Introduction

The songs on our iPods, the television shows we capture on TiVo, the music videos in our new portable video players, the movies we watch in our DVD collections – we believe that these digital slices of media also belong to us in a real sense. (J.D. Lasica, *Darknet* 1)

In the landmark *Sony Betamax* case in 1984, the Supreme Court of the United States held that consumers’ home copying of television programmes on video cassette recorders (VCR) was a fair use of copyright works. 2 Accordingly, the Bench ruled that the manufacturer of a VCR was not liable for the secondary copyright infringement, because the technology was capable of substantial non-infringing uses. The judgment has been hailed as ‘the Magna Carta and the Declaration of Independence rolled into one’ for consumers and technology innovators. 3 The ruling has been lauded by consumers as a boon not only for ‘the makers of not just VCRs, but also every other technology capable of being used for infringement (e.g., photocopiers, personal computers, Cisco routers, CD burners, and Apple’s iPod)’. 4 At the same time, the decision has been derided as an unwarranted incursion into the economic rights of copyright industries. Jack Valenti of the Motion Picture Association of America famously compared the VCR to ‘the Boston strangler’. 5 Others wondered whether the significance of the decision had eroded over time, especially in light of digital technologies. 6

In 2005, the Supreme Court of the United States had an opportunity to revisit the *Sony Betamax* decision, and consider the rights of consumers in respect of digital copyright. The nine judges considered whether the peer-to-peer networks, Grokster and Streamcast, were liable for secondary copyright infringement because the users of the systems traded copyright music and films, without authorization. 7 Awaiting judgment, competing protestors squared off against one another on the steps of the Supreme Court of the United States. On one side, consumer activists marched with placards warning, ‘Save Betamax’, ‘Hands off my iPod’, ‘Don’t Touch my TiVo’, and ‘Don’t Put Home Recording on Pause’. 8 Similarly, supporters of technology developers and entrepreneurs held up banners, proclaiming ‘Don’t Stop Innovation’, ‘Pro America Innovation’, and ‘Pro America, Pro Innovation, Pro Betamax’. 9 On the other side, the
supporters of copyright industries held up opposing placards. Some invoked a natural rights theory of copyright law, protesting to a higher authority, ‘Thou Shalt Not Steal – God’.

Others relied upon the image of romantic authorship, with guitar-wielding musicians seeking sympathy for the plight of starving artists, ‘Feed a Musician Today – Download Legally’ and ‘Don’t Steal My Future’. This lively, theatrical display – ‘Rent-a-Crowd’, if you are cynically inclined – was well organized by the competing interests. Once the verdict was handed down, the various lawyers, business leaders and spin-doctors descended from on high to the steps of the Supreme Court of the United States. A variety of partisan views were delivered on the nature and the significance of the decision in Grokster. A media scrum packed into the arena, and listened intently.

This protest was symbolic of a larger concern about the impact of copyright law upon consumers. There has been a growing consumer movement in opposition to the strictures imposed by the copyright industries. A number of NGOs, civil society groups, research centres and legal clinics have been at the vanguard of this movement. The Home Recording Rights Coalition has sought to ‘protect your right to buy and use audio and video recorders players, and PCs’. The Electronic Frontier Foundation (EFF) has been a significant advocate for consumer rights in respect of copyright law. The organization bills itself in these terms:

From the Internet to the iPod, technologies are transforming our society and empowering us as speakers, citizens, creators, and consumers. When our freedoms in the networked world come under attack, the Electronic Frontier Foundation (EFF) is the first line of defense. EFF broke new ground when it was founded in 1990 – well before the Internet was on most people’s radar – and continues to confront cutting-edge issues defending free speech, privacy, innovation, and consumer rights today. From the beginning, EFF has championed the public interest in every critical battle affecting digital rights.

