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A Comparative Analysis of International Copyright Protection & Enforcement Mechanisms

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Ellenor Hayes

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ABSTRACT

The need for effective international enforcement of intellectual property rights is a key policy concern for nations both developed and developing. The importance of the global 'trade in ideas' has seen the creation of several international instruments developed to protect and promote intellectual property between national jurisdictions. This dissertation will comparatively consider various mechanisms and models of international relations to the extent that they relate to the enforcement of copyright. The paper will first consider the need for effective international copyright laws and the unique challenges posed to any such framework in contemporary society. Then, by considering the existing national framework, multilateral conventions, regional mechanisms and bilateral agreements, will highlight the need for Australia's international trade negotiators to develop and conform to a comprehensive and considered policy for the accrual of future international intellectual property obligations.

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I INTRODUCTION

A *History of Copyright*

1 *Conceptual development*

The origins and early developments of copyright protection provide an interesting context through which to consider its underlying goals and objectives. There have been varying accounts of its history expounded by various distinguished authors and legal minds. Unsurprisingly there are inconsistencies between such accounts, especially regarding the earliest notions of authorship and ownership of artistic works. Nonetheless, several key features may be identified in framing the current discussion.

To a certain degree an exposition of the origins of copyright requires consideration of the development of literature, and indeed language, itself. Streibich asserts that the notion of intellectual property 'began when the first man made the first symbol that someone else could read – the creation of writing.'[1]

Early Western conceptions of authorship and ownership are most clearly articulated in the laws and literature of the Greco-Roman era. It was during this time that the notion of plagiarism (central to our modern law of copyright) was developed as, if not a legal, than a moral wrong.[2]

Arguably the notion of moral ownership of intellectual property was carried forth into the age of Christianity and is encapsulated succinctly within the Commandment proscribed under both the Jewish and Christian faith: 'Thou shall not steal.' Interestingly, despite this it is widely acknowledged that artistic work generated in Europe during the early to mid Middle Ages was often created under the auspices of the Roman Catholic Church, which became the de facto owner of all such works.[3] In this sense artists were considered mere craftsman, with no more claim to recognition for their work than a blacksmith or other

[1] Harold Streibich, 'The Moral Right to Ownership of Intellectual Property: Part 1 – From the Beginning to the Age of Printing' (1976) 6 *Memphis State University Law Review* 1, 35.
[2] A correspondence between Martial and Fidentinus highlights the importance of recognition in enabling the fair use of another's work – '*It is said, Fidentinus, that in reciting my verses you always speak of them as your own. If you are willing to credit them to me, I will send them to you gratis. If, however, you wish to have them called your verses, you had better buy them, when they will no longer belong to me.*' Martial, *Epigrams,* Book I, No. 30, cited and translated in Streibich, ibid ff 34.
[3] Ibid 24-4.

producer of utilitarian objects. It has been asserted that Michelangelo was one of the first artists to assert rights of paternity, integrity and disclosure over his works.[4] Despite the fact that his ability to do so flowed from the force of his reputation (rather than the law) it has been recognised that this 'nonetheless served as the source for legal recognition of artists' rights in later years.'[5]

2 *The Printing Press*

The most important development impacting upon the law of copyright came with the invention of the printing press in the 1450's. This technological development allowed for the reproduction of written works on an unprecedented scale and thereby 'provided the first realistic opportunity for authors to realise the potential economic benefits of their work.'[6]

This economic realisation was not the only objective of state intervention on the uncontrolled printing of books and pamphlets. Once the provenance of a small elite minority, the printing press enabled mass production and distribution of the written word – recognised from the outset as a vessel for the dissemination of ideas both favourable and dangerous to the interests of the State. As a result the printing industry was controlled by royal grants of privileges and patents, with these prerogatives essentially exercised negatively to impose a system of censorship. This legal development, while bearing great 'resemblances to the later legal institution of copyright … did not stand on any notion of original composition.'[7]

Furthermore it was not individual authors who benefited economically from state intervention and early forms of copyright. Highlighting the underlying commercial interests which have shaped modern intellectual property law, it was booksellers and stationers who were extended the first royal prerogatives – 'Right of copy was the stationer's not the author's.'[8]

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[4] Dan Rosen, 'Artists' Moral Rights: A European Evolution, An American Revolution', (1983) 2 *Cardozo Arts & Entertainment Law Journal* 155, 170-3.
[5] Ibid 171.
[6] Emmett J in *EMI Songs Australia Pty Limited v Larrikin Music Publishing Pty Limited* [2011] FCAFC 47, [34].
[7] Benjamin Kaplan, *An Unhurried View of Copyright* (Columbia University Press, 1967) 2-7.
[8] Ibid.

The Statute of Anne[9] is said to be the first statutory expression of copyright. The right granted was also framed as a privilege, granted by the Crown for the benefit of authors and publishers to prevent unauthorised reproduction of printed books. Nonetheless, the Statute is remarkable in that it contains the first clear recognition of the author's interest in his or her work. In this earliest expression of modern copyright we see a clear policy objective balancing the commercial interests it sought to protect 'for the encouragement of learned men to compose and write useful books'.[10]

3 *Changing Philosophical & Cultural Understandings*

There is some discussion as to the role of the philosophers and writers of the Enlightenment in highlighting the inalienable link between an author and his work: for example, the Lockeian notion of property creation through the application of individual labour,[11] and later the work of Kant, and then Hegel, who augmented this notion specifically in relation to intellectual property to assert that in the process of creation the will of the author is infused unassailably into the work.[12]

This focus upon authors' rights highlights a distinction that may be drawn between development of copyright in the British context and that which occurred in the civil law jurisdictions of continental Europe – in particular the French recognition of *droit d'ateur*.[13] It is said that this civil law model was born out of and remains far more connected to the natural rights of authors. It aims to not only secure the economic interests of the author but also to recognise his or her moral right to control the subsequent use and reinterpretation of the original work. It has been suggested that this purer connection to human or natural rights elevates the status of copyright beyond that which may be limited politically or legally by the State.[14] Furthermore it may be said that the natural rights approach is logically more consistent with international copyright protection – 'Natural rights, by their nature, are not bound by national borders; they

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[9] *Statute of Anne 1710*, 8 Ann, c 19.
[10] Ibid.
[11] Karen Vaughn, 'John Locke and the Labor Theory of Value', (1978) *Journal of Libertarian Studies* 2 (4), 311, 311.
[12] Daniel Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (2005) 9 *Marquette Intellectual Property Law Review* 1, 5 (ff 13).
[13] Jane Ginsburg, 'The Concept of Authorship in Comparative Copyright Law' (2003) 52 *DePaul Law Review* 1063.
[14] Gervais, above n 12, 5.

adhere to every living person.'[15] Following this, it is unsurprising that the civil law jurisdictions of continental Europe were more amenable to the introduction of international copyright protections and were the first to extend such protections to authors creating and distributing their works in foreign jurisdictions.[16]

4 *The Development of an International Framework*

The above demonstrates the various cultural and historical understandings of authorship and ownership which influenced the early development of copyright. Swift and pervasive development of printing and industrialisation, coupled with the strong trade relationships which developed across Europe during the Renaissance and the Enlightenment, meant that intellectual property protection was a comparatively early example of international legal cooperation.

Interestingly, historical accounts attribute some of the agitation for an international framework for copyright protection to individual authors. One example is Charles Dickens, whose published works enjoyed international acclaim during his own lifetime. In light of the blatant copying of his works in the United States, Dickens publicly advocated for the adoption of international copyright laws declaring himself the 'greatest loser by the existing [copyright] law alive.'[17]

The establishment of an international regime for the protection of intellectual property rights dates back to the late 19th century. Within a relatively short time frame several key instruments were concluded to ensure foreign recognition and protection of intellectual property rights.[18] The development of this international framework was motivated by the realisation that, in light of the already extensive cultural and economic international exchange taking place at that time,[19] national protections would not be sufficient to protect the significant economic interests at stake.

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[15] Peter Burger, 'The Berne Conventions: Its History and its Key Role in the Future' (1988) 3 *Journal of Law & Technology* 1, 7.

[16] For example the *French Decree of 1852* extended the principle of national treatment to foreign authors even in the absence of any effective reciprocity with other States – Ibid, 9-10.

[17] Sidney Moss, *Charles Dickens' quarrel with America* (Whitson, 1984) 1.

[18] *Paris Convention for the Protection of Industrial Property (1883)*; *Berne Convention for the Protection of Literary and Artistic Works (1886)*; *Madrid Agreement on the Repression of False or Deceptive Indications of Source on Goods (1891).*

[19] It has been suggested that the Great Exhibition held in London in 1851 was a central impetus for the development of international legal mechanisms to prevent copying and underselling – See Clare Pettitt

Indeed, it is well documented that a great deal of unauthorised copying of literary, musical and artistic works occurred during the nineteenth century.[20] The greatest detriment of such behaviour was caused to countries with high levels of literary and artistic output, especially were there was close geographical proximity or a shared common language between states. On account of this it is no surprise that the genesis of international copyright law was in Europe, where cultural and literary works were easily transferred (often illegitimately) across jurisdictions. In response to the rampant international piracy of works in Europe a vast web of bilateral agreements were negotiated between states[21] to gain mutual recognition for the copyright of nationals. Ricketson and Ginsburg note that the 'prevention of this international piracy was the principle reason for the gradual development of international copyright relations during the nineteenth century.'[22]

5 *The Beginning of Multilateralism*

In September 1858 the Congress of Authors and Artists held its first meeting in Brussels. Over three meetings delegates from various States,[23] including representatives from a diverse array of interests and industries,[24] drafted five resolutions which would go on to form the basis of the Berne Convention.[25] Subsequently an International Association founded by prolific French writer Victor Hugo – *L'Association Litteraire et Artistique*

'Dark Exhibition: The Crystal Palace, Bleak House and Intellectual Property' in James Buzard (ed) *Victorian Prism: Refractions of the Crystal Palace* (University of Virginia Press, 2007) 250.

[20] W Briggs, *The Law of International Copyright* (Stevens & Haynes, 1906) Ch II.

[21] Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Right: The Berne Convention and Beyond* (Oxford University Press, 2nd ed, 2006) vol 1, 40.

[22] Ibid, 20.

[23] The composition of the Congress was notably transatlantic. The nations represented were Belgium, Canada, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Portugal, Russia, Spain, Sweden, Norway, Switzerland, and the United States - Stephen Ladas, *The international protection of literary and artistic property* (Macmillan, 1938) 72.

[24] 62 authors, 54 delegates of literary societies, 40 members of political assemblies, 29 lawyers, 29 librarians and printers, 24 artists, 21 economists and 16 journalists - E. Rothlisberger, *Die Berner übereinkunft zum schutze von werken der literatur und kunst und die zusatzabkommen* (1909) 3, cited in Burger, above n 15, ff 58.

[25] The resolutions were: (1) That the principle of international recognition of copyright in favor of authors must be made part of the legislation of all civilized countries; (2) This principle must be admitted regardless of reciprocity; (3) The assimilation of foreign to national authors must be absolute and complete; (4) Foreign authors should not be required to comply with any particular formalities for the recognition and protection of their rights, provided they have complied with the formalities required in the country where publication first took place; (5) It is desirable that all countries adopt uniform legislation for the protection of literary and artistic works - Ladas, above n 23.

Internationale (ALAI) – was formed in 1878 to adopt these basic resolutions and elevated the political influence of authors in the development of international copyright protections. However, in recognition of the fact that the only way to achieve international copyright protection would be to form a treaty based Union, at the invitation of the Swiss Government, eleven countries met in Berne in 1884 to negotiate an eighteen article draft treaty which was eventually signed by ten countries and ratified by nine – the Berne Union – in 1887.

From this modest original membership the *Berne Convention for the Protection of Literary and Artistic Works*[26] (Berne Convention) has become the most influential international agreement on intellectual property rights and indeed one of the most enduring international treaties in existence. There are now 165 contracting parties to the treaty – encompassing the vast majority of developed and developing countries.[27] The Berne Convention and other multilateral agreements are discussed in Chapter II.

The above discussion has outlined the conceptual development of copyright and its integration into the international legal order. While various cultural understandings have impacted upon the law of copyright, we may conclude that its protection is largely underpinned by economic imperatives and is inseparably linked to international trade relations.

B *Copyright Today*

Copyright is an innately international legal concept – 'texts, sounds and images, like birds, fly over borders with complete disregard of national laws and dictates.'[28] This was true in the 19th century and has only been amplified by modern developments in communication technologies and global trade relations. These have clearly presented unprecedented challenges but have also strengthened the importance of a balanced and effective international approach to the enforcement of intellectual property rights.

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[26] *The Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1161 UNTS 30 (entered into force 5 December 1887).
[27] *Berne Convention – Contracting Parties*, World Intellectual Property Organisation <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15> (As at 5 July 2012).
[28] Sam Ricketson, Megan Richardson and Mark Davison, *Intellectual Property: Cases, Materials and Commentary* (LexisNexis Butterworths, 4th ed, 2009) 494.

1 *Economic Importance*

The 'economics of intellectual property' is underpinned by the growth of a global knowledge based economy. While not new, the role of knowledge and information in both domestic and international economic activity has taken on greater importance as technological innovation has proliferated during the late 20th and early 21st centuries.

In an Australian context it is estimated that intellectual property is worth approximately $170 billion.[29] In recent decades there has been a shift away from our traditional resource and agricultural industries towards more intellectual property reliant sectors such as banking and finance, retail and telecommunications.[30] Despite the fact that we remain a net importer of intellectual property, it has been asserted that Australia is among the most innovative economies in the world.[31]

The explanatory memorandum to the recent *Intellectual Property Laws Amendment (Raising the Bar) Bill 2011* highlights the current government perspective in the importance of intellectual property protection:

> One of the keystones of an innovative economy is its intellectual property regime … a strong and well regulated IP regime encourages the flow of innovation, technology and knowledge into the country by giving importers confidence that their technology will be protected from copying. This gives Australians access to new technology and helps Australian businesses which rely on foreign technology to remain competitive.[32]

From this it is clear that intellectual property protection, of which copyright is a major component, is high on the public agenda and central to Australia's economic prosperity in the global information economy.

2 *Technological advancements*

For all the emphasis placed upon strong intellectual property protection in a global digital world, it is impossible to ignore the immense challenges posed by the very technological

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[29] Australian Bureau of Statistics National Accounts for 2009-2010 cited in Department of Foreign Affairs and Trade (Cth), *Intellectual Property and International Trade* <http://www.dfat.gov.au/ip/>.
[30] Tim Wilson, *Intellectual Property and the Australian Economy*, Institute of Public Affairs, 12 June 2008, 5.
[31] Joshua Gans and Richard Hayes, Assessing Australia's Innovative Capacity: 2009 Update, Melbourne Business School and Intellectual Property Research Institute of Australia (2010) 15.
[32] Explanatory Memorandum, *Intellectual Property Laws Amendment (Raising the Bar) Bill 2011* (Cth) 12.

developments which have enabled this information economy. The most significant of these is of course the internet. The proliferation of information accessible through global networked communication systems has led some to proclaim the 'death of copyright'.[33] In assessing this outlook Gervais employs an apt analogy – 'Dematerialisation has made copyright, which was designed to protect the bottle and not the wine, irrelevant, for in the digital era the bottle has disappeared.'[34]

One does not have to look too hard to see that content providers have largely failed to prevent the illegal distribution of copyright material online. Peer-to-peer networking, file sharing and streaming remain rampant and well used. As identified by Egan, it has become 'the prevailing public view that if the files or information are available via the Internet, you are free to deal with them with no regard for the consequences of the owner's rights'.[35] Where litigation has occurred[36] any effect in strengthening enforcement has been immediately undermined by the development of new means of accessing protected content online. This reality has been further illustrated in the Australian context by the recent High Court decision in *Roadshow Films Pty Ltd v iiNet Ltd*[37] where it was held that the internet service provider was not guilty of 'authorising' the breach of film company's copyrights when iiNet customers used the internet and torrent software to illigitimately download films.

