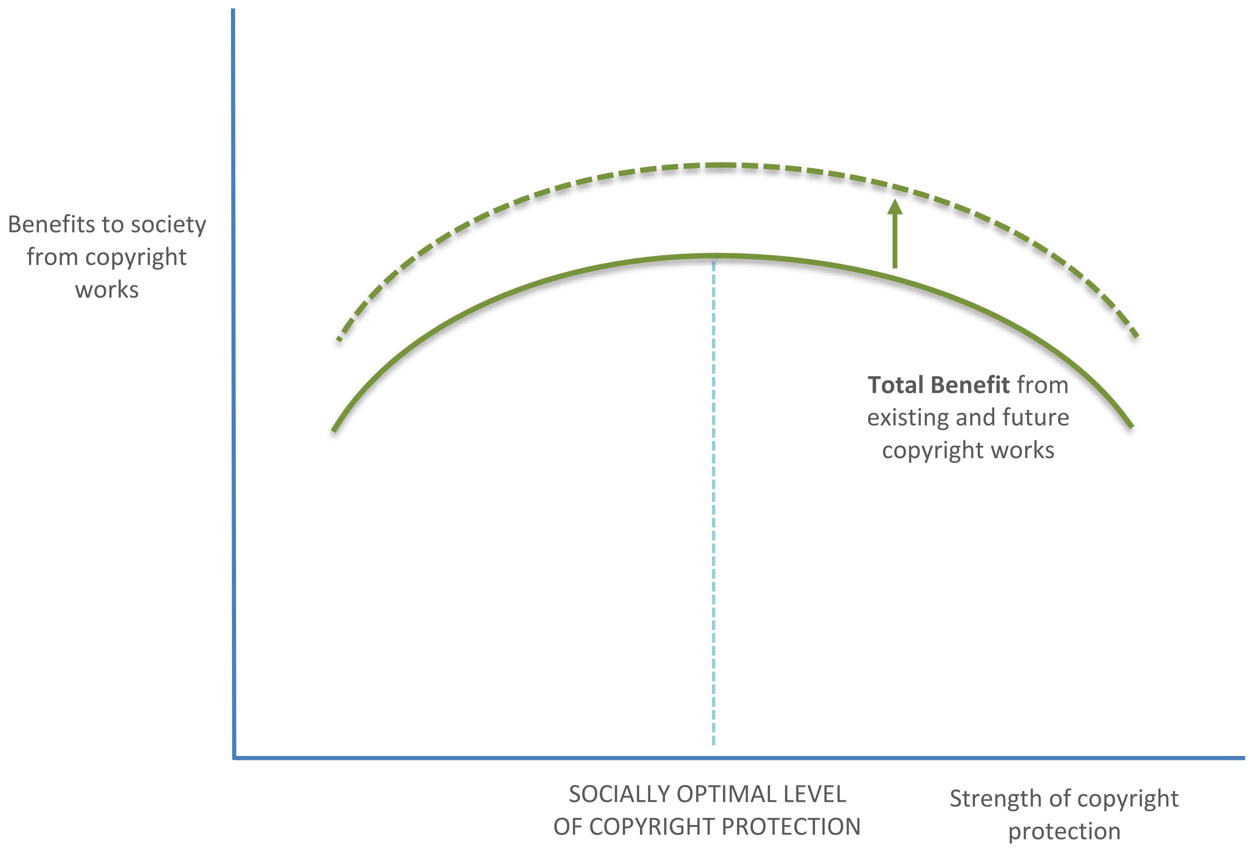
[2] In this illustration it would be necessary to think of all the future benefits from Copyright works being expressed at the present time using a Net Present Value framework.

This idea is illustrated in the figure below. Since the particular relationship between the benefit curve from existing works and the benefit curve for new works is empirically determined, the exact shape of the total benefit curve is not known. The objective of copyright policy is to determine the point at which the maximum benefits to society are achieved taking into account both the benefits of increasing access and the need to create incentives to encourage the flow of future works.