Political action groups like the American Civil Liberties Union, which previously had been concerned only with online privacy or censorship, have begun to take an active interest in intellectual property policy. Downhill Battle launched a campaign of civil disobedience in respect of DJ Danger Mouse’s mash-up, The Grey Album, a musical composition which spliced together The Beatles’ White Album and Jay-Z’s The Black Album. The Swarthmore Coalition for the Digital Commons has protested about copyright owners demanding that Internet Service Providers take down and remove politically sensitive copyright works. Ralph Nader’s organization, the Consumer Project on Technology (CP Tech), has shown a keen interest in intellectual property, access to knowledge and international law. A number of advocacy and research centres have been established,
such as the Creative Commons, the Center for the Study of the Public Domain and Public Knowledge. Legal clinics, like the Stanford Law Center for Internet and the Society, and the Samuelson Law, Technology, and Public Policy Clinic, have also played an important role in representing the interests of consumers in both amicus curiae briefs and policy deliberations.

A number of companies who form part of the new economy have championed the cause of consumers. The Consumer Electronics Association has promoted a broad reading of the defence of fair use in a range of contexts. The technology industry has traditionally been a strong advocate of consumer rights and the defence of fair use, and resisted the entreaties of the copyright industries. J.D. Lasica wonders whether such support has been undermined by recent developments, such as media consolidation, government mandates and technology convergence. Internet Service Providers, such as Verizon and Charter Communications, have sought to protect the anonymity and privacy of consumers from subpoenas sought by copyright owners. Search engines have obtained increasing prominence in the digital economy. In order to support its digitization projects, Google has become a champion of the copyright interests of libraries, archives and educational institutions. The behemoth of the computer industry, IBM, has defended open source software in legal battles with the SCO Group. The entrepreneur, James Wales, has funded the development of the online encyclopaedia, Wikipedia. There has also been a growing sensitivity amongst government regulators about the impact of copyright law upon competition in a knowledge-based economy.

A number of academics and scholars have become engaged intellectuals, and provided policy support to the cause of copyright law reform. David Bollier comments:

One of the engines of the new politics of copyright law has been a new generation of legal scholars, academic centers, and policy-oriented legal clinics that are collectively forging a new public-spirited vision. While there is no single, coordinated agenda, legal scholars are collaborating closely on a wide range of research, litigation, and policy advocacy projects. Among the many topics that legal scholarship is addressing are the economic dynamics of commons versus markets, alternative business models for music distribution, the ‘geography’ of the public domain, and the tensions between the Internet and copyright and trademark law.

There has been a concerted intellectual effort to reconceptualize the role of the consumer in copyright law. There have been three strands to this literature. First, the scholars of new historicism have sought to recast consumers as citizens, commoners and social actors. Second, the practitioners
of cultural studies have emphasized that copyright users can be bricoleurs, creators and political activists. Third, the theorists of law and technology have stressed the need to focus upon the ability of consumers to manipulate and adapt technology.

I. CITIZENS, COMMONERS AND GLEANERS

There have been a number of histories, which have focused upon the role of authorship and ownership in copyright law. Most recently, academics and intellectuals have taken a new interest in the larger social objectives of copyright regulation in early historical debates. Ronan Deazley has commented: ‘In allocating the right to exclusively publish a given literary work, the eighteenth-century parliamentarians were not concerned primarily with the rights of the individual, but acted in the furtherance of these much broader social goals.’

The first modern copyright statute (the Statute of Anne 1710 (UK)) was enacted in the United Kingdom. The preamble stated that this legislation was ‘An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned’. A number of features of this statute served the interests of the larger public. The temporal limitation upon copyright duration ensured that works would fall into the public domain. The restriction upon copyright term also encouraged greater competition. The formal requirements of registration enabled users to locate the owners of copyright works. The requirement for books to be deposited in university libraries ensured that there was public access to copyrighted works. There was much litigation involving the booksellers of England and Scotland over whether the Statute of Anne 1710 (UK) extinguished common law rights in respect of copyright. The House of Lords eventually established in Donaldson v. Beckett that copyright law was a ‘creature of statute’, in which rights and responsibilities were determined by legislation.