Social attitudes to copyright infringement play a significant role in the perpetuation of such behaviours – a fact recognised even before the advent of the internet: 'Copyright infringement … is something like speeding. It's considered by many to be quite all right as long as you don't get caught.'[38]

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[33] John Barlow, *The Economy of Ideas: A Framework for Patents and Copyrights in the Digital Age (Everything You Know about Intellectual Property is Wrong)* (March 1994) *Wired 2.03* <http://www.wired.com/wired/archive/2.03/economy.ideas.html>

[34] Daniel Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (2005) 9 *Marquette Intellectual Property Law Review* 1, 1.

[35] Lisa Egan, 'Are international copyright laws keeping up with the Internet?' (2005) 62 *Journal of the Intellectual Property Society of Australia and NZ* 34, 34.

[36] See for example the famous Napster litigation *A&M Records Inc. v Napster Inc*. 239 F.3d 1004 (9th Cir. 2001) and discussion of findings and implication in Michael Elkin and Alexandra Khlyavich, 'Napster Near and Far: Will the Ninth Circuit's Ruling Affect Secondary Infringement in the Outer Reaches of Cyberspace?' (2002) 27 *Brooklyn Journal of International Law* 381.

[37] [2012] HCA 16 .

[38] Lecture by Leonard Feist, Executive Vice-President of the National Music Publisher's Association, Memphis (1 March 1975) cited in Gervais, above n. 12.

How then are we to enforce an effective international copyright regime? The body of this dissertation will critically analyse the various mechanisms and models of international relations developed to achieve this difficult task.

II MULTILATERAL FRAMEWORK

This chapter contains an analysis of the multilateral instruments which currently regulate the international protection and enforcement of copyright. The purpose of the chapter is to explore the unique context in which each instrument was developed and to highlight the 'patchwork' of agreements which form the foundation of international relations in this area.

A *Berne Convention for the Protection of Literary and Artistic Works*

Opened for signature on 9 September 1886 and coming into force on 5 December 1887, the Berne Convention was the first major step in achieving a multilateral approach to copyright enforcement. The Berne Union, originally comprised of only nine states (almost all European),[39] today has grown to encompass nearly all major developed and developing nations.[40] Throughout its history the Berne Convention has been revised five times.[41] Its flexibility and frequent revision marks it as 'one of the most enduring of all international agreements'[42] – though conceived of over 100 years ago it remains the centrepiece of today's international copyright protection regime.

1 *Negotiation & Development*

The Berne Convention was negotiated over three official conferences initiated by the Swiss Government in 1884, 1885 and 1886.

The initial Diplomatic Conference of 1884 was to be of a preliminary nature and had the object of 'determining the general principles which would have the greatest chance of being realised in the current circumstance.'[43] Despite this, discussion was largely shaped by the German delegation and its advocacy of a bold universal codification of copyright protections. This was quite at odds with the general intention to adopt an international convention which would 'command immediate acceptance by the largest number of states'[44] and received negative response from several delegations who questioned the

[39] Germany, Belgium, Spain, France, Haiti, Italy, Switzerland, Tunisia and the United Kingdom.
[40] Above n 27.
[41] 1896 in Paris; 1908 in Berlin; 1928 in Rome; 1948 in Brussels; 1967 in Stockholm; and 1971 again in Paris.
[42] Burger, above n 15, 1.
[43] *Actes* 1884, 9 cited in Ricketson and Ginsburg, above n 21, 59.
[44] *Actes* 1884, 29 cited in Ricketson and Ginsburg, above n 21, 62.

appropriateness of such a proposal in light of the dissonance between domestic copyright laws which prevailed at the time. As a result the 1884 conference brought into sharp relief the differing copyright philosophies of the attending states. Importantly it also highlighted that the impetus for a universal copyright code was evident even at this earliest instance of multilateral collaboration.

While the codification was not realised in the subsequent negotiations of 1885, and to this day has not been overtly pursued, it has been recognised that the impact of Germany's overzealous objectives was to conduce discussions 'more permeated with the universalist views than could have been expected at the outset.'[45] This had the important effect of imbuing the instrument with an inherent flexibility and framing the Convention with a view to progressive expansion. This has been realised throughout its many revisions which have ensured that it now contains 'a significant corpus of basic standards respecting the rights that each member country must recognise and apply in relation to works emanating from other member countries.'[46]

2 *Regime of Protection*

(a) National Treatment

The principle of national treatment is fundamental to the protection offered under the Berne Convention. Simply put it requires each member state to accord the same level of protection provided to its own nationals to nationals of other member states. Thus it provides for the assimilation of an author into the legal system under which copyright protection is sought; making recourse to enforcement mechanisms theoretically straightforward. However, in practice the principle is potentially uncertain and uneven in its application. As Ricketson et al. demonstrate:

> … if country A applies protection at a certain level (L), claimants from countries B and C are entitled only to L, even though country B may accord L+1 and country C may accord only L-1 in relation to their own authors. On the other hand, authors from A will be able to claim L+1 in B, but only L-1 in C.[47]

[45] Ricketson and Ginsburg, above n 21, 73
[46] Ricketson, Richardson and Davison, above n 28, 494.
[47] Ibid, 495.

From this we see that national treatment is distinct from the notion of reciprocity which grants only the level of protection that the foreign author's country itself grants to foreign authors. Under a system of reciprocity in the above example country A would only be obliged to accord L-1 to claimants from C, while B would only have to accord L to claimants from A and L-1 to those from C, even though it provides L+1 to its own nationals. This clearly creates even more complex questions about equivalent protections and countries of origin and as such national treatment continues to be the preferred basis for international enforcement of intellectual property rights. However in its simplest form it does not address the issue of inconsistency between different levels of domestic protection.

To overcome the potential for inadequacies between national standards of protection, the principle of national treatment in the Berne Convention is crucially supplemented by a solid core of minimum standards which each member state is obliged to apply in protecting the intellectual property of foreigners. Article 5(1) provides that in addition to the principle of national treatment, each member state is to accord 'the rights specially granted by this convention.' In 1886, when the Convention was first concluded, this did not connote a high degree of supplementary obligations. However, successive revisions have seen the gradual addition of substantive rights, thus strengthening the obligations of the Convention over time and in accordance with changing international positions on intellectual property protection.[48] This mechanism has an inevitable effect on domestic standards of protection 'as very few countries will ever be prepared to accord rights to foreigners that they are not prepared to accord to their own nationals.'[49] As such, in order to ratify or accede to the successive texts of the Berne Convention, states (including Australia) have amended domestic laws and strengthened domestic protections in accordance with international obligations.

(b) Lack or Formality and Independence of Protection

Another important aspect of the protection of copyright offered under the Berne Convention is that it must not be dependant on any formality required under the

[48] For a detailed and chronological account of these revisions see Ricketson and Ginsburg, above n 21, Chp 3.
[49] Ricketson, Richardson and Davison, above n 28, 495.

domestic law of the country in which protection is claimed.[50] As such no requirement of registration, deposit, notice or similar can be imposed on the foreign work – even where such a requirement exists for national authors under domestic law (as in the United States). This is closely related to the principle that protection is to be enjoyed 'independent of the existence of protection in the country of origin of the work.'[51]

These 'twin provisions' buttress the principle of national treatment by mandating that foreign authors are truly assimilated in to the legal system where protection is sought, regardless of any qualification or limitation upon the author's rights in the country of origin. It has been recognised that this mirrors the conceptual development of copyright[52] 'toward an understanding of copyright as justified by the act of creation, rather than by an act of public recordation.'[53]

(c) Works Protected

The subject matter of the Berne Convention is expressed in very broad terms at Article 2(1):

> The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression …

This is followed by an open ended and illustrative list of examples designed to guide but not limit the operation of the Convention:

> … such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

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[50] Berne Convention, above n 26, Art 5(2).
[51] Ibid.
[52] Discussed above – Chapter I.
[53] Ricketson and Ginsburg, above n 21 citing Jane Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' in Brad Sherman and Alain Strowel (eds), *Of Authors and Origins: Essays in Copyright Law* (1994) 131-158.

(d) Duration of Protection

Duration is one of the most proscriptive aspects of the Berne Convention, leaving little room for autonomous interpretation in domestic application. The general requirement is that works receive protection for the life of the author plus 50 years[54] – with variable periods for specific subject matter, most notably cinematographic[55] and photographic[56] works. However, as will be seen in subsequent discussion, this has been significantly extended by several subsequent international instruments.

While the practice of temporally limiting copyright protection is an engrained practice, it is not altogether logical.[57] Under the common law (and in various other jurisdictions) intellectual property is treated in many respects as any other property right. Intellectual property is alienable, transferable and may be used as a security. Why then is copyright not perpetual? Why, unlike land or chattels, do the rights associated with intellectual property fall into the public domain after an (arguably arbitrarily) pre-determined period of time? The reason may be pinned down to the intangible and uniquely amorphous nature of intellectual property. Copyright ownership is easily fragmented. It would therefore become very difficult to discern if author's rights were extended through hereditary succession. Furthermore a fixed duration of protection is needed to balance the economic aspects of copyright against the need to encourage creativity and access to creative works. This necessarily dictates that works should pass into the public domain so to allow subsequent authors to adapt and extend upon old materials in producing new creative works without fear of infringing copyright. The importance of this balance is emphasised by Ricketson and Ginsburg:

> If private rights in a work are restrained beyond a reasonable period they will become oppressive and anti-social. Not only can an excessive term disable later authors, it may not significantly advantage the first author, as the copyright will be then be controlled by someone far removed from the first author.[58]

It has long been accepted that it is suitable to protect copyright for the life of the author plus a certain number of years. This reflects the accepted notion that the creator and their

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[54] Berne Convention, above n 26, Art 7(1).
[55] Berne Convention, above n 26, art 7(2).
[56] Berne Convention, above n 26, art 7(4).
[57] Ricketson and Ginsburg, above n 21, 527.
[58] Ibid, 529.

immediate decedents should derive any financial success of the copyrighted work. While the need for a temporal restriction on copyright is justified with reference to these policy considerations, the formulation of a precise term is 'ultimately an arbitrary matter' which has never been officially justified or explained.[59]

Prior to the Berne Convention, domestic copyright laws and the network of bilateral agreements contained widely divergent periods of protection. They ranged from 42 years or life plus seven years (which ever was longer) in the UK[60] to life plus 80 years in Spain.[61] The task of agreeing upon a term of protection was too difficult to accomplish during the initial Berne Convention negotiations. Instead the term of protection was excluded from the general principle of national treatment and was initially determined by reference to author's country of origin. The current term of life plus 50 years was not agreed upon as a minimum requirement until the Brussels Revision Conference of 1948. Even today no clear factual evidence exists to prove or disprove the effects of duration of protection upon creative activity or financial investment.[62] Rather the period arguably represents the longest possible term politically feasible at the time the standard was adopted.[63]

(e) Translation Rights

As discussed in Chapter 1 above, international cooperation in the area of intellectual property was borne out of the increasing cultural exchange that was occurring in Europe towards the end of the 19th century. In light of this it is unsurprising that translation rights were a contentious issue throughout the initial negotiations and subsequent development of the Berne Convention. The question of whether these rights should be fully assimilated into reproduction rights (thus making it an infringement of copyright to translate a work without the authority of the author) was treated very differently under the domestic laws of Berne Union countries. While it might seem plainly apparent that translation was simply a means of reproduction, only a limited number of states took this view. To the contrary, other countries required that authors expressly reserve a translation right upon first publication.[64] Often where a separate translation right was

[59] Ibid, 530-1.
[60] Copyright Act 1842 (UK) 5 & 6 Vict, c 45, s 3.
[61] Law of 1879 (Spain), Art VI.
[62] Ricketson and Ginsburg, above n 21, 533.
[63] Ibid, 531.
[64] See discussion and specific examples in Ricketson and Ginsburg, above n 21, 13-14.

recognised it was of far lesser duration than the usual copyright term.[65] Clearly these divergent rules have important economic implications and the potential to greatly hinder author's rights in foreign markets.

This issue was resolved under the Berne Convention at the Berlin Revision Conference of 1908. The current Article 8 assimilates translation rights with reproduction rights, an outcome which accords with the instruments intention to expand international copyright protection.

(f) Moral Rights

While not recognised in the original instrument, the inclusion of moral rights in the Berne Convention has been of major significance – especially in the common law or Anglo-American jurisdictions which do not traditionally recognise such a right within copyright protection regimes.

Introduced at the Rome Revision Conference of 1928, moral rights allow authors to claim 'paternity' over their works as well as 'the right to object to any deformation, mutilation or other modification' of the work which would be 'prejudicial' to the author's 'honour or reputation.' This concept is deeply steeped in the continental European concept of *droit d'auteur*.[66] Its inclusion in the Berne Convention was the first clear recognition of this personal element to copyright under international intellectual property law.

Article 6bis of the Berne Convention provides for moral rights which are independent of any economic rights in a particular work. The article conveys two separate fundamental rights. First, the right to claim authorship – i.e. 'the author has a right to have his or her authorship of works recognised in a clear and unambiguous fashion.'[67] Second, the right to protect the integrity of the work. By their nature of being inherently personal to the author moral rights may be exercised after the transmission of economic rights. The duration of the moral rights is to be at least the duration of economic rights.

Despite the fact that the wording and intention of Article 6bis appears reasonably straightforward, it allows member states a high degree of latitude in implementing moral rights into domestic law. Determining the form and scope of the protection is therefore

[65] Ibid.
[66] Rosen, above n 4, 155.
[67] Berne Convention, above n 26, Art 6bis.

difficult to discern. For example Ricketson et al. highlight the complex formulation of the UK Act[68] where moral rights are:

> … complicated in their formulation and operations, since they seek to accommodate the conflicting interests of both authors and users, doing so through the provision of certain limitations … as well as through the device of permitting waiver of these rights in particular situations.[69]

Article 6[bis] of the Berne Convention has only recently been satisfied in an Australian context. Despite our well-established membership of the Berne Union, in 1988 a report presented by the Copyright Law Review Committee (CLRC) concluded that given the lack of theoretical basis for such rights under the common law, legislation imposing specific moral rights would lead to considerable practical problems and inconvenience, and should not be enacted in Australia.[70] Following this there was considerable debate as to whether Australia was in fact in breach of its international obligations under the Berne Convention.[71] Eventually, with the support of the significant electoral sway of the arts lobby, moral rights received bi-partisan support and the relevant amendments were enacted in 2000.[72]

3 *Administration*

The original Berne Convention provided for the establishment of a small bureau to handle administrative tasks for the implementation and future revision of the Convention. In 1893 this body merged with a similar entity created under the Paris Convention for the Protection of Industrial Property and became collectively known as the United International Bureaux for the Protection of Intellectual Property (better known as its French acronym BIRPI). In 1967, this became the World Intellectual Property Organization (WIPO). In 1974 WIPO became a specialised agency within the United Nations. Today WIPO comprises 185 member states and administers 24 treaties.