Changes in technology, such as the shift to digitisation (illustrated by shift of the total benefit curve to the dotted line), will have differing impacts on the benefits that society derives from existing and new works and the direction that the optimum level of copyright protection takes, either weaker, stronger or unchanged, is unknown but should be not presumed to be lower.

This set of idea summaries much of the nature of current copyright debate. The next section examines a more sophisticated approach that recognises that copyright has a number of dimensions.



To summarise:

- the term monopoly is often used in a misleading fashion in discussion about copyright and explicitly specifying exclusive property rights for copyright goods is a necessary condition for them to be transacted on commercial terms like physical property
- maximising benefits to society via copyright policy requires balancing the social benefits of maximising access to existing copyright works with the social benefits created by future new works that will be encouraged by the returns that copyright protections enable
- changes in technology, in particular, the digitisation of content may shift the optimum level of copyright protection either upwards or downwards depending on its relative impact on the benefit to society from existing and future works.

3 THE THEORY OF IMPURE PUBLIC GOODS AND COPYRIGHT

As described in the introduction, the idea that information wants to be free is based on a relatively simplistic interpretation of the theory of public goods. US economist and legal scholar, Christopher Yoo, has argued that the existing application of public good theory is misleading and has suggested a significant reinterpretation that is based on the work of two of the twentieth century's leading economists, Paul Samuelson and Joseph Stiglitz.

3.1 Private good and efficiency; public goods and market failure

Yoo's arguments are somewhat technical and it is useful to begin by emphasising how radically different are private goods and public goods in economic theory. In economic theory, well-functioning markets are regarded as socially desirable because they allocate goods and services efficiently. In a market, the interaction of supply and demand determines the market price. Individual consumers cannot influence the market price but they can express their relative preferences for the private goods they are buying by buying smaller or larger quantities. The total quantity demanded in the market will be the total of all the quantities demanded by all consumers in a particular period of time. Producers of the good compete with each other to supply this aggregate amount demanded by all consumers. Such a market has a number of efficiency characteristics that can be non-technically summarised as the right amounts of the right goods going to the right consumers which leads to the maximisation of social welfare.

In the case of a pure public good the situation is starkly different. Once the producer has provided the public good to one consumer, all consumers can consume the same amount (it is non-rivalrous) and all have access (it is non-excludable) – for example, the total amount of national defence provided by government is available to all citizens and no one can be excluded from consuming it. Although each consumer is likely to value these defence services differently and may want more or less to be supplied there is no way that their relative preferences can be observed because all consumers consume the same amount (equal to the total of what is produced) and have an incentive to understate what they would be prepared to pay for such services (to 'free ride' – pay nothing; or at least 'easy ride' – pay less than their true valuation). If the preparedness to pay of each citizen *could* be reliably observed, then a government could theoretically determine exactly what level of defence it would be socially optimal to provide. Because preferences can't be observed, market failure is likely and either governments must provide public goods or they are, where feasible, provided via twopart markets as is the case with television broadcasts funded through bundled advertising.

Economists are concerned that public goods will be undersupplied or not supplied at all if markets are left to themselves. Opponents of copyright who invoke public goods arguments with the 'information wants to be free slogan' claim that copyright goods will be undersupplied because the copyright-enforced price for these goods excludes some consumers who would benefit even though the cost of providing most consumers in the absence of copyright protection would be zero.

In contrast, Yoo, argues that the theory of *impure* public goods provides a more useful analysis for copyright goods and "in sharp contrast to pure public goods, markets for impure public goods do not exhibit a systematic tendency towards underproduction and underutilisation. On the contrary, impure public goods are susceptible to efficient market production under a wide range of circumstances"[3]

3.2 Private goods and copyright: from pure to impure

The literature on public goods describes impure public goods as those which do not have one of the characteristics of non-excludability or non-rivalry. In fact, these characteristics are not absolutes and may exist to varying degrees. An encrypted TV broadcast, for example, is excludable but non-rival. An empty road at 3:00 am is non-rivalrous but at 8:00 am, peak-hour drivers compete with each other for the now scarce road space. By 9:30 am the level of congestion has decreased and if more-or-less continuously variable from open road to gridlock.