A number of writers, including James Boyle, Lawrence Lessig, David Bollier and Peter Drahos, have proposed reforming copyright law to recover the intellectual commons. They draw parallels between the current expansion of copyright law in the new millennium and the Enclosure of common lands in England that took place between the fifteenth and nineteenth centuries. The co-founder of Public Knowledge, David Bollier has written about the importance of reclaiming the commons:

The commons is an important concept because it can help us develop a new vision of law and politics. It offers a new vocabulary for talking about roles,
behaviours, and relationships that cannot be adequately captured by market theory and copyright law. It gets us beyond market-speak in which everyone must be either a producer or a consumer, each with prescribed economic roles, and instead describes a cultural ecology, in which people may play a variety of roles – citizen, creator, collaborator, community member.34

Bollier complains: ‘Current applications of ordinary citizens as consumers of intellectual property, not as sentient human beings who have their own creative urges and needs to use the artefacts of their culture, including perhaps trademarked Disney characters, to comment upon their life and times.’35 He concludes: ‘If the law is going to recover the public respect that its champions say it deserves, its most zealous champions will need to surrender their imperial ambitions and learn to respect the cultural commons as an equal.’36

The language of the ‘commons’ has had some success in mobilizing the public into activism in copyright law. It has been particularly attractive to libraries, cultural institutions and copyright users. However, some academic commentators have expressed concerns regarding the academic discourse about the ‘commons’. The astute Swedish scholar, Eva Hemmungs Wirten, has expressed some scholarly reservations about this discourse of the ‘public domain’.37 She notes: ‘Definitions of the public domain are many and confusing, as are indeed the penumbra of rights and uses that come with the territory in question.’38 Wirten comments that the concepts of the ‘public domain’, ‘creativity’ and ‘freedom’ deserve greater scrutiny and self-reflection. She observed that such terms have a distinct genealogy and history:

The public domain, and to an even larger degree the commons, operate with and can be approached from a number of perspectives that all somehow relate to place and space, be they primarily natural or virtual, tangible or symbolic. And as new as the concerns of our contemporary digital environment are, the impetus behind the formation of the Electronic Frontier Foundation and the Creative Commons are not that different from what prompted the launch of the Commons Preservation Society in Britain in 1865. Rural, urban, or digital, land is still essential to the way we think about the public domain.39

Wirten observed: ‘The ongoing copyright wars have resulted in a polarization of debate and ways of thinking that sometimes hide the complexities of the problem at hand.’40 She concludes that ‘a more constructive way to approach the private/public matrix is to envision them not as static opposites, but as constituents of a field in constant flux’.41 Wirten has suggested that it would be productive to think of copyright users as ‘gleaners’ who have rights to gather and use cultural material from the commons.42
In a mapping exercise, Pamela Samuelson identified 13 distinct conceptions of the ‘public domain’. She has argued that there is a need to embrace a vision of multiple public domains:

Accepting the existence of multiple public domains allows context-sensitive meanings of ‘public domain’ to evolve. It also contributes to a richer understanding of the contents of public domains, social values these information resources serve, persons and communities who care about public domains, the legal and institutional structures available to preserve them, threats that some public domains face, and strategies for responding to these threats.43

Samuelson suggests that such an approach will help broaden awareness about public domains and public domain values: ‘When scholars, such as Professors Benkler, Birnhack, Boyle, and Lessig, speak about a wide range of free uses of information resources as a public domain that members of the public should be able to enjoy, they speak in a language accessible to the public, appealing to shared values of the American free speech culture.’44

However, the discourse of the ‘commons’ has not translated into substantial law reform, partly because the terminology suffers from vagueness and uncertainty. It has been open to attack and ridicule from copyright owners. For instance, Scott Martin, the vice-president of intellectual property at Paramount Pictures Corporation, is scathing of the mythology of the public domain.45 He complains: ‘Among the opponents of term extension there has been a tendency to misstate the impact of term extension on the public domain and to rely on slogans and myths in attempting to elevate the value of the public domain over the value of copyrights.’46 The correspondent from the American Open Technology Consortium considers the metaphorical dimensions of the debate over the copyright term: ‘“The Commons” and “the public domain” might be legitimate concepts with deep and relevant histories, but they’re too arcane for most of us.’47 This comment reflects an anxiety about the place of history in contemporary law, as well as insecurity in reading and applying jurisprudence. These fears feed the conservatism of the law, and encourage a minimal positive elaboration of its ends and purposes.

