

**Launch of “A Short History of Copyright: The Genie of Information”
by Benedict Atkinson and Brian Fitzgerald
2 April 2014**

About 25 years ago I was briefed on behalf of a gentleman known as Rodney Keft, who used the stage name “Rodney Rude”, to try to restrain Queensland police officers from infringing his copyright in his performance as a comedian at a venue at Noosa. The police were investigating him for obscenity and threatened to tape record his performance. From recollection Sir Joh Bjelke-Petersen was still the Premier.

I was rung by the solicitors early on a Sunday morning to appear later that day before the duty Judge to try to stop the infringing recording. Rodney had obtained a similar order to the one he sought here before a Western Australian Supreme Court judge not long before and my leader’s researches disclosed another relevant decision from the High Court of New Zealand in Auckland.

I must confess that the legal theory behind the application struck me as one more likely to have been sourced in A P Herbert’s fictional “Misleading Cases”. They were short stories based on logical but farcical extrapolations of the law to circumstances no sensible person would ever have envisaged. One example I remember from the television series that the books were turned into was of a cow presented with a cheque written into its hide in payment of a debt.

The attempt to expand the comedian’s copyright in his performance to prevent police from recording it when investigating whether he was committing an offence took that right of property a bit too far. We managed to obtain a temporary injunction for that evening’s performance in Noosa, but the logical edifice came tumbling down around my ears about a month afterwards when a more sceptical judge asked me in front of a large audience at the start of the hearing of applications on a normal court day: “Do you have any authority for this proposition Mr Douglas?”

I referred his Honour to the Western Australian and New Zealand decisions to be met with the following riposte:

“No, no - I mean binding authority!”

Laughter in court ensued... I challenge the older members of the audience to identify the judge!

Intriguingly, Mr Atkinson and Professor Fitzgerald in their work “A Short History of Copyright: The Genie of Information” are also sceptical about the extent of the proprietary right that should be accorded by the grant of copyright.

They ask: “To what is the owner entitled, and on what basis?” and say in reply that “These are the great unanswered questions of copyright law”.

In seeking to provide answers to their questions, they take us back well before the statute of Queen Anne in 1710 in the United Kingdom to concepts of property espoused by the philosophers of Greece and Rome. They cast their net very widely around the world historically and geographically but particularly focus on England,

the United States, France and to some extent Australia for the sources of their answers.

They speak of how Aristotelian ethics concentrated little on the existence of property and much more on the way in which citizens exercise proprietary rights and how Aristotle's views strongly influenced the social teaching of the Catholic Church.

They focus on the tension between one object of the law of copyright, the dissemination of information, and another, the provision of reward to the authors and also the publishers of the information.

They define three phases at least of the development of international copyright starting with the 150 years following the enactment of the Statute of Anne in 1710 where all legislatures acknowledged the author as a figure of social value, deserving of reward. The second phase they identify as having occurred from the middle to the late 19th century where internationalism permeated with the values of the authors' rights movement established the character of copyright law throughout the globe. They point out that in the 20th century the law regulated far more than the economic transactions of book publishers, extending its reach to govern music recording and the public performance of music by radio broadcasters. Then they argue that, after 1950, a new internationalism transformed international copyright law into an instrument favourable to the export needs of the entertainment, broadcasting and software industries of the United States.

In bringing the story up to the present they contrast the acceptance by politicians by the 1990s that ingenuity and labour created an entitlement to ownership, and that restriction of this entitlement also restricted liberty, with the manner in which those principles faltered in the face of the digital lawlessness made easy by the internet. This has led to the unauthorised mass copying of digital works and products and the simple electronic distribution of illicit copies. The struggle was between the copyright defenders who took the view that unauthorised copying or downloading was theft and the millions of otherwise law abiding citizens who appeared unconcerned that their activities breached copyright law.

The copyright owners – I quote - “felt beleaguered, and alarmed by the growing evidence that in cyberspace an ever-growing alliance of internet users rejected the legal parameters of the earthbound material world, repudiating monopolies and rules that in the 20th century allowed the industries to grow rich.”

They take us through the controversies associated with time shifting in the use of video recorders and copying by peer to peer file sharing, the valiant attempt to limit the extension of copyright terms in the United States in the case of *Eldred v Ashcroft*, argued partly by Professor Lawrence Lessig, and the Australian decision in *Roadshow Films Pty Ltd v iiNet Ltd* where our courts refused to make an internet service provider liable for the infringing activities of its customers. iiNet had no control over the BitTorrent system and was not responsible for its operation.

These developments have affected the industries protected by copyright enormously. The value of sales of recorded music fell by half in the nine years after 1999. The film industry appears not to have been affected so significantly by the high incidence

of illegal copying but the effects on the book publishing industry, including the development of e-publishing, have been profound.

The authors refer to some evidence that the global recorded music industry is now on the path to recovery fuelled by readily used licensed music services such as iTunes, rapid expansion into new markets internationally and a revival in popularity of concerts and festivals.

In contrast to the proprietary approach to the use of copyright, the authors also discuss the open access movement, including the creative commons licences that have become popular in facilitating the legal dissemination of works designed to allow information to be shared freely while not preventing the commercial exploitation of copyright material for commercial purposes.

In reaching their conclusion, they tie that approach back to their earlier philosophical discussion of the nature of proprietorial rights and argue that – I quote again - “if copyright regulation is adapted to offer users freedom, akin to expressive political freedoms guaranteed in rights of free speech, communication and access to information, it may yet endure by consent. Consent may grow, if regulators continue to discuss, for reform purposes, the length of copyright monopoly.”

The length of that monopoly, 70 years after the death of the author of a new work, is one of the main features that may, in my view, be validly criticised in modern copyright law. The creation of a monopoly that can exist for such a period, well after most works will have earned out any reward commensurate with the effort required to produce them, seriously inhibits the ability of great works to become part of the common human heritage.

Let me conclude by saying that although the title of the book is “A Short History of Copyright”, the word “short” is used in the sense that Pascal used it when writing a letter to a friend. He apologised for the length of the letter and said that he would have made it shorter but did not have the time to do so. These authors have taken the time to make a short work out of a large topic but one which displays all the signs of thoughtfulness, wide reading and the conscious refinement of large ideas into pithy and precise statements.

A similar approach to the virtues of brevity is attributed to Mark Twain. He was, as this book reveals, not only an author but a copyright lobbyist on behalf of authors. The better view appears to be that he did not actually infringe Pascal’s by then expired copyright in the saying. Rather he said “You will have to excuse my lengthiness - the reason I dread writing letters is because I am so apt to get to slinging wisdom and forget to let up. Plus much precious time is lost.” That advice about the loss of precious time is the signal to me to stop.

I am delighted to launch this book and I congratulate Mr Atkinson and Professor Fitzgerald. Their interesting, well written and topical work is on a subject of vital importance to today’s economy and society.