Yoo, takes ideas from the theory of impure public goods using Paul Samuelson's original conception of non-rivalry[4] and combines these with theories from spatial competition described by Harold Hotelling and George Stiglitz[5]. He concludes that copyright goods are a class of impure public goods which can possess a range of characteristics such as quality, style and subject material which provide a means by which consumers can express their preferences and also enable authors and publishers to produce differentiated products and compete in markets for copyright goods.

Yoo, argues that producers of copyright works will differentiate their products, new producers will be attracted into the market to service particular niches, including

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3 Yoo, Christopher S., "Copyright and Public Good Economics: A Misunderstood Relation" (2007). Faculty Scholarship. Paper 780. http://scholarship.law.upenn.edu/faculty_scholarship/780, p. 715

4 "In the original Samuelsonian conception of nonrivalry, the central feature is not jointness in production, typically modeled by zero marginal cost, but rather jointness in consumption, which, as noted earlier, means that consumption by one person does not reduce the supply available for consumption by others. Stated somewhat more formally, nonrivalry allows the same quantity to serve as an argument in both Adam's and Beth's consumption functions." Ibid p. 647

5 ibid pp. 687-9

niches made up of consumers who would not get access to copyright goods according to conventional analysis, and that this process will create diversity and generate social welfare. Furthermore, there is no necessity that such markets will be systematically undersupplied and therefore will not necessarily be characterised by market failure. The positive social welfare characteristics of copyright protections and incentives are presented in this analysis as contrasting the conventional analysis that suggests that reducing copyright protections is necessary in order to increase social welfare by increasing access to copyright works.

> *Modeling copyright as an impure public good thus suggests an alternative approach to promoting access that differs starkly from the conventional approach. Rather than promoting access directly by limiting the level of copyright protection, the impure public goods approach promotes access indirectly by facilitating entry and allowing the ensuing increase in competition to drive price closer to marginal cost. In the process, it contradicts the conventional approach's presumption that any solution that allows authors to recover their firstcopy costs is bounded away from providing optimal levels of access to copyrighted works. Indeed, because price converges asymptotically to marginal cost as entry increases, the systematic bias toward underutilization simply disappears. In addition, the fact that entry will continue until all supracompetitive returns are dissipated undercuts any suggestion that increasing the total surplus encompassed by copyright will enhance authors' ability to earn supracompetitive returns.*[6]

These are important conclusions in thinking about copyright protections and social welfare, and indeed all forms of intellectual property and social welfare. Yoo, maintains that including the perspective from spatial competition enables an analysis that "avoids the tendency in the existing literature to represent all of the different aspects of copyright protection with a single variable and speak in general terms about the overall strength of copyright protection. Instead, it suggests that access would best be promoted of copyright protection were relatively strong along certain dimensions and relatively weak along others"[7] He continues:

> *the tension between access and incentives generally thought to underlie much of copyright policy disappears. Instead, the same policy instruments can promote both interests simultaneously. As a result, the justification for regarding copyright as a "necessary evil" collapses.*[8]

An example of such an approach might suggest that core protections such as duration of copyright be increased but that other conditions pertaining to some exceptions or 'derivative works' be loosened and that such a change might well promote increased social welfare.

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6 ibid p.695

7 ibid p. 695

8 ibid p.699

4 DIGITISATION, TERRITORY AND PARALLEL IMPORTING

A near-pervasive Internet makes distance more or less irrelevant for the distribution of content in digital form. In this environment, consumers are also much more aware of when new content is released anywhere in the world. This, in turn, creates demand for content to be available on a global basis, that is, without discrimination by particular jurisdictions or territories.