II. BRICOLEURS, PARODISTS AND AMATEURS

Strongly influenced by post-modern ideas about authorship and creativity, media and cultural scholars have argued that creativity in the arts and technology are best served by a culture of sharing, and loose legal controls.48

In The Cultural Life of Intellectual Properties, Rosemary Coombe provides a map of intellectual property, which is situated in the United States
and Canada. She observed that signs of intellectual property are pervasive in ordinary life – copyright symbols, trademarks and celebrity images are omnipresent.\(^49\) She emphasized that intellectual property is not just a product of formal legislation, cases and policy documents: it is a part of everyday life and experience. Coombe develops a post-modern theory of consumption in the course of her text:

In conditions of postmodernity, cultural consumption is increasingly understood as an active use rather than a passive dependence upon dominant forms of signification. As Micel de Certeau and Paul Willis argue, consumption is always a form of production and people continually engage in cultural practices of bricolage – resignifying media meanings, consumer objects, urban spaces, and cultural texts in order to adapt them to their own interests and make them fulfil their own purposes. The consumer is seen as actively reworking everything from the design of the shopping mall and the rhetoric of the romance to mass-marketed toy culture in the articulation of alternative meanings and identities. Commodified signs become cultural resources with which new social and political realities are forged.\(^50\)

Such scholarship has envisaged consumers as ‘bricoleurs’, who create and fashion new cultural productions from tinkering with pre-existing copyright works.

The theorists of cultural studies have celebrated post-modern artists who engage in the copying, quotation and remixing of copyright works.\(^51\) They have lionized the artistic accomplishments of literary parodists, appropriation artists, culture-jammers, digital samplers, performance artists, guerrilla broadcasters and open source programmers. In \textit{Darknet}, J.D. Lasica considers the tensions between the mass media of the industrial age and the personal media from the information age. He observed that creators have long borrowed from the copyright works of others:

Borrowing from earlier works has always been a time-honored and accepted part of the creative tradition. Every painter learns by emulating the masters. Every musician acquires her own voice and style by first imitating those who came before. Fledgling filmmakers imitate the oeuvre of a Spielberg, Kubrick, Kurosawa, or Cassavetes. The fandom phenomenon celebrates pop culture by appropriating it: young adults publish comic-book fanzines that borrow copyrighted images; on Internet fan fiction sites, viewers write episodes that add new story lines for characters from more than five hundred television shows; amateur video buffs have created more than four hundred homemade versions of Star Wars and circulated them online. Every night, dance club DJs and MCs digitally splice together bootleg remixes of Top Forty hits in remarkable new ways.\(^52\)

Lasica concludes, with the quotation: ‘Using the omnipresent sea of symbols, images, sounds and texts as source of material, millions of people
are laying claim to their cultural inheritance. He adds: ‘Call it postmodern, call it open source, call it rip/mix/burn, the upshot is a culture transformed.

The Internet and the development of new technologies, such as blogs, fanzines and content sharing sites, has enabled millions of citizens not only to consume cultural content, but also to engage in self-expression and creative play. Dan Hunter and Gregory Lastowka have discussed the rise of ‘amateurs’ who create cultural work without financial or proprietary motives. The pair comment that, traditionally, consumers were conceived of as mere objects of the imperial power of copyright law: ‘The citizenry, in the view of copyright’s shareholders, are merely passive beneficiaries of copyright’s regime, and are described as “readers,” “viewers,” and/or “consumers” of content, the product that copyright specialists create.’ In grandiloquent terms, the authors observe that this paradigm is under threat from recent technological and cultural developments:

Like the Roman Empire before it, copyright finds itself today under threat from its borders. The former subjects of copyright are increasingly aware that they are being taxed by copyright, but they have only a vague notion of how allegiance to copyright benefits them. This change in the status quo is largely attributable to the fact that copyright’s formerly passive consumer is increasingly an active participant in content-production processes. The average citizen now feels copyright law intruding on her personal information practices.