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[68] *Copyright Designs and Patents Act 1988* (UK) c 48, Ch IV.
[69] Ricketson, Richardson and Davison, above n 28, 383.
[70] Copyright Law Review Committee, *Report on Moral Rights*, Attorney General's Department (January 1988).
[71] Sam Ricketson, 'Is Australia in Breach of Its International Obligations with Respect to the Protection of Moral Rights?' (1990) 17 *Melbourne University Law Review* 462.
[72] *Copyright Amendment (Moral Rights) Act 2000* (Cth).

B *Universal Copyright Convention*

The Universal Copyright Convention[73] (UCC) was established as a sort of 'half way house between Berne and non-Berne members.'[74] Writing just two years after the adoption of the UCC, Dubin praised the pragmatic nature of the instrument labelling it a 'realistic and workable treaty'[75] and commented on its remarkably inclusive nature:

> For the first time, countries in the Pan-American area, adherents to Berne, and those in neither orbit, combine to establish a workable system of copyright. All parts of the free world were represented – all concepts of jurisprudence … were made known.[76]

The absence of America from the Berne Union throughout the 20th century was a significant gap in the international regime of copyright protection. While the US had been engaged in the initial stages of the Berne Convention's negotiation it declined to sign the instrument in 1886. US disengagement from international copyright obligations was despite the petitioning of foreign authors (mostly British who, because of the common language, suffered the most from piracy of their works by American booksellers).[77] These efforts were overpowered, however, by the lobbying of the American publishers 'who feared that English publishers would seize control of the domestic market'.[78] The continued refusal of America to accede to the Berne Convention may be justified in part by the perceived difficulties in changing US domestic copyright laws (especially regarding formalities, moral rights and duration of protection) to comply with the Berne Convention.[79] Eventually, in light of the overwhelming economic benefits of securing

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[73] *Universal Copyright Convention*, opened for signature 6 September 1952, 943 UNTS 178 (entered into force 10 July 1974).
[74] Ricketson and Ginsburg, above n 21, 167
[75] Joseph Dubin, 'The Universal Copyright Convention' (1954) 42(1) *Californian Law Review* 89, 89 citing John Schulman, 'A Realistic Treaty', *American Writer* (November 1952)
[76] Ibid.
[77] 'In 1837 Henry Clay presented to the [US] Senate a petition signed by Thomas Moore and fifty-five other British authors, protesting the invasion of their property rights, together with a report on a bill extending copyright protection in the United States to subjects of Great Britain and France.' Paul Sherman, 'The Universal Copyright Convention: Its Effect on United States Law' (1955) 55 *Columbia Law Review* 1137, 1140; See also Moss, above n 17.
[78] Sherman above n 77, 1140.
[79] Ibid, 1146-1148.

copyright protection in approximately 24 additional jurisdictions, President Regan signed on to the Berne Convention in 1989, over a century after it was created.[80]

Due to the eventual accession of the US and other significant world economies to the Berne Convention, the UCC's significance to the current international copyright framework is greatly diminished. However, the UCC's role in expanding the ambit of international copyright protection should be emphasised.

1 *Negotiation & Development*

Developed under the auspices of the United Nations Education Scientific and Cultural Organisation (UNESCO) in the years following WWII, the UCC was preceded by several significant agreements between states of the Americas.[81] This was particularly in response to a general feeling that the Berne Convention was too Eurocentric and unsuited to countries at their more preliminary stages of literary and artistic development. As a result:

> By 1928, two distinct systems of international copyright protection had come into existence: one comprising the countries of the Old World and their colonies, and the other centred on the independent republics of the New World.[82]

However, many of the 'New World' states had in fact been present at various preparatory stages of the Berne Convention. Thus, while differing in several key ways, the UCC and many of its bilateral or regional preceding instruments were modelled upon the Berne Convention and ultimately the 'substantive differences between the two systems were not as great as may be supposed.'[83]

2 *Regime of Protection*

(a) National Treatment

Like the Berne Convention the UCC is underpinned by the principle of national treatment. The benefits of this system, as opposed to material reciprocity, are discussed above.

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[80] Orrin Hatch, (1989) 'Better Late Than Never: Implementation of the 1886 Berne Convention' 22 *Cornell International Law Journal* 171.
[81] For example: Montevideo Copyright Convention, 1889, on Literary and Artistic Property; Caracas Convention 1911; The Pan-American Conventions of 1902, 1906, 1910 and 1928.
[82] Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Right: The Berne Convention and Beyond* (2nd ed, 2006) vol 2, 1177.
[83] Ibid.

Under Article II published and unpublished works must be afforded the same protection in any member state as works produced by its own nationals. Like the Berne Convention, this national treatment is specifically supplemented by 'protections specially granted under this Convention.'[84]

(b) Formalities

A key difference between the UCC and Berne is the former's explicit acceptance of administrative formalities for the subsistence of copyright in a published work. Where Berne expressly prohibits the requirement of any formality which would hinder the enjoyment of the rights protected therein,[85] the UCC allows for a *compromised* acceptance of domestic laws which required 'as a condition of copyright, compliance with formalities such as deposit, registration, notice, notarial certificates, payment of fees or manufacture or publication in that Contracting State'.[86] As such the UCC did not interfere with domestic systems of formalities imposed by states upon works produced by their own nationals and first published in their own territory. This was key issue dividing the states of the Berne Union from those of the American republics. Article III represents a critical compromise in this regard by providing that such formal requirements are fulfilled in the international arena by the placing of a © symbol, followed by the name of the copyright proprietor and the year of first publication upon all copies of a published work protected under the Convention. This represents a significant erosion of the systems of formalities which had long been maintained, especially in the US where there were strict requirements of notice, registration, deposit and domestic manufacture. Equally, however, it impinged upon the principle of automatic copyright upon creation unequivocally accepted under Berne. In order to enjoy extended copyright protection under the UCC, Berne Union countries who had operated under the 'no formality' provision of Berne for the previous 40 years had to revert to the © notice requirements.[87]

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[84] *UCC*, above n 73, Art II (1) & (2)
[85] *Berne Convention,* n 50, Art 5(2)
[86] *UCC*, above n 73, Art III (1)
[87] It is questionable whether this compromise, made earlier, might not have lead the US to adhere to Berne in the first instance and so ameliorate the need for the UCC altogether. Arpad Bogsch, 'The First Hundred Years of the Berne Convention' [1986] *Copyright* 291, 298 cited in Ricketson and Ginsburg, above n 82, 1186.

(c) Works Protected

Again in clear contrast to the Berne Convention, the UCC does not include a detailed list of works to be protected. Article I stipulates a general undertaking to:

> … provide for the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works, and paintings, engravings and sculpture.

(d) Duration of Protection

With a general term of life of the author plus 25 years (with shorter periods for certain types and classes of works) the UCC is far less onerous than the Berne Convention. In light of the US's current approach to international copyright protection (especially concerning the duration of protection – discussed below), it is somewhat ironic the shorter terms and various exceptions were introduced to accommodate states (particularly the US), which did not compute the term of protection *post mortem auctoris* but rather from the date of publication. The result was a complex compromise between the principle of national treatment and the 'doctrine of comparison of terms'. Dubin illustrates this with an example involving a work emanating from the US:

> … no state is required to protect a work first published in the United States for longer than the United States protects it, even though that other state gives its own nationals protection after death. It is thus possible that protection for a term of 56 years will be afforded [in the United States] if the original term is renewed. This would mean that the United States works might be protected in most countries for life plus 25 years [i.e. under the principle of national treatment], and in other countries (where we have no protection) for at least 25 years from publication [i.e. in accordance with the substantive minima under the UCC].[88]

(e) Translation Rights

Translation rights are the only specific right accorded to authors and copyright proprietors under the UCC.[89] They are dealt with quite differently than under the Berne Convention. Instead of assimilation into reproduction rights, translations may be subject to a compulsory licensing scheme under domestic law. Under Article V(2) a compulsory

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[88] Dubin, above n 75, 106.

[89] N.B. The UCC does not include nor even mention moral rights.

licence for the right of translation may be imposed by a contracting state where, after a period of seven years from first publication, the work was not available in the national language or languages of that state. This was a compromise which was only arrived at after considerable debate between Berne Union countries and others who believed that an author's right in this regard should be limited to a relatively brief period.[90]

3 *Relationship to Berne*

The UCC includes what has been aptly described as a 'Berne Safeguard Clause'.[91] Article XVII and its Appendix Declaration provide a carefully considered mechanism to prevent the newly drafted UCC from undermining the existing application and operations of the Berne Convention.

Article XVII and its Appendix Declaration contain three distinct provisions: (1) the UCC is to have no effect on the operations of the Berne Convention;[92] (2) a sanction against withdrawal from the Berne Convention in favour of the less onerous requirements of the UCC; and (3) the application of the Berne Convention in the relations between countries that are parties to both conventions.

Of these, the second is of greatest significance as means that any state party to the Benre Convention which denounces its obligations in favour of the lower protections of the UCC will be unable to claim protection in any state which is party to both conventions. Thus drastically limiting the scope of protection afforded. This is clearly a grave implication which proved successful in protecting the scope and application of the Berne Convention whilst allowing the UCC to operate alongside it as an effective meeting point between Berne and non-Berne states.

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[90] Ricketson and Ginsburg, above n 82, 1187,

[91] Ibid, 1189

[92] A legally redundant proclamation in light of the fact that the UCC could never effect the internal operations if the Berne Union. Arpad Bogsch, 'Co-existence of the Universal Copyright Convention with the Berne Convention' in T R Kupferman and M Foner (eds), *Universal Copyright Convention Analyzed* (Federal Legal Publications, 1955) 141, 147.

C *World Intellectual Property Organisation Copyright Treaty*

The WIPO Copyright Treaty[93] (WCT) was developed in recognition of the profound impact that modern information and communication technologies were having (and continue to have) upon the creation, dissemination and consumption of literary and artistic works. It sought to clarify and extend international copyright law through the adoption of new international norms for application in the digital age.

1 *Negotiation & Development*

The WCT is a Special Agreement under Article 20 of the Berne Convention. It was adopted in Geneva in 1996.

As mentioned above, much of the success of the Berne Convention was due to its frequent and incremental revision. Since 1886 member states reconvened approximately every 20 years to discuss the challenges posed to international copyright law and to implement reforms to address these concerns. Throughout most of the 20th century this proved to be a successful process, making the Berne Convention one of the most responsive and enduring multilateral agreements, while building a strong corpus of copyright protections. However, the final two revision conferences (in Stockholm in 1967 and Paris in 1971) risked much of this progress and saw the Berne Union come back from the brink of political destruction. At the centre of this controversy was the highly contested Protocol Regarding Developing Countries which purported to introduce special concessions for developing nations. So opposed to these measures and the potential erosion of authors rights which they entailed were they, that the more developed members of the Berne Union 'were willing to forego the substantive and structural improvements made in the Stockholm Convention in order to avoid enactment of the protocol's concessionary provisions'.[94] As such the Stockholm revisions did not receive the requisite number of ratifications to enter into force. Swift diplomacy was required to save the Berne Convention. This was fortunately achieved during Paris Revision Conference of 1971 – a compromise was reached regarding the developing country crisis and states were able to ratify the substantive improvements negotiated in Stockholm.

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[93] *World Intellectual Property Organisation Copyright Treaty*, open for signature 20 December 1996, 36 ILM 65 (entered into force 6 March 2002)
[94] Burger, above n 15, 38.

As a consequence of this impasse, in the 1970's and 1980's there was a general reluctance to undertake further structural revision of the Berne Convention for fear of reviving political divisions.[95] While the differences between developed and developing nations remained (and still remain) a controversial issue, threats to the copyright protection were 'now coming from other quarters, mainly the new modes of exploitation made possible by technological development'.[96] To address this, the newly formed WIPO essentially instituted a new process for the negotiation and revision of the international intellectual property regime. It oversaw the 'guided development' of international norms which were tightly focused upon the digital agenda. It has been suggested that the negotiation and development of the WCT represents a 'watershed moment for international copyright law' in terms of the diplomatic process which led to its creation.[97] For the first time negotiations were underpinned not by 'prior national experimentation' but rather on a truly international and unprecedentedly balanced dialogue between states (developed and developing), non-government organisations, expert advisors and the specialist UN agency – WIPO.[98]

2 *Regime of Protection*

The regime of protection under the WCT may be divided into two. First, points of clarification which expound existing norms thought to be unsettled or unclear under the Berne Convention. Second, the creation of new rights and obligations aimed at enabling international copyright law to traverse in the digital era.

(a) Clarifications

Apart from restating the well-known principle that 'copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts'[99] the WCT specifically highlights the status of particular types of works as literary works. Despite the fact that this was probably already the position of the law before the WCT, computer programs 'whatever may be the mode or form of their

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[95] See discussion in Stephen Stewart, *International Copyright and Neighbouring Rights* (Butterworths, 2nd ed, 1989), ff 296.
[96] Ricketson and Ginsburg, above n 21, 140.
[97] Graeme Dinwoodie, 'The WIPO Copyright Treaty: A Transition to the Future of International Copyright Law Making?' (2010) 57(4) *Case Western Reserve Law Review* 751, 752.
[98] Ibid.
[99] WCT, above n 93, Art 2.

expression' are noted as literary works.[100] The same may be said of compilations of data 'which by reason of the selection or arrangement of their contents constitute intellectual creations'.[101]

(b) Novel Provisions

The centre piece of the WCT is Article 8 which provides that authors 'shall enjoy the exclusive right of authorising any communication to the public of their works, by wire or wireless means'.[102] It further specifies that this encompasses the right of 'making available to the public of their works in such a way that members of the public may access their works from a place and at a time individually chosen by them.'[103] This recognises that the audience of a work may be separated both in time and space where under the Berne Convention it was not clear that on-demand transmissions constituted communication 'to the public.' This applies to all works protected under the Berne Convention, including computer programs and data compilations (as clarified in the WCT).

Articles 6 and 7 of the WCT extend exclusive rights to the author for the distribution and rental of physical copies of protected works. Article 11 expressly prohibits the circumvention of technological measures designed to prevent unauthorised dealings with protected works. Article 12 obligates states to prohibit the unauthorised modification or removal of rights management information contained in protected works.

[100] WCT, above n 93, Art 4.
[101] WCT, above n 93, Art 5.
[102] WCT, above n 93, Art 8.
[103] Ibid.

D *Agreement on Trade Related Aspects of Intellectual Property*

The Agreement on Trade Related Aspects of Intellectual Property[104] (TRIPS) has been described as 'undoubtedly the most significant milestone in the development of intellectual property in the twentieth century'.[105] It is broader in scope than preceding instruments and includes unprecedented enforcement and dispute resolution mechanisms.

1 *Negotiation & Development*

TRIPS emerged out of negotiations at the Uruguay Round of the General Agreement on Tariffs and Trade (GATT). It is Annex 1C of the *Marrakesh Agreement Establishing the World Trade Organisation*, signed in Marrakesh, Morocco on 15 April 1994. In accordance with Article II.2 of the Marrakesh Agreement TRIPS binds all member states of the WTO.