It needs to be emphasised at the outset, that parallel importing restrictions pertain to physical products, not digital ones. While it is true that digital books are of growing significance, their existence per se does not imply that current arrangements in relation to physical books necessarily require revision.

4.1 The purpose of restrictions on parallel importation and the benefits of local publishing

The objective of parallel importation restrictions (PIRs) is to make consumers of books better off by providing greater diversity of titles in general and a greater range of domestic publication, in particular, by domestic authors, than otherwise would be the case. It does this by enabling authors and publishers a temporary and limited window within which to earn returns on risky investments.

Proponents of the removal of PIRs argue they confer market power on Australian publishers and international publishers with a presence in Australia thereby artificially raising the price of books in Australia, disadvantaging Australian consumers.

There are significant weaknesses in this argument, in particular:

- That PIRs confer market power sufficient to enable publishers manipulate supply and price is simply an assertion that is, in fact, contradicted by the evidence – book prices in Australia have fallen significantly in real terms and are no higher than in jurisdictions that have abandoned PIRs. In addition, PIRs apply only to books sold in Australian book stores. Consumers are free to buy books online from anywhere in the world further limiting the market power of Australian publishers and the extent of price increases under PIRs.

- Consumer welfare is significantly determined by factors other than price, for example, quality and range of choice. It is also more than likely that the demand for such characteristics is significantly income elastic meaning that more of such characteristics will be demanded as real incomes increase. There are likely to be meaningful trade-offs between price reductions and reductions in other characteristics that consumers place value on in respect of changes in copyright protections including PIRs.

- In relation to the previous point, it is likely that the impact of the removal of PIRs would have significant impacts on important qualitative and quantitative dimensions of publishing in Australia, including: tailoring of content to the Australian market (especially education curricular), publication of Australian authors, the range of titles available in Australia, the quality of publications in Australia across a range of characteristics including quality of editorial inputs, the physical characteristics of books produced in Australia, et cetera. The negative impacts of the removal of PIRs have been clearly demonstrated in the case of New Zealand[9].

In terms of the analysis provided above, the removal of PIRs would represent a weakening of copyright protection with respect to a particular copyright product, in this case, books, which would be expected to lead to a decrease in the benefit to society from new works from Australian authors into the future. This decreasing benefit could be via any characteristic that impacts on consumer utility in the consumption of books, for example, the quality and range of choice variables discussed above that are likely to be negatively affected by the removal of PIRs.

Publishing is a business that is heavily dependent upon subjective judgements about markets and demand, the management of risk, local knowledge and relationships. Evidence, again especially from the New Zealand experience of the removal of territorial protections, indicates that the direct impact of maintaining PIRs is a greater presence of domestic publishing businesses and activity. This results in better transmission of consumer tastes and preferences into the publishing process resulting in better matching of consumer preferences and titles produced. It is Australian publishers or the Australian offices of international publishers that overwhelmingly are responsible for publishing Australian authors. Publishers need to be close to demand and close to supply in order to better match the two. A lower level of Australian publishing activity will mean fewer Australian authors are published.

The arguments presented in the previous section summarising Christopher Yoo's analysis indicate the importance of diversity, having multiple producers that attempt to supply many narrow niches in the publishing market.

4.2 Legislation is national

While from the perspective of a connected consumer, the idea of a single global licensing arrangement for copyright products seems like an obviously sensible idea, it

[9] Submission to the Productivity Commission Issues Paper: *Copyright restrictions on the parallel importation of books*, The Book Publishers Association of New Zealand, January 2009.

is, in fact, far from a simple proposition. Laws, including copyright laws are still organised on the basis of national jurisdictions notwithstanding various intellectual property agreements that are embedded within trade agreements. Whatever copyright regime exists, it needs to be defined and enforced on a national basis. Content creators, distributors, retailers and publishers all need to write contracts with each other in relation to the relevant national legislation. Within this context companies that operate across multiple countries will set price with reference to demand characteristics in those countries in such a way as to maximise long-term profits. In this they are no different from any other type of company.

