

Creative content and the failures of public IP policy.

Dr Terry Cutler, January 2005¹

In addressing the public policy issues around developments in open content licensing, and the issues surrounding intellectual property management more generally, I see three broad points that merit attention and reflection. In my view there has been:

1. A systemic failure in public policy across the whole domain of innovation, investment in creative capital, and intellectual property. *A symptom of this systemic failure has been...*
2. The abnegation of public policy leadership to non-government organizations and the private sector. *These points of failure have been compounded by....*
3. A failure by governments in their administration of public information and content assets.

These points of failure are inter-connected and mutually reinforcing. This brief paper addresses each in turn.

1. Systemic failures in public policy

The main point to be noted is that, for some strange reason, we isolate and quarantine the public policy discussion of copyright and intellectual property matters from the general frameworks of public administration which govern our approaches in other areas. We can identify three domains in which this “carve out” occurs.

First, we carve out intellectual property matters from the prevailing wisdoms about trade and markets. World wide public policy is shaped by the mantras of “free trade” and “free markets”. It is indeed ironic that the latest strengthening and extension of copyright protections has occurred under the guise of the bi-lateral Free Trade Agreement between Australia and the United States. This is ironic because I suspect that Adam Smith, the grandfather of modern economics, would roll in his grave at this reification of mercantilist trade regimes given that his whole purpose in writing *The Wealth of Nations* was to attack the regulated trades based on “letters patent” and charters for private monopoly. It was against this system that Adam Smith established economics as the science of market forces.

Second, and with admirable consistency, we carve out intellectual property matters from competition policy and competition law² The former Chairman of the Australian Competition and Consumer Commission, Alan Fels, occasionally drew attention to this anomaly and partially addressed some of the failings in the application of competition policy by examining the restrictions on parallel importing of books and software under the industry’s mercantilist schemes for assigning territorial markets. What we often forget, in adopting intellectual property regimes and conventions from other countries and in ratifying international treaties, is that many of these other jurisdictions have policy offsets which modify the effect of the regimes we import. The most notable instance is the absence of anti-trust provisions in Australian law, which provisions play a crucial role in the US and Europe in providing some constraints to the monopsonist exploitation of intellectual property protections. In Europe there is also a residual framework of legislative support for “open” industry standards and, in the pharmaceutical area, for generic drugs. Lobbying over

¹ This is an expanded version of a paper delivered at the Open Content Licensing Conference, Queensland University of Technology, 18 – 19 January 2005. Australian formats for Open Content Licences were launched at this conference.

² On the other hand, the principle of public sector **competitive neutrality** is frequently invoked to justify a lack of discrimination between proprietary and “open source” systems and markets.

pharmaceutical IP rights featured strongly in the negotiation of the Australian US Free Trade Agreement.

These first two areas of carve out which can be identified are quite subject specific. Lurking behind them is a more curious parochialism in intellectual property law, and a failure to apply in this area the intellectual rigour and contributions from other disciplines such as economics which inform comparable public policy debates in other domains. In these other domains – such as development economics, science and technology policy, social welfare, or the debates about social equity and distributive efficiency – we can observe a wide range of intellectual contributions to the shaping of policy frameworks and consequent law and regulation. This has been largely lacking in the domain of intellectual property policy, or essentially ignored when recently advanced on a few occasions.

Intellectual property law has traditionally centred on striking a balance between the interests of different parties: the owners of creative ideas and inventions, versus the interests of users and citizens. Now it strikes me that this striking of a balance between competing interests is a core function of the political process in all areas of human life. What I find puzzling is the “carve out” in the domain of intellectual property law of the approaches and thinking about social and community choices and the calculus of the public interest which underpins virtually every other area of civil polity.

I find it salutary to consider the elaboration of social choice theory³ by people like Amartya Sen and its application in development economics for which he received the Nobel Prize in 1998. In his studies of famine Sen found that famine is not caused by a lack of supply, but by a lack of capability to access supply giving rise to a systemic failure in the equitable distribution of benefits. Famously Sen noted that famines do not occur in democratically ordered communities. Sen then proceeds to define poverty as the “*unfreedom*” arising the “serious deprivation of certain basic capabilities”, often through expropriation.

Immediately the mind jumps to Laurence Lessig’s latest book, *Free Culture*. If food famines do not occur in democratic societies, why does intellectual and knowledge deprivation – unfreedoms and a lack of capability to access supply - occur in that class of sustenance we call knowledge and which is vital to feed the mind and creative spirit? That knowledge and creative famines can occur in a democratic society is, to my mind, a failure of the greatest magnitude.

Finally, the systemic public policy failure I have been exploring also includes market distortions resulting from deliberate policy priorities and choices. In recent times governments across all jurisdictions have focussed heavily on policy and funding incentives for public research institutions to commercialise research generated intellectual property. The performance of public research institutions and universities has been increasingly assessed against the narrow metrics of patent numbers and the number of spin out companies. This incentive structure, not surprisingly, creates a bias to the “lock up” and private appropriation of intellectual property. This is, however, at the expense of the counter-balancing public interest in the widespread diffusion of technology and intellectual property. Apart from the obvious distributional impacts on access to knowledge and know how capabilities, this policy imbalance threatens to produce unintended consequences at a national and macro-economic level. In a digital, networked era we know that the network effects of technology diffusion create significant and far ranging positive externalities within the economy (and the community). Hence in many small market economies like Australia the resulting innovation system does not support a virtuous cycle of sustainable growth. The point is that the consequences of this policy distortion, or imbalance, really matter.