TRIPS was developed in direct response to the deficiencies perceived in existing international intellectual property frameworks. Gervais identifies the principal flaws of the pre-TRIPS framework as twofold:

> (a) the absence of detailed rules on the enforcement of rights before national judicial administrative authorities; and (b) the absence of a binding and effective dispute settlement mechanism (for disputes between states).[106]

The need to develop a modern and more far-reaching instrument was no doubt compounded by 'the evolution of the world trading system, the sky-rocketing importance of intellectual property, and technological changes, in particular generalised computerisation and digital technology'.[107]

However, the diplomatic difficulties of reaching a consensus on necessary changes had already been experienced by parties to the Berne Convention at the Stockholm Revision Conference of 1967. The difficulties that arose in that context between developed and developing nations reflected the shifting focus upon intellectual property enforcement as

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[104] *Agreement on Trade Related Aspects of Intellectual Property*, Annex 1C of the Marrakesh Agreement establishing the World Trade Organisation, opened for signature 15 May 1994, 1869 UNTS 299 (entered into force 1 January 1995)
[105] Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* (Sweet & Maxwel, 2nd ed, 2003) 3.
[106] Ibid, 10.
[107] Ibid.

an element of global economic relations.[108] The challenge of negotiating a new model of international cooperation on this front was amplified by the vast impact changes would have upon major industries, national economies and domestic legislation. As such it seemed appropriate to address international intellectual property issues as part of the burgeoning international trade regulator, the World Trade Organisation (WTO).

2 *Regime of Protection*

TRIPS is a broad and inclusive instrument which deals with all types of intellectual property. The current discussion is limited to the substantive provisions relating to copyright as well as the broader enforcement mechanisms and dispute resolution system established within the WTO framework.

Gervais commends 'the logic of TRIPS' as an incremental addition to existing conventions.[109] It is no surprise then that TRIPS takes a 'Berne-plus'[110] approach to copyright protection – incorporating the vast majority of the substantive provisions of the Berne Convention into its text.[111] This is designed to increase harmonisation of international intellectual property law by ensuring that those states not party to the existing WIPO conventions nonetheless adhere to their provisions via the WTO and TRIPS. It also has the important implication of bringing Berne protections within the dispute resolution mechanisms of the WTO, thus giving teeth to Berne obligations which were previously very difficult to enforce.

(a) National Treatment

National treatment remains a fundamental principle under TRIPS. Article 3 provides that '[e]ach Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property'. The decision to adhere to this long standing basis for international

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[108] Peter-Tobias Stoll, Jan Buche & Katrin Arend, 'WTO – Trade Related Aspects of Intellectual Property Rights' in Rudiger Wolfrum & Peter-Tobias Stoll (eds.) *Max Planck Commentaries on World Trade Law* (Brill Publishers, 2009) vol 7, 5.
[109] Gervais, above n 105, 68.
[110] Ricketson, Richardson and Davison, above n 28, 507. N.B. The term 'plus' in this context connotes the conveyance of obligations more extensive/prescriptive than those required under the framework established by the existing instrument (also commonly used in relation to TRIPS – discussed below).
[111] The major exception being the moral rights granted in Art 6bis of the Berne Convention, discussed below.

protection was deliberate and 'ensures that TRIPS [does] not wreak havoc with extant protection schemes.'[112]

(b) Most-Favoured Nation Clause

Article 4 provides that 'any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.' Though a frequently adopted mechanism in the context of international trade relations, the inclusion of this most-favoured nation clause in TRIPS was the first time such a standard had been applied to international intellectual property law. It underscores the economic focus of the instrument and ensures uniformity in the multilateral trade environment.

It is important to note that the clause acts to prohibit an advantage given to *any* other country, not just WTO Members. While in time this should also serve to strengthen and harmonise international intellectual property protection, its short-term impact will be very limited, as it does not apply to agreements entered into before the entry into force of TRIPS.[113]

(c) Works Protected

As mentioned above TRIPS is a broad and inclusive instrument which covers various intellectual property rights. Part II Section 1 deals with the substantive aspects of copyright protection and directly transplants Articles 1-21[114] of the Berne Convention[115] into the TRIPS Agreement.[116] As such the works protected under TRIPS include any work which falls within the broad and inclusive definition at Article 2 of Berne (discussed above). The well established proposition that copyright protects 'expressions and not to ideas, procedures, methods of operation or mathematical concepts' is explicitly stated[117] and 'helps to delineate the scope of Article 2 of the Berne Convention.'[118]

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[112] Gervais, above n 105, 98.
[113] TRIPS, above n 104, Art 4(d).
[114] Except Art 6bis, discussed below.
[115] i.e. The Paris Revision Text of 1971 – subsequent revisions (if they are negotiated) will not bind WTO Members under TRIPS.
[116] TRIPS, above n 104, Art 9(1).
[117] TRIPS, above n 104, Art 9(2).
[118] Gervais, above n 105, 130.

Article 10 expressly includes computer programs ('whether in source or object code') and compilations of data within the definition of a literary work protected under Article 2 of the Berne Convention. This extended definition was duplicated in the later formulated WCT (discussed above).

(d) Duration of Protection

For the most part TRIPS does not depart from duration of protection provided in the Berne Convention – i.e. life of the author plus 50 years.[119] However Article 12 TRIPS provides in more detail the minimum requirement where the duration of protection is calculated on a basis other than the life of a natural person.

> Whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.

The minimum term of 50 years will apply, for example, to cinemagraphic works or where there is a 'corporate author'. However, as Ginsburg and Ricketson point out 'it is left to domestic law to determine whether, for example, a work created by an employee, is a corporate work whose term is to be calculated not on the basis of the employee-creator's life, but by some other measure.'[120]

TRIPS leaves intact the special treatment of photographic works and 'works of applied art' which are protected for a shorter period of 25 years from the date of creation under Article 7(4) of the Berne Convention.

(e) Moral Rights

The exclusion of moral rights under TRIPS is a notable diversion from Berne. Initially it was asserted that the economic focus and trade objectives of TRIPS made it an improper instrument through which to protect moral rights. Furthermore, it can be argued that the subjective nature of moral rights and the flexibility allowed under Berne for their implementation in domestic laws render them too elusive to be enforced under the TRIPS dispute resolution system.

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[119] Above n 50, Art 7(1)
[120] Ricketson and Ginsburg, above n 21, 575-6.

However, it is clear that abuse of moral rights 'tend to be at least indirectly trade-related.'[121] This is because the lingering existence of moral rights might well impede a purchaser's right to fully exploit their legally obtained interest in a work. In light of this it seems the true reason for their exclusion seems to be the insistence of the US, who openly wanted to 'avoid any possibility of these rights being strengthened'.[122]

The exclusion of moral rights attracted a negative response from some states who perceived it as a triumph of a market based, economic conception of copyright over the humanistic approach centred on the act of creation and the author's personality. It demonstrates the continuing dichotomy between civil (continental European) and common (Anglo-American) legal thinking in modern international copyright law.

(f) Enforcement

Part III of TRIPS contains substantive provisions concerning the enforcement of intellectual property rights and is regarded as one of the main innovations of TRIPS. The TRIPS negotiations were aimed at developing the highest possible degree of protection for intellectual property and the enforcement provisions seek to achieve this via the imposition of civil and criminal procedures and remedies as well as special border measures for the suspension and release of suspicious goods.

Article 41 sets out general obligations to permit effective action against infringement, to avoid the creation of barriers to legitimate trade and to safeguard against abuse of such procedures. There is a general obligation of expediency and efficiency and more specific requirements for fair hearings,[123] the presentation of evidence,[124] reasoned decisions[125] and recourse to judicial review of administrative decisions.[126]

Part III provides specifically for injunctive relief[127] and 'provisional measures' which may be granted by courts to 'prevent an infringement of any intellectual property right from

[121] Gervais, above n 105, 124.
[122] United States General Accounting Office, Report to Congress: Uruguay Round Final Act Should Produce Overall US Economic Gains, Washington, July 1994, 89 cited in Gervais, above n 105, 124-5
[123] TRIPS, above n 104, Art 42.
[124] TRIPS, above n 104, Art 43.
[125] TRIPS, above n 104, Art 41(3).
[126] TRIPS, above n 104, Art 41(4).
[127] TRIPS, above n 104, Art 44.

occurring' or 'to preserve relevant evidence in regard to the alleged infringement.'[128] This aspect of TRIPS is one of the most practical and important, especially in relation to piracy and counterfeiting. As Gervais highlights – 'Professional infringers seldom remain available to pay damages and costs awarded on the merits of a case.'[129]

Articles 51-60 set out a regulatory framework of border measures for the suspension of suspected infringing goods by custom authorities. These were developed in recognition of the fact that the most effective means of combating piracy and counterfeiting is to prevent the circulation of such goods both across borders and within domestic markets. In essence where *prima face* evidence is received that the importation of counterfeit trade marked or pirated copyright goods may take place, the goods may be suspended by authorities for an initial period of ten days pending a decision on the merits of the case.

Under Article 61 WTO members must provide for criminal sanctions (including imprisonment and/or monetary fines and the seizure, forfeiture and destruction of the infringing goods) in cases of wilful trade mark counterfeiting or copyright piracy on a commercial scale.

(g) Dispute Settlement System

Article 64 imposes the GATT Dispute Settlement System[130] and the WTO Dispute Settlement Understanding[131] upon controversies arising between states under TRIPS. This is a detailed and comprehensive dispute settlement system. Where a member state alleges that another member has violated their obligations under TRIPS (or indeed any WTO agreement) they must submit a 'Request for Consultations'. If the dispute cannot be resolved via consultations it progresses much like an arbitration before an expert panel or 'Dispute Settlement Body' (DBS) established under the authority of the WTO General Council. The process is helpfully summarised by Gervais.[132]

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[128] TRIPS, above n 104, Art 50.
[129] Gervais, above n 105, 308.
[130] *General Agreement on Tariffs and Trade*, open for signature 30 October 1947, 55 UNTS 194 (entered into force 1 January 1948) Art XXII: *Consultation*; Art XXIII: *Nullification or Impairment*
[131] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2 to the *Marrakesh Agreement Establishing the World Trade Organisation,* opened for signature 15 May 1994, 1869 UNTS 299 (entered into force 1 January 1995).
[132] Gervais, above n 105, 342.

The findings do not have direct binding effect upon WTO members. Rather it is upon the member to bring the infringing policy or domestic law in to line with the ruling or recommendations made by the DSB and if deemed appropriate to pay compensation to the aggrieved state/s. If this is not done within a reasonable period it is open for the WTO to impose trade sanctions. It is the potential of these sanctions (so called 'retaliation measures') which give TRIPS the teeth that previous international agreements were lacking.

E *Conclusion*

The marriage of trade relations and intellectual property enforcement via TRIPS was an inevitable development and has been beneficial for both international trade (in light of the vast economic interests which underpin our information economy) and IP protection (by bringing state obligations within the WTO framework). However, in the almost two decades since its adoption TRIPS has come under significant criticism and has been eclipsed by many bilateral and plurilateral agreements concluded in the intervening years.

It has been asserted that the 'achilles heel' of TRIPS are the broad and ambiguous enforcement provisions contained in Part III which 'constitute a set of minimum standards of due process on which future legislation will have to be built' and therefore make it difficult for WTO dispute settlement bodies to pin down violations of international law. [133]

Some critics label TRIPS as an 'imperialistic' instrument and focus upon its impact on developing economies.[134] The role of international copyright obligations in facilitating (or hindering) cultural and economic development has always been a central consideration for parties negotiating and binding themselves to international copyright agreements – nowhere else is this as clear as in the position of the US during UCC negotiations and its eventual accession to the Berne Convention (discussed above). However, the 'luxury' of being able to refrain from entering into international copyright agreements is not so

[133] Jerome Reichman and David Lange, 'Bargaining Around the TRIPS Agreement: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions' (1998) 9(11) *Duke Journal for Comparative and International Law* 11, 34-40.
[134] Marci Hamilton, 'The TRIPS Agreement: Imperialistic, Outdated and Overprotective' (1996) 29 *Vanderbilt Journal of Transnational Law* 613; A. Samuel Oddi, 'TRIPS – Natural Rights and a "Polite Form of Economic Imperialism"' (1996) 29 *Vanderbilt Journal of Transnational Law* 415.

easily enjoyed by developing countries in a modern context. Hamilton questions the legitimacy of the TRIPS agreement in light of its potential sociological implications:

> Despite its innocuous name, TRIPS does not merely further trade relations between … countries. Rather, TRIPS imposes a Western intellectual property system across-the-board – which is to say that it imposes presuppositions about human value, effort, and reward.[135]

Still more criticisms highlight that TRIPS was outdated even 'before the ink was dry' due to its negligible consideration of digital technologies and the dissemination of copyrighted work via the Internet.[136]

All of this, as well as the benefit of hindsight, has revealed that 'TRIPS was never enough.' Reflecting upon the numerous 'extra-multilateral' agreements (to be discussed below) Sell laments the changing landscape of international IP enforcement:

> While many countries believed that they were negotiating a ceiling on intellectual property rules, they quickly discovered that they actually had negotiated only a floor. Looking back on the past fifteen years of intellectual property norm setting and governance, critics' initial objections to TRIPS look almost mild, and I, for one, never imagined that the original TRIPS would look so good.[137]

And with this sage reflection we turn to a consideration of subsequent developments.

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[135] Hamilton, above n 134, 616

[136] Donald Harris, 'TRIPS After Fifteen Years: Success or Failure Measured By Compulsory Licensing' (2011) 18 *Journal of Intellectual Property Law* 367, 371.

[137] Susan Sell, 'TRIPS Was Never Enough: Vertical Forum Shifting, FTAS, ACTA and TPP' (2011) 18 *Journal of Intellectual Property Law* 447, 448.

III PLURILATERAL MECHANISMS & REGIONAL AGREEMENTS

If the preceding chapter on multilateral cooperation outlined the bones of the international framework for copyright protection, then a consideration of regional and plurilateral agreements on the topic provides a more contoured description of the meat (and more importantly the muscle!) of the regime.

This exposition demonstrates the tapestry of agreements which have developed between nations, motivated by different sovereign and (sometimes shrouded) commercial interests. In general the expansion of protection and enforcement mechanisms and the proliferation of fora in which these obligations are adopted, reflects a fragmentation of international IP relations. Furthermore the fact that almost all of the regional IP agreements form part of more general free trade agreements perhaps means that less attention is given to the specific IP implications and unique interests of contracting parties. This has contributed to an upward ratcheting of TRIPS plus protection and enforcement measures, to which there is no end in sight.

A *North American Free Trade Agreement*

The North American Free Trade Agreement (NAFTA), concluded between the US, Canada and Mexico and coming into force in 1994, was the first regional trade treaty to protect IP rights. The treaty creates a trilateral trade block in the North American region and broadly obligates members to provide nationals of other NAFTA countries with adequate and effective measures to protect and enforce intellectual property rights while ensuring that such measures do not become barriers to legitimate trade.[138]

Given that NAFTA was concluded pre-TRIPS it is unsurprising that the obligations contained therein are quite normative and largely reflective of the basic principles set out in the existing major international intellectual property conventions. It does, however, include the novel addition of enforcement and border protection procedures which obligate state parties to implement domestic legislation to allow customs administrators to suspend the release of counterfeit trade mark goods or pirated copyright goods.[139] This is a precursor to the more proscriptive measures found in later instruments. Interestingly

[138] *North American Free Trade Agreement*, Canada–Mexico–United States, signed 17 December 1992, 32 ILM 289 (entered into force 1 January 1994), Art 1701(1).
[139] Ibid, Art 1714.

the provisions of NAFTA are balanced against a general undertaking that enforcement procedures be fair and equitable, not unnecessarily complicated or costly, not entailing unreasonable time limits or unwarranted delays and be subject to judicial review[140] – an undertaking which has not been expressly applied in subsequent instruments of a similar nature (to be discussed below).