The two contend: ‘Instead of a model of content that proposes manufacturers and consumers, we want to look at the creation of content as a feature of human expressive activity.’ The pair have used the phrase, ‘amateur-to-amateur’, to describe the social phenomenon of popular information creation and free distribution. Hunter and Lastowka comment: ‘The big shift to amateurisation in content promises vast potential in people’s ability to express themselves and in the social benefits that flow from a vast new corpus of amateur content.’ They conclude: ‘It would be a tremendous shame if we failed to recognize the opportunity of amateur content and continued to assume that the protection of copyright industries was the only way to guarantee the production of valuable cultural expression.’

III. CONSUMERS, USERS AND ADDICTS

The law and technology movement has been interested in the engagement of consumers with the Internet and new digital technologies of reproduction and distribution.
In her classic text, *Digital Copyright*, Jessica Litman provides a history of the industry lobbying and the political wrangling behind the passage of digital copyright laws through the United States Congress, and the development of the WIPO Internet Treaties in the World Intellectual Property Organization. The resulting legislation has little to say explicitly about the role of the users of copyright works. She highlighted ‘the paucity of language speaking to the behaviour of individuals who are consuming rather than exploiting copyright material’. Litman comments that digital copyright laws should be recast to take into account the position of consumers of copyright works:

If the overwhelming majority of actors regulated by the copyright law are ordinary end users, it makes no sense to insist that each of them retain copyright counsel in order to fit herself within niches created to suit businesses and institutions, nor is it wise to draw the lines where the representatives of today’s current stakeholders insist they would prefer to draw them. Extending the prescriptions and proscriptions of the current copyright law to govern the everyday acts of non-commercial, non-institutional users is a fundamental change. To do so without effecting a drastic shift in the copyright balance will require a comparably fundamental change in the copyright statutory scheme. If we are to devise a copyright law that meets the public’s needs, we might most profitably abandon the copyright law’s traditional reliance on reproduction, and refashion our measure of unlawful use to better incorporate the public’s understanding of the copyright bargain.

Litman is hopeful that copyright industries would be amendable to drafting laws that would be respected amongst the wider public: ‘If a law is bad enough, even its proponents might be willing to abandon it in favour of a different law that seems more legitimate to the people it is intended to command.’ There is a need to simplify and demystify digital copyright laws, so that they are accessible and comprehensible to the consumers.

In his magnum opus, *The Wealth of Networks*, Yochai Benkler has argued that there has been a fundamental shift away from ‘passive’ consumers to ‘active’ users, as a response to the emergence of new technologies and market configurations. He comments upon the change in tastes: ‘The industrial information economy specialized in producing finished goods, like movies or music, to be consumed passively, and well-behaved appliances, like televisions, whose use was fully specified at the factory door.’ By contrast, Benkler notes: ‘The emerging businesses of the networked information economy are focusing on serving the demand of active users for platforms and tools that are much more loosely designed, late-binding – that is, optimized only at the moment of use and not in advance’. Benkler observed: ‘To some of the incumbents of the industrial information economy, the pressure from social production is experienced as pure
threat.  

He postulated that the tension between the ‘old’ and ‘new economy’ has been the source of much legal conflict: ‘It is the clash between these incumbents and the new practices that was most widely reported in the media in the first five years of the twenty-first century, and that has driven much of policy-making, legislation, and litigation in this area.’