The problem of politics and lawmaking operating at the national level cannot realistically be regarded by opponents of copyright as simply an annoying detail or something that can be easily dealt with. This reality can be illustrated, for example, by considering the effectiveness of environmental policy at the national and global levels. In the case of local and national environmental pollution, well-functioning governments have demonstrated over time that, through legislation and effective enforcement, local environmental problems can be overcome – previously smoggy air and polluted rivers have been cleaned up. In countries that are still developing or have less mature political and legal systems, local pollution remains a pressing problem. When the environmental problem is global not local, however, the lack of effective global political and lawmaking systems has, so far at least, forestalled effective solutions. The prospect of unified and effective transnational legislation on copyright is similarly remote.

4.3 National asymmetries in parallel importing legislation, characteristics of national markets and returns to domestic publishers

PIRs are common practice among Australia's international trading partners. The two main markets for Australian publications are the UK and the USA. Both of these countries maintain PIRs.

As a starting point it is critical to understand that the current PIRs in place in Australia coupled with industry led extensions to these requirements, mean that Australian publishers are already subject to a demanding set of requirements in relation to Australian book consumers. Under use-it-or-lose-it provisions in 1991 amendments to The Copyright Act, territorial protection for a given title is lost if a book is not published in Australia and made available for purchase within 30 days of its overseas publication. In 2012 the Australian Publishers Association and the Australian Booksellers Association entered into an industrywide agreement known as the Speed to Market Initiative. Publishers agreed to allow booksellers to import books and publisher is unable to dispatch an order within 14 days. [APA PC Submission).

From this perspective, PIRs are a very limited intervention. What then is the value of PIRs to Australian publishers? To appreciate the answer to this question it needs to be emphasised again that publishing is a highly risky activity. Publishers need to make choices about which writers to support, what titles to publish and about how much to invest in production and promotion of particular titles. In addition, in the publication of physical books, publishers must confront the difficult decision of print runs. Although digital printing technologies have made printing decisions and processes more flexible, it is still the case that per copy production costs fall rapidly as the size of print runs increase. Publishers must balance the fundamental economics of printing against the uncertainties inherent in introducing a new title into the marketplace.

As is in the case of the movie business, the few blockbusters help pay for the many also-rans. The profitability of publishing in general cannot be judged by observing only successful titles although these are obviously the most visible outputs of the industry. Far less visible are the many commercially marginal successes and also the many significant failures.

What PIRs do enable is publishers to generate higher returns from the relatively few successful titles. These returns are the only sustainable sources of investment in new titles. If Australian publishers were fully exposed to competition from imported books, overseas producers, observing sales trends in Australia, could swamp the market as successful titles reach their peak sales levels. *Without PIRs Australian publishers would be exposed to all the risks and failures but be unable to benefit from the successes.* This will obviously have the effect of compressing the returns to Australian publishers on their successful titles and, just as obviously, this will reduce overall returns to Australian publishers and, at the margin, given that profit levels are particularly high, some publishers, perhaps many, will exit the industry. This was precisely the experience in New Zealand following the abolition of PIRs there.

As argued earlier, a loss of Australian publishers and the Australian offices of international publishers will lead to a decrease in the publication of Australian writers.

Moreover, given that both the UK and the USA maintain their PIRs, Australian publishers and book producers will be excluded from accessing these key markets for Australian publications – they would face increased overseas competition in domestic markets without any increase in their ability to compete in overseas territories.

In addition to these factors, Australia's market for books is small compared to our main export markets and competitors, the USA and the UK. This heightens the risks inherent in publishing and reduces the absolute level of returns even from successful publications.