NAFTA is thus an interesting model with which to compare and contrast more current and emerging themes (and controversies) arising of regional and plurilateral collaboration on IP enforcement. Though not strictly chronological, a logical starting point for this is the freshly minted Anti-Counterfeiting Trade Agreement (ACTA).

B *Anti-Counterfeiting Trade Agreement*

The Anti-Counterfeiting Trade Agreement[141] is the most recent development in the field of international copyright enforcement. Formed outside the patronage of any international body or organisation, ACTA is described as a 'US backed plurilateral agreement'[142] and has been heavily criticised for its unbridled support for private economic interests. After the leaked release of ACTA policy documents, Fewer aptly summarised widespread concerns – 'If Hollywood could order intellectual property laws for Christmas what would they look like? This is pretty close.'[143]

1 *Negotiation & Development*

The initial push for an international agreement targeting counterfeiting came from the Global Business Leaders' Alliance Against Counterfeiting (GBLAAC) – an interest group representing some of the world's largest trade mark and copyright owners.[144] In 2004 WIPO, the World Customs Organisation and INTERPOL co-hosted the first annual Global Congress on Combating Counterfeiting in Brussels. The meeting was sponsored by GBLAAC and was attended by both public sector officials and international business

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[140] Ibid, Art 1714(2)-(4).
[141] *Anti-Counterfeiting Trade Agreement*, signed 1 October 2011, [2011] ATNIF 22 (not yet in force).
[142] Charles McMannis, 'The Proposed Anti-Counterfeiting Trade Agreement: Two Tales of a Treaty' (2009) 46 *Houston Law Review* 1235, 1246.
[143] Cited in 'Copyright Deal Would Toughen Laptop, iPod Laws', *Calgary Herald* (online), 24 May 2008 <http://www.canada.com/calgaryherald/news/story.html?id=642326df-30e7-4822-b919-1f6cd88b0c9d>.
[144] Including the brands Coca Cola, Daimler Chrysler, Pfizer, Proctor and Gamble, American Tobacco, Phillip Morris, Swiss Watch, Nike and Canon – Aaron Shaw, 'The Problem with the Anti-Counterfeiting Trade Agreement (and what to do about it)' (2008) 2 *Knowledge Ecology Studies* 1, ff2.

leaders. The goal of the Congress was to create a co-ordinated response between the public and private sectors to oversee better enforcement and stiffer penalties for counterfeiting. This mantel was taken up at the 2005 G8 Summit where, upon a suggestion from the Japanese delegation, it was agreed that member states would support stricter regulations to combat counterfeiting and piracy in light of 'links to organised crime' and threats to 'employment, innovation, economic growth, and the health and safety of consumers'.[145]

In the subsequent years proponents of ACTA were accused of 'forum shifting' as they sought to 'promote their agenda in a number of multilateral governance institutions',[146] including the G22, WIPO and WTO. However, in light of growing pressures and criticisms surrounding intellectual property enforcement and less developed economies (discussed above), the rigid enforcement mechanisms and harsh penalties proposed in ACTA were unable to gain traction in any established multilateral institution. This presented an 'apparent multilateral stalemate on enforcement'[147] and led to a 'deliberate shift towards a more select, and hence friendlier, forum.'[148]

ACTA negotiations were thus held independent of any formal institution. Preliminary meetings were organised by the US and Japan. Australia, Switzerland, Mexico, Morocco, New Zealand, South Korea, Singapore and the EU (representing its Member States) joined the formal negotiations in 2008. The negotiation process was criticised for lack of transparency and for being highly susceptible to the private lobbying of multinational corporations with vested interests. When a discussion paper was uploaded to the infamous Wikileaks[149] it was revealed that alongside states, an advisory committee, made

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[145] Group of 8, *Reducing IPR Piracy and Counterfeiting through more Effective Enforcement*, 31st G8 Summit Gleneagles, UK (2005)

[146] Shaw, above n 144.

[147] Kimberlee Weatherall, 'Politics, Compromise, Text and the Failures of the Anti-Counterfeiting Trade Agreement' (2011) 33 *Sydney Law Review* 229, 237 citing Margot Kaminski, 'The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA)' (2009) 34 *Yale Journal of International Law* 247.

[148] Ibid citing Susan Sell, 'The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: the State of Play' (Occasional Papers No 1, IQsensato Group, Geneva, 9 June 2008) and Laurence Helfer, 'Regime-shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking' (2004) 29 *Yale Journal of International Law* 1.

[149] *US Discussion Paper of a Proposed Anti-Counterfeiting Trade Agreement* (2007) Leaked document available via Wikileaks <http://wikileaks.org/w/index.php?title=Proposed_US_ACTA_multi-lateral_intellectual_property_trade_agreement_%282007%29>.

up of corporate lobby groups and backed by considerable private interests, had been established to consult on the content of the draft treaty.[150] In an attempt to quell the growing suspicions concerning ACTA's scope and purposes in April 2009 a Summary of Key Elements Under Discussion was released. However the use of 'exceedingly malleable rhetorical terms' only served to fuel concerns.[151] Indeed, Yu viewed the leaked material and final text as confirmation of the fears that arose during the negotiations process.[152] Perhaps Doctorow best encapsulated the general scepticism surrounding the instrument – 'What's in ACTA? Well, it kind of doesn't matter. If it were good stuff, they'd be negotiating it in public where we could all see it.'[153]

ACTA was signed on 1 October 2011 amid a continuing blaze of controversy. Including public demonstrations across Europe[154] and the resignation of EU Rapporteur, Kader Arif, who denounced the treaty 'in the strongest possible manner' for its lack of transparency and tainted consultation process.[155]

ACTA will enter to force with six ratifications[156] but (perhaps unsurprisingly) is yet to be ratified by any state party.

2 *Regime of Protection*

When compared to the international agreements considered thus far it is clear that ACTA is a more practical instrument aimed at developing enforcement mechanisms and sanctions for copyright (and other intellectual property right) infringements. ACTA provides for the introduction of civil[157] and criminal[158] penalties for *commercial* trade in

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[150] James Love, *Who are the cleared advisors that have access to secret ACTA documents?*, Knowledge Ecology International (13 March 2009) <http://www.keionline.org/blogs/2009/03/13/who-are-cleared-advisors>

[151] Charles McMannis, 'The Proposed Anti-Counterfeiting Trade Agreement: Two Tales of a Treaty' (2009) 46 *Houston Law Review* 1235, 1247

[152] Peter Yu, 'Six Secret (And Now Open) Fears of ACTA' (2011) 4 *Southern Methodist University Law Review* 81.

[153] Cory Doctorow, *Big Entertainment Wants to Party Like It's 1996* (21 April 2009) Internet Evolution <http://www.internetevolution.com/document.asp?doc_id= 175415>

[154] *Activists Rally to Give ACTA the Cold Shoulder* (11 February 2012) euronews <http://www.euronews.com/2012/02/11/activists-rally-to-give-acta-the-cold-shoulder/>

[155] Mike Masnick, European Parliament Official In Charge Of ACTA Quits, And Denounces The 'Masquerade' Behind ACTA (26 January 2011) *Techdirt* <http://www.techdirt.com/articles/20120126/11014317553/european-parliament-official-charge-acta-quits-denounces-masquerade-behind-acta.shtml>

[156] ACTA, above n 141, Art 40.

[157] Ibid, Art 7-12.

counterfeit and pirated goods and sets out means of preventing international dissemination of such products both physically[159] and digitally.[160] However, perhaps as a result of the strong dissent and public outcry which surrounded the treaty's inception, it does not overtly erode the privacy or civil liberties of individual citizens that many feared and sought to contest. It is important to note, and has been stressed by the contracting parties, that ACTA does not pave the way for 'iPod searching border guards'.[161] Article 14 excludes 'personal luggage' from the Border Measures outlined in section 3. Nonetheless, valid concerns remain as to ACTA's silence on the protection of human rights and fundamental freedoms. Under the instrument '[p]arties … have no positive obligation to protect freedom of expression, consumer rights, fair process, and privacy.'[162]

3 *Conclusion*

Clearly the process by which ACTA has come into being is clearly an 'object lesson in how *not* to negotiate an agreement on international cooperation in law enforcement.'[163] It has also been asserted that in the face of technological developments which have seen a proliferation of trade mark and copyright infringement, the substantive provisions of ACTA are 'an effort on the part of intellectual property owners to socialize the enforcement costs of their increasingly valuable private intellectual property rights'.[164] Questions of legitimacy, balance and public interest are likely to continue to beleaguer any future implementation and development of the agreement in years to come.

C *Trans-Pacific Partnership Agreement*

The Trans-Pacific Partnership Agreement (TPPA) builds upon the Trans-Pacific Strategic Economic Partnership Agreement concluded between Brunei, Chile, New Zealand and Singapore (the so called P4) in 2006. With the addition of Australia, Peru, the US, Vietnam

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[158] Ibid, Art 23-26.
[159] Ibid, Art 13-22.
[160] Ibid, Art 27.
[161] Michael Geist, Government Should Lift Veil on ACTA Secrecy (9 June 2008) *Copyright News* <http://www.michaelgeist.ca/content/view/3013/135/>.
[162] Matthew Rimmer, Supplementary Submission No. 1.1 to the Joint Standing Committee on Treaties on the Anti-Counterfeiting Trade Agreement, 21 November 2012, 10.
[163] Kimberlee Weatherall, 'Politics, Compromise, Text and the Failures of the Anti-Counterfeiting Trade Agreement' (2011) 33 *Sydney Law Review* 229, 229 [emphasis added].
[164] Charles McMannis, 'The Proposed Anti-Counterfeiting Trade Agreement: Two Tales of a Treaty' (2009) 46 *Houston Law Review* 1235, 1237.

and Malaysia, TPPA is set to become a significant regional[165] IP agreement and potentially a building block towards a larger Asia-Pacific FTA.[166] In an Australian context the conclusion of TPPA is currently DFAT's 'highest regional trade negotiation priority'.[167]

While the TPPA is yet to be concluded, controversy as to its intellectual property provisions is already rife. Basing assertions upon a leaked US draft of the intellectual property chapter[168] the Electronic Frontier Foundation (EFF) warns that the instrument could potentially impose 'copyright measures far more restrictive than currently required by international treaties, including the controversial Anti-Counterfeiting Trade Agreement.'[169] An examination of the leaked document reveals that this may include developments as controversial as the extension of the duration of copyright protection calculated on a basis other than the life a natural person (i.e. works by 'corporate author') up to 95 or even 120 years from the date of creation. This is in line with the US 'work for hire' doctrine[170] and replicates the terms negotiated in the US-Oman FTA, which entered into force on 1 January 2009.[171]

According to EFF the provisions in the leaked draft chapter will also 'override Australia's technological protection measure regime exclusions for region-coding … and embedded software in devices that restrict access to goods and services for the device'[172] (discussed below).

Time will tell with more certainty what the true implications of the TPPA are for the international copyright enforcement regime and Australia's obligations therein. However these initial signs are ominous. As Barfield points out - 'the key questions revolve around

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[165] While the TPPA includes states positioned around the Pacific Ocean this is a very large geographical area. It is thus questionable whether it is aptly termed a 'regional' agreement. However, DFAT adopts this terminology and it is likewise adopted here.

[166] Claude Barfield, 'The Trans-Pacific Partnership: A Model for Twenty First Century Trade Agreements?' (2011) 2 *International Economic Outlook* 1, 1.

[167] Department of Foreign Affairs and Trade (Cth), *Trans-Pacific Partnership Agreement Negotiations* <http://www.dfat.gov.au/fta/tpp/index.html>

[168] *Trans-Pacific Partnership Agreement Intellectual Property Chapter US Draft Proposal* (10 February 2011) Leaked document available via Knowledge Ecology International <http://keionline.org/sites/default/files/tpp-10feb2011-us-text-ipr-chapter.pdf>.

[169] *Trans-Pacific Partnership Agreement,* Electronic Frontier Foundation <https://www.eff.org/issues/tpp>.

[170] *Copyright Act 1978* (US) s302(c).

[171] *Oman–United States Free Trade Agreement*, signed 19 January 2006 (entered into force 1 January 2009), Art 15.4(4).

[172] Electronic Frontier Foundation, above n 169.

whether and how far the TPP will move beyond the existing WTO rules in the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement.'[173]

D *Association of South East Asian Nations*

The Association of South East Asian Nations (ASEAN) is an enduring regional cooperation between ten states located in South East Asia. Originally formed between Indonesia, Malaysia, the Philippines, Singapore and Thailand in 1967, under a new charter which entered into force in 2008, ASEAN aims to foster economic prosperity, stability and development in the region.[174] In the area of intellectual property ASEAN has taken on a role appropriate to the diversity of nations which it represents – particularly in terms of economic development – by committing to enhance not only IP protection, but also (and perhaps more fundamentally) the pace and scope of IP asset creation and commercialisation.[175]

The Australian-ASEAN-New Zealand FTA (AANZFTA) came into force in 2010 and is the most comprehensive trade agreement entered into by ASEAN to date.[176] It contains a specific IP Chapter with several interesting features. Broadly speaking Chapter 13 of AANZFTA reinforces member states existing obligations under the WTO TRIPS framework. Further to this, and in express recognition of the 'significant differences in capacity between some Parties in the area of intellectual property'[177] the chapter contains detailed provisions for cooperation between the parties to assist in implementation. It also establishes an IP Committee, consisting of representatives of the Parties to monitor the implementation and administration of the chapter.[178] It is interesting to note that Australia has been successful in negotiating and implementing an FTA which is sensitive to the varying interests and capacities of the obligated states. This supportive and cooperative approach is a positive development in the landscape of regional IP agreements. However, when contrasted to the adoption of proscriptive and onerous

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[173] Barfield, above n 166, 5.
[174] *Charter of the Association of South East Asian Nations*, signed on 20 November 2007 (entered into force 15 December 2008).
[175] *Intellectual Property Overview*, Association of South East Asian Nations <http://www.aseansec.org/6412.htm>.
[176] Department of Foreign Affairs and Trade (Cth), *About AANZFTA* <http://www.dfat.gov.au/fta/aanzfta/index.html>.
[177] *Agreement Establishing the ASEAN –Australian–New Zealand Free Trade Area*, signed on 27 February 2009 [2010] ATS 1 (entered into force 1 January 2010) Chapter 13, Art 9(1).
[178] Ibid, Chapter 13, Article 12(1).

obligations under the AUSFTA (negotiated with a politically and economically dominant trading partner, the US) it also highlights a stark lack of coherence in Australia's international IP policy.

E *European Union*

In recent years the development and strengthening of the European Union's (EU) internal market has resulted in the free flow of goods and services. This has resulted in the need to harmonise intellectual property laws between member states. To this end the European Commission has issued a broad range of directives in the area of copyright. Most important are Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society and Directive 2004/48/EC on the enforcement of intellectual property rights. Goldstein and Hugenholtz consider EU harmonisation in the area and conclude that the directives generally exceed the minimum standards set out in international instruments and 'more often than not … also exceed the average levels of protection granted by the member states prior to implementation.'[179]

On more general terms it may be said that 'EU developments have provided useful models for consideration in the current reviews of copyright law and policy in Australia'[180] and potentially also for our cooperative participation at a regional or international level.