³ One of the pioneers of social choice theory was Jeremy Bentham who founded the utilitarian school of economics around the social calculus of the maximising principle of “the greatest happiness for the greatest number”. Apart from his great treatise of 1789, *Introduction to the Principles of Morals and Legislation*, Bentham’s other obsession was the design of new model prisons and asylums – *panopticons* – based on ubiquitous surveillance. These have an uncanny resemblance to the principles behind contemporary digital rights management and give rise to speculation as to whether we are entering a lunatic asylum where our use of content is under ubiquitous surveillance and where the guardians and warders are corporate CEOs.

2. The abnegation of public policy leadership

A symptom of the systemic failure in public policy is the abnegation of policy leadership to non-government organizations and the private sector. Governments have relinquished moral leadership to public institutions like the BBC, private foundations like Creative Commons or the Wikimedia Foundation, and to commercial leadership from firms like IBM. That others have taken up leadership roles in this domain is reassuring, but ultimately no substitute for a sustainable public polity. “Opt out” schemes like Creative Commons and voluntary standards collectives like the World Wide Web Consortium (WWW⁴) provide palliative relief to onerous legislative regimes. I would argue, however, that these worthwhile endeavours are necessary but not sufficient responses to the technology challenges of the 21st century.

At a time when governments are addressing the strengthening of intellectual property protections, it is instructive to note a countervailing trend within the private sector and changes in the approach of high technology firms to the management of innovation. We are seeing the breakdown of older models of “closed innovation” as now fewer and fewer companies maintain closed, vertically integrated in-house R&D labs. Firms like IBM and Intel recognise that sources of useful knowledge for a firm spread across corporate and disciplinary boundaries. This has led to trends towards:

- The practice of extensive cross licensing across an industry which reduces the scope for individual firm rent seeking;
- The proactive recourse to pre-emptive publishing (to put IP into the public domain so as to promote industry standards) or the release of patents under an open licensing scheme; and
- The proliferation of industry standard setting forums.

Emerging “open innovation” models have been well described in an important recent book by Hank Chesbrough (2003) simply entitled *Open Innovation: The New Imperative for Creating and Profiting from Technology*.

The fact that non-government organizations and private firms are filling the leadership vacuum is not a sufficient alibi for continuing government inaction, the result of which could be increasing inconsistency and tension between private practice and prevailing law, leading to increased transaction and agency costs across the board.

3. Failure in Governments' administration of public content and IP assets.

As well as being the rule maker and regulator, government is a creator, collector, and commissioner of content and IP. In a small market environment like Australia, government usage and practice has a disproportionate impact on the structure and functioning of information markets and content industries.

A neglected aspect of copyright reform is the status of crown copyright, a species of copyright peculiar to the UK and its erstwhile colonies. I suspect that many of us forget that the US has always held that government content properly belongs in the public domain. The 1998 UK Green Paper on *Crown Copyright in an Information Age* is a good read. It canvasses the issues with clarity and with a refreshing lack of jargon and tortured English. It provides a good springboard for a review here in Australia. The UK review canvassed a wide range of reform options, for subsequent public consultation and feedback. It is noteworthy that consultation responses in the UK supported a major wind back of crown copyrights. In the end the government adopted a somewhat more cautious and evolutionary, not revolutionary, policy of wind back. Australia is yet to follow suit, but perhaps the new Open Content Licences might inspire one or other State Government and some enlightened

public institutions, including universities, to begin to put at least some categories of content into the domain of a creative commons.

Government's impact on this IP domain ranges more broadly than just its approach to the administration of Crown Copyright. Several other areas merit attention.

Public cultural institutions, from public broadcasting to museums, play an important if uncelebrated role in R&D and innovation. For example, institutions like the ABC have pioneered new broadcasting technologies, and the Australian Centre for the Moving Image has developed new international standards for multimedia metadata. The spillovers from such public sector activity can catalyse local industry development and know how if, and only if, these institutions do not attempt to commercialise such innovation within proprietary models.

A related issue is the potential role and importance of cultural institutions as natural open content repositories and access points. Putting the public collections held by cultural institutions within a creative commons would, within the Australian context, build scale and critical mass around open licensing models.

Finally, Government in Australia is responsible for the creation and operation of collection agencies to administer copyright and royalty schemes. These organizations are legislative monopolies, but function with little public accountability or administrative oversight. Active attention is needed to ensure that the rules and operations of these agencies do not create impediments to the voluntary participation of creative artists and organizations in open licensing schemes.

Creative feast or famine.

This paper has identified and teased out what, in my opinion, are some major failures in public policy and administration bearing on copyright and intellectual property regimes. This matters because not only are content industries important economic sectors in their own right, but their activities are increasingly important to the health and vitality of nation states in a knowledge economy. As citizens we protest when governments are slow to address shortages in food, water, basic health services or disaster relief. That knowledge or creative famines – including lack of access to such basic capabilities as digital literacy or access to storehouses of knowledge – can occur in a democratic society is a civic failure of the greatest magnitude.