Some critics of PIRs have argued that they are a blunt instrument for encouraging the publication of more Australian authors and that the direct subsidy such as those applied to screen production in Australia are preferable. There are a number of counterarguments that can be put to this position:

- the absolute cost of book publishing is significantly lower than for film and television production and the costs of public allocation of subsidies is likely to be much higher relative to the cost of book publication than it is for screen production
- a substantially greater number of books are published than films or television productions made which would further increase the cost of public allocation of subsidies
- direct subsidisation entails non-market based allocation of funds and this introduces many possible distortions and suboptimal outcomes including poor matching of published works with consumer preferences
- government controlled funding implies the risk of government sanction of what is published in Australia which most Australians would regard as undesirable
- there is likely a misconception among proponents of a subsidy approach that the alternative to PIRs would a relatively small level of subsidy to writers in the ‘cultural space’. This view ignores the axiomatic fact that writers must be published to reach the public. What needs to be funded for this to happen is all of commercial activity from writing to development, editing, production and promotion. Further, the content that is Australian or ‘Australianised’ in the local publishing industry is much more extensive than just cultural works and encompasses school textbook, non-fiction, sport, history etc. The industry estimates this investment at around $260 million per annum.

5 CONCLUSIONS

Copyright policy faces a reduced level of public support largely as a result of the advent of the Internet and the digitisation of content. These have led to a fall in the costs of distribution of digital copyright works and a perception that society's welfare is best promoted by a reduction in copyright protection. This perception tends to discount long-term benefit of providing incentives to the creators of copyright works and publishers to create a flow of new works from which society will benefit in future.

The analyses provided above indicate that, at worst, copyright protections enable a trade-off between providing the greatest possible access to existing works and providing incentives to create new works. Christopher Yoo's analysis provides a more optimistic perspective on copyright protections, indicating that, at best, with the appropriate settings of various dimensions of copyright protection, it is possible to achieve market based outcomes that maximise both access and incentives.

> *Unlike private goods, impure public goods lacked an invisible hand that steers market outcomes towards optimality. Determining the best policy response dust depends upon careful analysis of the underlying empiric's and the possible institutional solutions. Even so, impure public goods equilibrium have the advantage of not being bounded away from efficient outcomes. Under an impure public goods approach, copyright policy is no longer an exercise in second best outcomes, but rather a more promising space in which near optimality may be a real possibility*[10]

The maintenance of territorial copyright protections then, can be seen as a policy intervention that enables returns to be made from risky investments in publishing. It is an institutional arrangement that increases diversity and provides for a higher level of domestic content than would otherwise be the case. A decrease in these returns will mean a lower level of investment which will almost certainly mean a decrease in the publication of Australian authors. Removal of these territorial protections would likely have the effect of transferring jobs in writing, publishing and printing from Australia to overseas with little demonstrated price benefits to Australian book consumers and large potential losses in terms of reduced choice and a decrease in the number of titles from Australian authors.

It is likely to be difficult to find a writer in Australia, especially a new writer, who would support the claim that getting published is easy. Removal of territorial protections will

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10 Yoo, Christopher S., "Copyright and Public Good Economics: A Misunderstood Relation" (2007). Faculty Scholarship. Paper 780. http://scholarship.law.upenn.edu/faculty_scholarship/780, p. 715

make getting published in Australia significantly harder. This is why Australian authors are opposed to the removal of PIRs.

The current case for the removal of PIRs relies on simplistic economic analysis and arguments and a more sophisticated analysis demonstrates that the case for appropriate copyright protections, especially those that encourage diversity and the entry of new producers, is strong. The arguments for removal of territorial protections for books is similarly based on a simplistic view of the business of publishing in Australia.

Such arguments represent the type of analysis that often leads to policy changes that have ultimately marginal impacts on the target variable (the price of books) and set in train unintended consequences that subsequently reveal a range of other considerations (quality, variety, choice, number of Australian publishers, number of Australian authors published, responsiveness to the needs of local consumers) which turn out to be more important than the original policy target and are negatively and significantly impacted by the policy change. Such changes, for example the exit of local publishers from the domestic market, are impossible or extremely difficult to undo.