One practical example is the Council of Europe's *Convention on Cybercrime*,[181] cited by Weatherall as a potential 'benchmark' example of an instrument which seeks to promote international cooperation for the effective enforcement of intellectual property rights.[182] Whilst it has a much broader mandate than just IP enforcement, also including computer-related fraud, child pornography, hate crimes and violations of network security, the Convention was developed over four years by European and international experts and includes detailed procedural, jurisdictional and enforcement provisions. When contrasted to the tangible and defined commitments contained in the *Convention on Cybercrime,*

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[179] Paul Goldstein and P. Bernt Hugenholtz, *International Copyright: Principles, Law and Practice* (Oxford University Press, 2nd ed, 2010) 68.
[180] Ricketson, Richardson & Davidson, above n 28, 507.
[181] *Convention on Cybercrime*, opened for signature 23 November 2001, 2296 UNTS 167 (entered into force 1 July 2004).
[182] Indeed, while it was initially developed by the Council of Europe, a number of non-member States have also signed the *Convention on Cybercrime* – Canada, Japan, South Africa and the United States. At the time of writing, a report by the Joint Standing Committee on Treaties supporting Australia's accession to the Council of Europe Convention on Cybercrime had been tabled in parliament (11 May 2011).

ACTA's rudimentary and aspiration provisions seem 'so vague as to be practically meaningless.'[183]

In light of the perceived need for proscriptive enforcement procedures which led GBLAAC and the G8 to instigate the ACTA negotiations in the first instance, it is clear that international accords will be developed as these issues inevitably intensify. The relative calm and considered, yet no less robust approach, of the EU's *Convention on Cybercrime* should serve as an example for future international cooperation in the field.

[183] Kimberlee Weatherall, 'Politics, Compromise, Text and the Failures of the Anti-Counterfeiting Trade Agreement' (2011) 33 *Sydney Law Review* 229, 239.

IV BILATERALISM

In addition to the controversial ACTA and other plurilateral instruments (discussed above), a key way of securing TRIPS plus obligations in the arena of international copyright has been through the negotiation of bilateral trade agreements. Such agreements typically contain a broad array of free trade obligations and invariably include detailed IP provisions. The implications of Free Trade Agreements (FTAs) have generally been criticised as undermining the 'multilateral compact' – 'They pick off countries one by one and they prevent coalitions building for multinational resolutions to outstanding issues.'[184] Drahos describes the new wave of Bilateral Intellectual Property Agreements (BIPs) as a 'ratcheting process which is seeing intellectual property norms globalize at a remarkable rate.'[185] There has been very little praise for the concept of bilateralism in international IP relations. Critics pointing to the distorted power balance between negotiating parties, lack of transparency in negotiations and unequally onerous obligations, to condemn such instruments as yet another example of forum shifting and private agenda pushing on the part of the world's most developed and influential economies.

While there is nothing legally inconsistent about the negotiation and conclusion of BIPs (the Berne Convention and TRIPS both being statements of minimum standards), implications for the wider international IP regime are significant. Under the principle of national treatment, and more acutely under the most favoured nation provision at Article 4 TRIPS, any higher protection implemented into domestic law or conveyed to one nation must be equally extended to all contracting parties. Thus a country entering into a BIP which confers benefits upon nationals of the reciprocal state must extend these benefits to all WTO members under TRIPS and will usually implement provisions into domestic law (thereby strengthening protection under the principle of national treatment).[186] A clear example of this is the extension of the duration of copyright protection adopted by Australia under the Australia-United States Free Trade Agreement (discussed below)

[184] Christopher Arup, 'Intellectual Property and International Trade' in Kathy Bowrey, Michael Handler and Dianne Nicol (eds) *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 202, 213.
[185] Peter Drahos, 'BITs & BIPs: Bilateralism in Intellectual Property' (2001) 4(6) *The Journal of World Intellectual Property* 791, 798.
[186] As recognised by Ricketson, Richardson & Davidson, above n 28, 495 - 'very few countries will ever be prepared to accord rights to foreigners that they are not prepared to accord to their own nationals'.

which now applies not only to works emanating from the US, but to all works which are entitled to copyright protection in Australia.[187] From this it is clear that BIPs have the inevitable effect of 'ratcheting up' international IP standards to the benefit of some states, but at the economic and developmental expense of others. Thus it is questionable whether bilateralism is a legitimate means of pursing international IP enforcement objectives.

Australia is currently party to five bilateral FTAs, with a further five under negotiation and one awaiting parliamentary approval.[188] Australia's participation in bilateral trade relations has been particularly heavily criticised in the context of intellectual property. There is a perception amongst scholars that in our dealings with more politically and economically powerful countries we have unwisely overcommitted ourselves to bilateral IP obligations. Furthermore, there is a sense that in the absence of a well defined and carefully considered policy to guide negotiations, these onerous commitments have unnecessarily flowed through to the bilateral agreements struck with nations with similar interests to ourselves.[189]

A *Australia-United States Free Trade Agreement*

A key instigator in the 'new wave of bilateralism' is the United States.[190] According to the Office of the United States Trade Representative, the US has free trade agreements in force with 18 countries.[191] Of these, two take the form of multilateral agreements[192] with the remaining 12 countries being bound on individual terms.

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[187] *US Free Trade Agreement Implementation Act 2004* (Cth).
[188] Department of Foreign Affairs and Trade (Cth), *Free Trade Agreements* <http://www.dfat.gov.au/fta/index.html>
[189] For a detailed analysis of the Intellectual Property Chapter of the Australia–Chile Free Trade Agreement negotiated 'to the mutual disadvantage of both Australia and Chile' see Matthew Rimmer, Submission No 11 to the Joint Standing Committee on Treaties on the Australia-Chile Free Trade Agreement 2008: Intellectual Property and Development, 18 June 2008.
[190] Ricketson, Richardson & Davidson, above n 28, 513.
[191] Australia, Bahrain, Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, Korea, Mexico, Morocco, Nicaragua, Oman, Peru and Singapore. A further FTA with Panama has been signed but not yet implemented - Office of the United States Trade Representative, *Free Trade Agreements* <http://www.ustr.gov/trade-agreements/free-trade-agreements>.
[192] *North American Free Trade Agreement*, Canada–Mexico–United States, signed 17 December 1992, 32 ILM 289 (entered into force 1 January 1994) and Central American/Dominican Republic Free Trade Agreement, signed 5 August 2004HR Doc 109-36 (entered into force 1 March 2009).

The *Australia–United States Free Trade Agreement*[193] (AUSFTA) was concluded in 2004 with most of the key IP provisions coming into force under Australian law in 2005. Chapter 17 covers intellectual property and is the 'largest chapter in the AUSFTA in content and substance.'[194]

The (unbalanced) implications of the AUSFTA upon Australian IP Standards are identified in practical terms by Ricketson and Ginsburg:

> Implementation legislation … ran to nearly 100 pages, and further was required by the US in order to satisfy its trade negotiators. No corresponding change to US domestic laws occurred … indicating that the negotiations in relation to copyright and related rights were something of a one-way street …[195]

The substantive changes made to Australian copyright law in light of these obligations are considered below. First, it is important to discern why the AUSFTA takes such a prescriptive approach to reformulating our IP policy. Weatherall highlights the unusual nature of the instrument, especially in light of the pre-existing strength of Australia's domestic laws:

> … the reason for much of the IP Chapter is not that Australia had a weak IP system. On the contrary, we have long had a very strong system of protection for IP owners. But the US wants to raise IP standards *worldwide*. Facing opposition in multilateral forums like the WTO, it has moved to impose its preferred standards through FTAs using a template approach—the IP Chapter in each FTA is negotiated according to a template set by the last, with the same provisions included in each, regardless of whether they address some 'problem' in the negotiating partner country.[196]

In a report compiled by the US Advisory Committee to the President, the Congress and the United States Trade Representative on AUSFTA the success of US negotiators in obtaining

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[193] *Australia–United States Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005).
[194] The Senate Select Committee on the Free Trade Agreement Between Australia and the United States of America, Parliament of Australia, *Final Report* (2004) <http://www.aph.gov.au/senate_freetrade/report/final/index.htm>
[195] Ricketson and Ginsburg, above n 82, 173.
[196] Kimberlee Weatherall, 'Locked In: Australia Gets a Bad Intellectual Property Deal' (2004) 20 *Policy: A Journal of Public Policy and Ideas* 18, 19.

an FTA which 'mirrors, as closely as possible, the Singapore and Chile FTAs in order to establish clear precedents for future FTA negotiations' was expressly commended.[197]

The practical result of this is that, contrary to most multilateral agreements which contain necessarily nebulous provisions to allow for a degree of flexibility in domestic uptake, AUSFTA does not contain any such 'wiggle room'.[198] There is little scope to tailor laws to suit Australia's interests and the practical effect being that we adopt US IP policy, where in economic (and potentially also creative) terms it is not in our best interests to do so. Key changes to Australia's domestic copyright law will now be considered.

1 *Duration of Protection*

The biggest implication is the extension of the duration of copyright protection from author's life plus 50 years to life plus 70 years, or 70 years protection in the case of corporate authorship, sound recordings and cinematographic films.[199] The decision to extend the duration of copyright protection has been one of the most controversial recent developments in copyright law, not just in Australia, but also when such laws were passed in the EU and in the US. After all – 'Dead men do not write poetry.'[200] So why have countries adopted a retrospective extension to copyright protection? In the absence of creating an incentive for the creativity and innovation,[201] the answer seems to be purely economic and purely to the advantage of existing copyright owners. Indeed, the act which implemented the extension in the US[202] became known as the 'Mickey Mouse Protection Act' in sardonic recognition of the windfall it would provide to the Walt Disney Company whose copyright in Mickey Mouse was about to expire.[203] The negative implications of the extension are amplified in the Australian context where not only is our creative industry

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[197] Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters, Parliament of the United States, *Advisory Committee Report to the President, the Congress and the United States Trade Representative on the U.S.-Australia Free Trade Agreement* (2004) <http://www.ustr.gov/archive/assets/Trade_Agreements/Bilateral/Australia_FTA/Reports/asset_upload_file813_3398.pdf>.

[198] Weatherall, above n 196.

[199] *AUSFTA,* above n 193, Art 17.4.6.

[200] Weatherall, above n 196.

[201] See discussion by Ian Kilbey, 'Copyright Duration? Too long!' (2003) 25(3) *European Intellectual Property Review* 105.

[202] *Copyright Term Extension Act of 1998*, 17 USC.

[203] Ben Depoorter, 'The Several Lives of Mickey Mouse: The Expanding Boundaries of Intellectual Property Law' (2004) 9 *Virginia Journal of Law and Technology* 4.

impacted by the reduction of the public domain, but as a net importer of copyright materials, the vast majority of profits from the term extension will flow overseas.

2 *Strengthening of Substantive Rights*

As mentioned above the breadth and detail of AUSFTA is remarkable in light of the already strong substantive rights protected under Australia's previous copyright law. Nonetheless, Chapter 17 of AUSFTA sought to state 'in express terms the basic rights that are now evident in mature national schemes and in the evolution of international standards.'[204] This had several direct implications for Australian law.

To give one example, under AUSFTA each party is to provide the right to authorise or prohibit all reproductions, in any manner or form, permanent or temporary (including temporary storage in a material form).

The definition of 'material form' has been altered to reflect this requirement and now includes 'any form (whether visible or not) of storage of the work or adaptation … (whether or not the work or adaptation … can be reproduced)'[205] This overturned the previous legislation as interpreted by the High Court decision in *Stevens v Kabushiki Kaisha Sony Computer Entertainment*[206] where it was held that the temporary reproduction of content in a computer's random access memory (RAM) was not embodiment in a material form.

3 *Enforcement in the Digital Realm*

The enforcement of copyright material in the digital environment is a key focus of AUSFTA and is dealt with in two principal ways. First, through the fortification of technological protection measures, and second, through a set of obligations upon internet service providers (ISPs) to avoid liability for the copyright infringement of users.

(a) *Technological Protection Measures*

Even in light of more substantive legal rights for copyright owners, the reality is that technological developments are providing new platforms and methods through which

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[204] Christopher Arup, 'The United States-Australia Free Trade Agreement: The Intellectual Property Chapter' (2004) 15 *Australian Intellectual Property Journal* 205, 212.
[205] *Copyright Act 1968* (Cth) s 10 as amended by the *United States Free Trade Agreement Implementation Act 2004* (Cth) Sch 9, item 186.
[206] (2005) 224 CLR 193.

copyright infringement might occur. Digital Rights Management (DRM) are essentially a 'self-help mechanism' or practical intervention imposed by copyright owners to prevent or inhibit infringement. Through technological protection measures 'the law is asked to support this strategy by attaching legal liability to interference with rights management information or circumvention of technological measures.'[207]

In this respect the provisions of ACTA are based upon the US *Digital Millennium Copyright Act*, described by Weatherall as a 'particularly draconian [set of] laws … which make it illegal to circumvent DRM, and to distribute technology to circumvent DRM.'[208] Subsequent to their adoption in the US these laws were the subject of much controversy for their impact upon the balance of rights between producers and consumers of copyright material.[209]

Article 17.4.8 AUSFTA imposes civil (and potentially criminal) liability upon any person who, knowingly or having reasonable grounds to know, circumvents any effective technological measure that controls access. Liability is to extend to manufacturers and distributors of products or services, should their primary purpose be circumvention. There is a narrowly defined public interest exception accorded to non-commercial entities for non-infringing use of the work, performance or phonogram.

(b) *ISP Liability*

In the absence of a clear and comprehensive authoritative statement from the High Court (even in light of the recent *iiNet* decision handed down by the High Court on 20 April 2012[210] – discussed below) the liability of ISPs for the infringing actions of users or customers is yet to be fully developed in an Australian context.

The development of Australia's domestic legislation on this issue has been significantly influenced by AUSFTA. However, there is also evidence that Australian legislators have looked to the US experience in an attempt to ameliorate some of the difficulties and controversies faced in the US.

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[207] Arup, above n 204, 218.
[208] Weatherall, above n 196, 23.
[209] See the subsequently debated *Digital Media Consumers' Rights Bill* of *2005* (US) and discussion in Weatherall, above n 196, 23-24.
[210] *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 (20 April 2012).

Article 17.11 AUSFTA sets out in detail the responsibilities of ISPs to avoid liability for copyright infringement of end users. In this sense liability is inverted[211] and therefore places an onerous obligation upon ISPs. Furthermore:

> While the conditions do not require the ISPs to investigate or monitor infringements, they must cooperate with the measures the owners are taking to protect their rights, including control of access. They must be prepared to terminate the infringers' internet access accounts and take steps to block access to infringing material.[212]

In implementing these obligations in Australia legislators have essentially spilt ISP liability across two tiers. The first is the issue of 'authorisation' under s101(1A) which holds to account persons who authorise the committal of an act which infringes copyright.[213] This section focuses upon the degree of control exercised by the third party over the person infringing copyright; the relationship between the parties; and whether reasonable steps were taken to prevent or avoid the infringement. The section tier is made up of the so-called 'safe harbour provisions' contained within s116AH which was enacted in 2004 by the *US Free Trade Agreement Implementation Act*[214] and applies specifically to ISPs.[215] The legislation identifies four categories of ISP activity and implements both obligations and limitations to proscriptively define the responsibilities of ISPs. As long as the conditions imposed are met in relation to each category of activity the ISP will not be liable for damages claimed by copyright owners. A table, setting out the conditions imposed upon each activity, can be found within the Act.[216]

Despite much discussion in light of the *iiNet* litigation, the role of this second tier in limiting relief against ISPs remains undecided in Australian jurisprudence. The High Court's decision in *iiNet*[217] reflects a restrained approach to the application of safe harbour provisions and offers no guidance for their future application. The outcome in that case turning instead on a finding that iiNet had not authorised the breach of Roadshow Films' copyright when iiNet customers used the internet and Bit Torrent software to download pirated films. As the common law now stands the continued

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[211] Arup, above n 204, 217.
[212] Ibid.
[213] *Copyright Act 1968* (Cth) s101(1A).
[214] *US Free Trade Agreement Implementation Act 2004* (Cth).
[215] *Copyright Act 1968* (Cth) s 1116AH.
[216] *Copyright Act 1968* (Cth) s 116AH(1).
[217] *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 (20 April 2012).

relevance of authorisation to the question of ISP liability, *precursory* to the more operationalised approach adopted in s116AH, to some extent ameliorates the proscriptive nature of Australia's obligations under AUSFTA.

4 *Benefits & Detriments of AUSFTA*

The totality of this analysis demonstrates that AUSFTA sits uncomfortably (at best) with Australia's public and economic interests regarding international obligations and intellectual property.

In light of this evidence it is difficult to discern why our international policy makers agreed to the terms and willingly succumbed to the adoption of US IP policy under the agreement. The question is not made any clearer with a view to political advice preceding the decision.[218] Citing numerous examples of government reviews, research papers and submissions, Weatherall sums up the overwhelming message – 'While there has never been a suggestion that Australia should resile from international standards, governments were repeatedly told not to go beyond them.'[219]

In expounding the benefits of AUSFTA's IP Chapter the Department of Foreign Affairs and Trade (DFAT) describes the harmonisation of Australian and US IP laws as an important means of attracting US investment 'by creating a more familiar and certain legal environment' and 'reinforc[ing] Australia's reputation as one of the world's leading countries in protecting and enforcing intellectual property rights.'[220] Furthermore DFAT asserts that:

> Australian copyright industries (including publishing, filmmaking and music) benefit from an extended term of copyright protection, an expeditious process that allows for copyright

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[218] See for example John Revesz, 'Trade Related Aspects of Intellectual Property Rights', Staff Research Paper, Productivity Commission (1999) which found that in most cases gains would be maximised by not exceeding minimum standards in TRIPS; Office of Regulation Review Submission to the Copyright Law Review Committee Review of Simplification of the Copyright Act (1995) which recommended caution in extending copyright in the digital environment; Nicholas Gruen, Ian Bruce and Gerard Prior, 'Extending Patent Life: Is it in Australia's Economic Interests?' Staff Information Paper, Industry Committee, June 1996 who concluded that extending the patent term from 16 to 20 years could cost Australia between $376 million and $3.8 billion over 30 years and that Australia should not protect IP more than international agreements require.

[219] Kimberlee Weatherall, 'IP in a Changing Information Environment' in Bowrey, Kathy, Michael Handler and Dianne Nicol, *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 1, 9.

[220] Department of Foreign Affairs and Trade (Cth), *Australia-United States Free Trade Agreement: Facts Sheet – Overview* <http://www.dfat.gov.au/fta/ausfta/outcomes/01_overview.html>

> owners, Internet Service Providers and subscribers to deal with allegedly infringing copyright material on the Internet, and agreed criminal standards for copyright infringement.[221]

Likewise, the Office of the United States Trade Representative highlights the importance of having strong trade relations with Australia, stating that AUSFTA 'supports the economy of a steadfast ally, further cementing the long-standing U.S.-Australia strategic relationship, while simultaneously benefiting U.S. commerce.'[222] Perhaps more revealing are the findings of the US Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters, whose conclusions are very telling:

> The goal for AFTA intellectual property negotiations was to achieve, for the first time with a developed country and a key trading partner, a level of protection that in some areas improved on the standards in TRIPS and in others clarified provisions in those agreements. In addition, it was critical to achieve Australia's agreement to adhere to, and fully implement the provisions of, the WCT and WPPT, along the same lines as the U.S. had in the DMCA [Digital Millennium Copyright Act] in 1998. ... While enforcement in Australia was by no means as serious a problem as in many other countries in the region, there were some key improvements that industry believed would make a major difference in that market. These objectives were, in almost all instances, achieved.[223]

This highlights the position of the US as the 'demandeur' during the AUSFTA negotiations.[224] It might also provide the true reason for Australia's acquiescence to less than ideal IP policies contained therein – the sheer political and economic strength of the US as a trading partner and a protagonist in the world IP enforcement arena.

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[221] Ibid.

[222] Office of the United States Trade Representative, *Statement Of Why The United States-Australia Free Trade Agreement Is In The Interests of U.S. Commerce* <http://www.ustr.gov/webfm_send/2627> 2

[223] Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters (Cth), above n 197, 206.

[224] Arup, above n 204, 206.

V Enforcement of Foreign Copyright in Australia

As a net importer of copyright material[225] it is important to understand how foreign copyright may be enforced in Australia. The first part of this chapter entails a consideration of the statutory regime which enacts the international obligations discussed above into domestic law. It will then consider questions of conflict of laws and the ability of Australian courts to hear matters concerning infringement of foreign copyright. In a modern context, particularly in light of the forces of globalisation, these issues are not always straight-forward. The final part of the chapter will explore how the common law is developing to reflect the realities of copyright, its infringement and enforcement in today's globalised and interconnected world.

A *Statutory Regime*

Recognition of foreign copyright in Australia is underpinned by our obligations under the various international instruments to which we are a party. These are given effect under Part VIII of the *Copyright Act 1968* (Cth). Part VIII provides for the creation of the *Copyright (International Protection) Regulations 1969* (Cth). The Regulations extend the operation of the *Copyright Act* to works and subject matter created by authors who are citizens of countries also bound under the relevant international conventions, or where the work was first published in any such country. This mirrors the connection required for the application of the *Copyright Act* over an Australian work or work first published in Australia,[226] thus adhering to the principle of national treatment.

Over time Australian copyright law has developed in response to our international obligations. This is an outcome built into the architecture of such agreements – in particular due to the principle of national treatment and the political nature of trade agreements on intellectual property. Examples of this can be discerned throughout the body of this dissertation. Two clear examples being the extension of the duration of copyright protection under the AUSFTA (discussed at IV-A-1) and the (eventual) inclusion of moral rights under Australian copyright law in response to our commitments under the Berne Convention (discussed at II-A-2-(f)).

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[225] Allen Consulting Group for the Australian Copyright Council and the Centre for Copyright Studies, *The Economic Contribution of Australia's Copyright Industries* (Sydney, 2001) cited in Rickeston, Richardson and Davidson, above n 28, 58.

[226] *Copyright Act 1968* (Cth) s32.

B *The Detriment of National Treatment*

The precise operation of the principle of national treatment has been discussed above. In essence it obliges state parties to international agreements to afford the same protection and rights to an alien, as it would to a citizen. It is thus distinct from the notion of reciprocity which grants only the level of protection that the foreign author's country grants to foreign authors. National treatment is to be preferred in the context of IP diplomacy because it ameliorates many complex issues concerning country of origin and equivalent protections. It also allows for the gradual strengthening of not only international protections but also domestic copyright laws because it is supplemented by core minimum standards which are necessarily adopted into national laws before accession.

Despite these benefits, the continuing importance of national treatment clearly perpetuates inconsistency between copyright protections afforded in various jurisdictions. An interesting and infamous example of this is the copyright subsisting in the illustration of Mickey Mouse. Mickey was first drawn in 1928 by Ub Iwerks who was under the employ of The Walt Disney Company.[227] Iwerks died in 1971. Under the US work for hire doctrine copyright protection extends to 95 years after publication for works. Therefore copyright over the illustration of Mickey Mouse will expire in the US in 2023. As discussed above the duration of this protection has been extended both in the US[228] and in Australia under our AUSFTA obligations. However, instead of meaning that copyright protection over the illustration of Mickey Mouse expires at the same time in both countries, under Australian law the illustration of Mickey Mouse will be protected for 70 years from the death of the author – i.e. until 2041. In light of this, and countless other examples, it becomes important to consider the extra-territorial application of domestic copyright laws and the possible conflict of laws issues which arise in the particular context of international copyright enforcement.

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[227] John Kenworthy, *The Man Behind the Mouse: An Intimate Biography of Ub Iwerks* (Disney Editions, 2001) 53-54.
[228] *Copyright Term Extension Act of 1998*, 17 USC.

C *International Copyright & Conflict of Laws*

Conflict of laws concerns the resolution of conflicts that arise because of the interaction between different legal systems.[229] Essentially it involves three distinct but interconnected issues or 'stages'. First, determination of jurisdiction or the justiciability of a dispute in a particular forum. Second, choice of law – determining what law should be applied in resolving the dispute. Finally, recognition and enforcement of foreign judgements. The task of fully dissecting the intricate conflict of laws rules which might apply to international copyright enforcement proceedings is better left to others.[230] Rather, the focus here is to consider the broader issue of territoriality and the developing role of courts in accepting jurisdiction over enforcement proceedings for foreign copyright.

1 *The Concept of Territoriality*

We have seen in the preceding chapters that copyright has been the subject of long and enduring international cooperation. Despite this, and an ever-increasing tendency to usurp international boundaries, it remains the case that *in law* copyright is territorially based.

In the seminal text of Dicey and Morris it is stated that copyright, similar to patents and trade marks, are 'strictly territorial in their operation'.[231] They conclude that:

> … a United Kingdom patent, trade mark or copyright cannot be infringed by an act committed outside the United Kingdom. Hence no action will lie in England for the infringement of … a United Kingdom copyright, e.g. in France or for a threat to bring an

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[229] Martin Davis, Andrew Bell and Paul Brereton, *Nygh's Conflict of Laws in* Australia (LexisNexis, 8th ed, 2010) 4.

[230] For further detail see Graeme Austin, 'Domestic Laws and Foreign Rights: Choice of Law in Transnational Copyright Infringement Litigation' (1999-2000) 23 *Columbia Journal of Law & the Arts* 1; Graeme Dinwoodie, 'Conflicts and International Copyright Litigation: The Role of International Norms' in Jürgen Basedow, Josef Drexl, Annette Kur and Axel Metzger (eds) *Intellectual Property in the Conflict of Laws* (Mohr Siebeck, 2005) 195; Jennifer Driscoll, 'It's A Small World After All: Conflict of Laws and Copyright Infringement on the Information Super Highway' (1999) 20(4) *University of Pennsylvania Journal of International Law* 939; Stuart Dutson, 'Actions for Infringement of a Foreign Intellectual Property Right in an English Court' (1997) 46(4) *The International and Comparative Law Quarterly* 918; K. Lipstein, 'Intellectual Property: Parallel Choice of Law Rules' (2005) 64(3) *Cambridge Law Journal* 593; K. Lipstein, 'Intellectual Property: Jurisdiction or Choice of Law?' (2002) 61(2) *Cambridge Law Journal* 295; William Patry, 'Choice of Law and International Copyright' (2000) 48 *The American Journal of Comparative Law* 383.

[231] Lawrence Collins, *Dicey & Morris on The Conflict of Laws* (Sweet & Maxwell, 12th ed, 1993) 1516.

> action for such infringement. Nor can the holder of a French … copyright sue in England for its infringement in France.[232] [footnotes omitted]

However, it is arguable that the unique nature of copyright, its philosophical foundations and treatment under prevailing international law has eroded the application of territoriality to copyright. This view can be supported with a view to recent common law developments.

2 *How Many Copyrights?*

The passage from Dicey and Morris cited above gives rise to a preliminary question with important implications for the determination of a conflict of laws in international copyright enforcement proceedings: How many 'copyrights' subsist across the various jurisdictions in which protection may be claimed? A multitude, or just one which vests in the work initially and is then enforced internationally by virtue of agreements between sovereign states? The answer is the subject of competing ideas and theories.

As we have seen the traditional view frames copyright as a territorial right[233] – i.e. that copyright exists within the confines of a particular jurisdiction because of the operation of the law within that territory. This supports a conclusion that multiple 'copyrights' exist across different states. This simplifies any questions of conflict of laws. As Patry points out, in such a situation 'there is little reason not to apply the law of the forum to all issues since rights are created wholly by the forum.'[234] If, on the other hand, it is concluded that there exists just one copyright capable of international enforcement then a conflict between potentially applicable laws is more likely to arise and will be harder to resolve.

Nonetheless it is argued that this approach is compatible with the particular nature of copyright which exists automatically upon creation, without any formal registration process or recognition (in contrast to patents, designs and trade marks which must be registered and granted by state authorities in order to legally exist). This position is supported by a comparison of the Berne Convention and the associated Paris Convention for the Protection of Industrial Property. The latter concerns international enforcement of patents and trade marks and specifically states that a patent or trade mark granted in one

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[232] Ibid.
[233] Especially in a common law context.
[234] William Patry, 'Choice of Law and International Copyright' (2000) 48(3) *The American Journal of Comparative Law* 383, 392.

jurisdiction is independent of any rights granted in another.[235] Conversely the Berne Convention lacks any reference to the existence of independent territorial copyrights and thus arguably implies that copyright is (or should be) singular and not territorially dependant.[236]

The law has developed an uneasy resolution to this question. Despite the fact that in reality we talk of only one work it is accepted that 'we adhere to the legal fiction that the single act of creation gives rise to numerous separate national copyrights.'[237]

3 *Common Law Development*

Under the common law the territoriality of copyright stems from the purported extension of the Australian High Court decision in *Potter v Broken Hill Pty Co Ltd.*[238] In that case the court drew an analogy between immovable property situated abroad and a foreign patent, holding that an action for the enforcement of a New South Wales patent could not fall within the jurisdiction of a Victorian Court.

The decision in *Potter* drew upon to the rule in *Moçambique*[239] – the accepted position under international law that it is inappropriate for one state to exercise jurisdiction in relation to land geographically situated within the territory of another state. This is because jurisdiction in relation to land is, by virtue of its immoveable nature, local. The application of the rule to the facts in *Potter* was a marked extension of the exclusion, beyond real property to include intellectual property, specifically patents.

The decision in *Potter* was also fundamentally dependent on the 'Act of State Doctrine' as famously enunciated by Fuller CJ of the US Supreme Court in *Underhill v Hernandez*:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgement on the acts of the government of another done within its territory.[240]

In *Potter* the High Court took the view that the granting of a monopoly right over a recognised invention was an administrative act of government and due to the 'Act of State

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[235] Ibid, 395 citing *Paris Convention* Arts 4bis (patents) and 6(a) (trade marks).
[236] Ibid, 392.
[237] Dinwoodie, above n 230, 198.
[238] (1906) 3 CLR 479.
[239] *British Africa Co v Cia de Moçambique* [1893] AC 602
[240] (1897) 168 US 250.

Doctrine' could not be adjudicated by a foreign court. The application of the 'Act of State Doctrine' to intellectual property law is bound up in the notion that intellectual property is a right bestowed upon the right holder in recognition of intellect, creativity or innovation. In the case of patents, trade marks and designs, where states often impose and maintain formal systems of registration, this is a logical outcome.

On the other hand, where international law dictates that rights must come into existence free from any formalities,[241] it is arguable that the doctrine is not applicable to copyright. As much was recognised by the New York District Court in *London Film Productions Limited v Intercontinental Communications Inc.*:

> [I]n adjudicating an infringement action under a foreign copyright law there is . . . no need to pass upon the validity of acts of foreign government officials,' since foreign copyright laws, by and large, do not incorporate administrative formalities which must be satisfied to create or perfect a copyright.[242]

This decision, while not binding in an Australian context, demonstrates clearly the distinction that can be drawn between types of intellectual property when considering jurisdictional issues.

The distinction, however, was blurred in the UK when the decision in *Potter* was followed and specially extended to foreign copyright in *Tyburn Productions Ltd v Conan Doyle*.[243] In that case the plaintiff, a British Company wishing to distribute a Sherlock Holmes movie in the United States, sought a declaration in the United Kingdom that the defendant, the only surviving child of author Sir Arthur Conan Doyle, did not possess copyright in the United States. The UK Court, reticent to decide on the *subsistence* of copyright in a foreign jurisdiction, dismissed the proceedings for want of jurisdiction. While perhaps a sensible decision in light of the questionable appropriateness of the forum,[244] the effect of Vinelott J's decision was controversial as it reduced the copyright protection afforded by British Courts by applying the *Moçambique* rule to international copyright claims. The practical detriment of this outcome is described by Fentiman:

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[241] *Berne Convention*, above n 50, Art 5(2).
[242](1984) 580 F.Supp. 47 citing *Nimmer on Copyright* (1982), 1703.
[243] [1991] Ch 75.
[244] See Vinelott J's concluding comments as to the force of any decision taken in the US, leading him to conclude that any 'judgment be an exercise in futility' ibid at 89.

> If such claims are inadmissible, the copyright protection afforded by English courts is seriously reduced. And those whose rights are infringed in several jurisdictions must litigate where each infringement occurs, perhaps at prohibitive expense, rather than consolidate their claims against an English infringer in England.[245]

The *Tyburn* decision has been considered and followed by the Federal Court of Australia on two subsequent occasions.[246] Both cases related to the less controversial area of patents and applied the rules in *Moçambique* and *Potter* to hold that actions to determine the rights in or title to a foreign patent lay beyond the jurisdiction of Australian courts. The position of Australian law in accepting jurisdiction over international copyright proceedings has not yet been open for judicial determination.

The implications of *Tyburn* for international copyright proceedings had not been considered until the recent decision of the UK Supreme Court in *Lucasfilm Ltd and others v Ainsworth and another.*[247] This is an interesting decision which highlights the particular nature of copyright and erodes the (dubious) extension of the principle of territoriality and the Act of State Doctrine to excluded jurisdiction over enforcement proceedings for foreign copyright. It is submitted that this decision will be highly persuasive in shaping future developments in an Australian context.

D *Case Study: Lucasfilm v Ainsworth*

The case involves the copyright subsisting in various artifacts made for use in the Star Wars films. The plaintiff, Lucasfilm, alleged that the defendant had infringed copyright by making and selling versions of the Imperial Stormtrooper helmet and other armour to the public. The defendant, Mr Ainsworth, skilled in vacuum-molding plastics, had been commissioned by the Lucasfilm to make objects for use as costume and props in the production of the films. In light of the gigantic success of the Star Wars enterprise, Mr Ainsworth established a website through which he made and sold replica artifacts from the film – including the Imperial Stormtrooper helmet (which was agreed by the parties to be taken as the paradigm case and decisive of issues arising in relation to other

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[245] Richard Fentiman, 'The Justiciability of Foreign Copyright Claims' (1999) 58(2) *The Cambridge Law Journal* 286, 286-7.
[246] *Tritech Technology Pty Ltd v Gordon* (2000) 48 IPR 52; *Glueck v Stang* (2008) 76 IPR 75.
[247] [2011] UKSC 39; [2011] 3 WLR 487.

artifacts subject to the dispute.) The evidence was that he sold some of the goods to consumers in the United States – but only to the value of between US$8,000-$30,000.

Initially Lucasfilm sued Mr Ainsworth and obtained a default judgment in the United States District Court. The judgment was given in the absence of the defendant (who therefore did not subject himself to the jurisdiction of the US Court) and the US$20 million award of damages[248] went unsatisfied. In an attempt to recover the damages awarded in the US, Lucasfilm brought an action before the UK Courts. They sought to have the US judgment enforced against Mr Ainsworth, and in the alternative to sue for breach of copyright under UK law. Having abandoned the US judgment enforcement proceedings after two unsuccessful attempts in lower courts, the Supreme Court decision dealt with the action under UK law, but precursory to this involved a finding as to the justiciability of the claim for breach of foreign US copyright before the UK Court. It is the Court's finding as to jurisdiction which is relevant to the current dissertation.

The Supreme Court first considered the rule in *Moçambique* and its purported extension to intellectual property law in *Potter*. The Court highlighted the politically sensitive and factually specific nature of the decision in *Moçambique* which involved issues of international law, comity and sovereignty. This lead the Court to conclude that the rule in *Moçambique* was not a fundamental aspect of the Australian High Court's decision in *Potter* and therefore significantly erodes the application of the principle of territoriality to copyright.

Lucasfilm thus departs from the conclusions of Vinelott J in *Tyburn* by interpreting *Potter* as 'a decision extending the Act of State Doctrine to foreign patents'[249] and concluding that *Tyburn* was wrongly decided.[250]

In line with the discussion above the decision in *Lucasfilm* dwells upon the particular nature of copyright as compared to other types of intellectual property – the lack of

[248] $10 million which represented 'treble damages' awarded under in accordance with the *Lanham (Trademark) Act*, 15 USC § 1117.
[249] [2011] 3 WLR 487, 507.
[250] Ibid, 519.

formalities required for creation meaning there is 'no need to pass upon the validity of acts of foreign government officials.'[251]

The Supreme Court also considered recent international developments dealing with jurisdiction over proceedings imbued with international aspects, in particular developments in European law. They specifically refer to Article 22(4) of the Brussels I Regulations[252] and Regulation (EC) No. 864/2007.[253] The former, in providing an exception to the general domicile rule of jurisdiction, makes a distinction between intellectual property rights which are required to be deposited or registered and those that are not. The latter envisages that actions may be brought in member states for infringement of foreign intellectual property rights even where the applicable law will be the law of the country in which the act of infringement was committed. The cumulative effect of these is to undermine arguments that actions for infringement of IP rights cannot be brought outside the state in which they are granted or subsist.[254]

Based upon this, and a consideration of foreign authorities on the justiciability of intellectual property claims, the Court perceived 'that the modern trend is in favour of the enforcement of foreign intellectual property rights.'[255] It also concluded that '[t]here are no issues of policy which mitigate against the enforcement of foreign copyright'[256] and that 'states have an interest in the international recognition and enforcement of their copyright'[257] as evidenced by the international cooperation which has long taken place in the field.

The practical implications of the Supreme Court's decision for the parties are slightly unclear. Ainsworth was found not to have infringed Lucasfilm's *UK* Copyright. This was because the Stormtrooper Helmet served a functional purpose in the films and could therefore not be defined as an 'artistic work' and attracted the defence to copyright infringement in s51 of the *Copyright Designs and Patents Act 1988* (UK). Although the

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[251] Ibid, 512 citing *London Film Productions Limited v Intercontinental Communications Inc.* (1984) 580 F.Supp. 47.
[252] Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2000] OJ L 012/1.
[253] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations [2007] OJ L 199/40.
[254] [2011] 3 WLR 487, 513-514.
[255] Ibid, 519.
[256] Ibid.
[257] Ibid.

substantive claim under US law and the quantum of damages to be awarded was not in issue on appeal and not considered by the Supreme Court, the US claim (successful in the first instance) was held to be justiciable. Despite this, given that it is doubtful that a UK court would impose punitive US style damages particularly on a defendant who appears to have made only modest returns from the infringing activities, it seems unlikely that Lucasfilm will pursue the matter further in the UK.[258] As such it seems to be in the best interests of both parties to reach an out of court settlement in this case. If this is not possible, a further hearing will be necessary.[259]

The real practical significance of the decision is for subsequent actions for infringement of foreign copyright brought in the UK where there is a basis for *in personam* jurisdiction over the defendant. The decision broadens the jurisdiction of the Court over claims regarding foreign copyright and is arguably a 'major step forward towards the effective international enforcement of intellectual property rights.'[260]

The decision will likely have important implications for right holders and be a significant addition to the potential enforcement mechanisms currently available. The implications of this in today's commercial IP context are summarised by Prinsley and Byrt:

> In a world of global commerce with major IP rights being exploited directly or indirectly by global operators in lesser developed countries … there may be stark differences between the speed and quality of remedies available for infringement in the country of 'residence' of prime owners of IP rights or the ultimate beneficiaries of the exploitation of those rights, and the countries in which those rights are being exploited.[261]

In light of this an opening of floodgates to litigation in UK courts for infringement of copyright under foreign jurisdictions may be a potentially unwelcome outcome of the decision.[262] However, this may be countered by recognising that the decision does not

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[258] Lucasfilm apparently indicated during the litigation that its aim was not to bankrupt Mr Ainsworth. See Paddy Gardiner, 'Lucasfilm Ltd v Ainsworth: focus on the justiciability of foreign copyright infringement claims' (2012) 23(2) *Entertainment Law Review* 23, 24.
[259] Andrew Dickinson, 'Sculpture & Mind Tricks in the Conflict of Laws' (2012) 1 *Lloyd's Maritime & Commercial Law Quarterly* 21, 23.
[260] Paul Torremans, 'Star Wars rids us of subject matter jurisdiction: the Supreme Court does not like Kafka either when it comes to copyright' (2011) 33(12) *European Intellectual Property Review* 813, 817.
[261] Mark Prinsley & Sarah Byrt, 'Lucasfilm Fails to Find the Force' (2011) 105 *European Lawyer* 14, 15.
[262] Oliver Tidman, 'The Supreme Court: may the force be with you?' (2011) 35 *Scott Law Times* 263, 264.

circumvent the need for a claimant to demonstrate standing to bring an action, just as he would if claiming breach of a contractual or any other type of right.[263]

Pila has critiqued this conclusion and is wary of the changing role of domestic courts to become 'non-exclusive world tribunals'.[264] She notes that '[t]he court's reasoning on justiciability is bold; less for its rejection of previous legal rules (which have long been criticised), than for its reliance on a 'modern trend' and the 'interest of states'.'[265]

The implications of the decision in *Lucasfilm* for enforcement of foreign copyright in Australia are not yet known. However, the acceptance of the decision of *Tyburn* in Federal Court jurisprudence[266] indicates that it will certainly require consideration in subsequent case law. It is important to note that 'although the process of adaptation of English decisions has not ceased altogether, it can no longer be assumed that modern English interpretations of conflicts law will be followed in Australia.'[267] What's more, the impact of the UK's obligations as a member of the EU 'together with a [general] reluctance to embrace more recent decisions of the House of Lords'[268] may result in a different development of the common law by Australian Courts.

Nonetheless, the conclusion of the court in *Lucasfilm* that a 'in a case of a claim for infringement of copyright of the present kind, the claim is one over which the English Court has jurisdiction, provided that there is a basis for *in personam* jurisdiction over the defendant'[269] is a significant development in the common law approach to foreign copyright enforcement. It cements the distinction between copyright and other types of intellectual property rights, excluding the former from the operation of the act of state doctrine. By removing its obsolete 'historical baggage'[270] the decision also drastically undermines the application of the principle of territoriality to copyright. This has

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[263] Dickinson, above n 259, 25.
[264] Justine Pila, 'The "Star Wars" Copyright Claim: An Ambivalent View of the Empire' (2012) 128 Law Quarterly Review 15, 18 citing the Court of Appeal's decision in *Lucas Films v Andrew Ainsworth* [2009] EWCA Civ 1328 at [129]
[265] Ibid, 18-19.
[266] See *Tritech Technology Pty Ltd v Gordon* (2000) 48 IPR 52; *Glueck v Stang* (2008) 76 IPR 75
[267] Davis, Bell and Brereton, above n 229, 11.
[268] Ibid.
[269] [2011] 3 WLR 487, 518.
[270] Dickinson, above n 259, 23.

significant implications for the previously accepted position that copyright is 'strictly territorial in their operation'.[271]

Ultimately the implications of the *Lucasfilm* decision highlight a need for trepidation on the part of the judiciary in accepting jurisdiction over claims relating to foreign copyright. In particular the case illustrates the extent to which copyright policy between different countries can differ. The acceptance of jurisdiction by courts in one country, over claims arising under the law in another, when in fact there would be no copyright (or a valid defence exists) under domestic law is problematic. It leads to a situation where, rather than 'Berne-style National Treatment', courts will offer 'Berne-Plus Preferential Treatment' for international rights. This is (at best) an odd situation and potentially another step towards the strengthening of private copyright owned by companies wealthy enough to take international enforcement actions, at the expense of legitimate local policy considerations.

[271] Collins, above n 231, 1516.

VI CONCLUSION

This dissertation has considered the negotiation and development of international copyright protection and enforcement mechanisms throughout time and across forums. From this we can discern a truly kaleidoscopic legal landscape – formed against a backdrop of different legal and cultural understandings of copyright; framed by broad and inclusive multilateral instruments; and increasingly filled in with smaller but more rigid accords.

The potential for this 'multi-nodal, networked governance of IP' to spread opportunities and uncover innovative and workable forms of international relations is recognised by Arup who, citing Rodriguez-Garavito (discussing possibilities in another field – labour standards), champions 'counter-hegemonic movements which allow for movement between styles and layers of law.'[272] Unfortunately, in the context of copyright and IP this has not been achieved.

Rather we are seeing an increasing and alarming fragmentation of international obligations concerning copyright protection and enforcement. The proliferation of regional, plurilateral and bilateral agreements represents a shift away from globally negotiated standards. Not only does this give rise to issues with transparency and legitimacy, it fundamentally disintegrates the possibility for holistic global cooperation in the area.

This disintegration, coupled with the (logical though problematic) erosion of the application of the principle of territoriality to copyright and the expanding jurisdiction of courts to enforce international copyright claims, is already producing an upward ratcheting of international obligations that do not take into account the fine balance between public and private interests which have always underpinned the law of copyright and the compromised monopoly which it conveys.

[272] Christopher Arup, above n 184, 216 citing C Rodriguez-Garavito, 'Nike's Law: The Anti-Sweatshop Movement, Transnational Corportations, and the Struggle over International Labor' in B Santos and C Rodriguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (2005).

The trend towards expanding intellectual property rights and enhancing international enforcement processes has been labeled 'information feudalism'. This is a term adopted to describe a process by which:

> …knowledge assets [are transferred] from the intellectual commons into private hands. These hands belong to media conglomerates and integrated life science corporations rather than individual scientists and authors. The effect of this [being] to raise levels of private monolistic power to dangerous global heights, at a time when states, which have been weakened by the forces of globalisation, have less capacity to protect their citizens from the consequences of the exercise of this power.[273]

In this picture it is easy to paint Australia as disenfranchised in the new system of global IP governance, lacking the political and economic sway to shape international IP relations and to reach advantageous (or at least more equitable) outcomes in our own national interest. Indeed, Australia's engagement in international copyright protection and enforcement to date has been tied heavily to our wider trade objectives and the politics of our international relations. This has led us to agree to onerous and unwarranted obligations with powerful trading partners, who have been lobbied by even more powerful private interests.

We are fast approaching a point where our international IP obligations, despite their detrimental impacts, must be labeled a *fait d'accompli* and compliance both domestically and internationally will be an irreversible, ongoing and ever increasing burden upon our economy and creative industries. This reality highlights the pressing need for Australia to adopt a clear and considered policy regarding the accrual of international IP obligations.

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[273] Peter Drahos and John Braithwaite, *Information Feudalism: Who owns the Knowledge Economy? Information Feudalism: Who Owns the Knowledge Economy?* (Earthscan Publications, 2002) 2-3.

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