Joseph Liu has argued that ‘copyright law currently conceives of consumers in one of two ways, either as passive consumers of copyrighted works or as active authors in their own right’. He contended: ‘This binary conception of the consumer, however, is incomplete, as it neglects important and complex consumer interests in autonomy, communication, and creative self-expression.’ Liu stressed that ‘in determining whether new kinds of uses (such as those enabled by new technology like MP3 players, TiVo, ad-stripping software, and web browsers) constitute fair use, courts should give some weight to these more complex consumer interests in autonomy, communication, and self-expression’. Moreover, he suggested that ‘members of Congress also need to be conscious that, in their attempts to bolster copyright law for purposes of reducing infringement, their activities may have an undesirable impact on these more complicated consumer interests’.

In a thoughtful piece of scholarship, Julie Cohen from Georgetown University has expressed discomfort about the term ‘user’: she notes that the phrase ‘manages simultaneously to connote both more active involvement in the processes of culture and a residual aura of addiction that may be entirely appropriate to the age of the iPod, the XBox, and the blogosphere’. She contends that academic scholarship has developed a fanciful and unrealistic typology of ‘users’ of copyright works:

In broad brush, scholarly efforts to cast the user have produced three fully-fledged candidates, each more unrealistic than the last: the economic user, who enters the market with a given set of tastes in search of the best deal; the ‘post-modern’ user, who exercises limited and vaguely oppositional agency in a world in which all meaning is uncertain and all knowledge relative; and the romantic user, whose life is an endless cycle of sophisticated debates about current events, discerning quests for the most freedom-enhancing media technologies, and home production of high-quality music, movies, and open-source software.

Instead of such figures, Cohen seeks to present a new character, ‘the situated user’. She observes: ‘The situated user engages cultural goods and artifacts found within the context of her culture through a variety of activities ranging from consumption to creative play.’ Cohen concludes: ‘This model of the situated user suggests that the success of a system of copyright depends on both the extent to which its rules permit individuals to engage in creative play and the extent to which they enable contextual
play, or degrees of freedom, within the system of culture more generally.\textsuperscript{78} Some commentators are somewhat more saturnine about consumer behaviour. Jane Ginsburg claimed that copyright law has obtained a bad reputation, because of consumer and corporate greed.\textsuperscript{79} She observed: ‘Copyright owners, generally perceived to be large, impersonal and unlovable corporations (the human creators and interpreters – authors and performers – albeit often initial copyright owners, tend to vanish from polemical view), have eyed enhanced prospects for global earnings in an increasingly international copyright market.'\textsuperscript{80} She noted that such entities ‘have urged and obtained ever more protective legislation that extends the term of copyright and interferes with the development and dissemination of consumer-friendly copying technologies’.\textsuperscript{81} Ginsburg observed: ‘Consumers, for their part, have exhibited an increasing rapacity in acquiring and “sharing” unauthorized copies of music, and more recently, motion pictures.’\textsuperscript{82} She noted that ‘some of the general public senses as illegitimate any law, or more particularly, any enforcement that gets in the way of what people can do with their own equipment in their own homes (or dorm rooms)’.\textsuperscript{83}

Rebecca Tushnet has demurred that the totality of the concerns represented by the public interest are not necessarily captured by an end-consumer analysis.\textsuperscript{84} She has contended: ‘In bringing consumers’ interests into the analysis, we should not forget that intermediate institutions like schools and libraries are major markets for copyright owners, and therefore, major sources of copyright works for many consumers.’\textsuperscript{85} Tushnet stressed that ‘these intermediaries often serve to mitigate the strict wealth discrimination imposed by the direct market for copyrighted works, allowing people to read and to watch far more copyrighted works than they could pay for themselves’.\textsuperscript{86}

Outline

This book considers battles over digital copyright over the past five years against the backdrop of wider trends and developments in the field. The geographical locus of this study is United States copyright law. This study will consider the impact of the Sonny Bono Copyright Term Extension Act 1998 (US) (the Sonny Bono Act) and the Digital Millennium Copyright Act 1998 (US) (the DMCA), and various law reform proposals. There is also a sustained analysis of United States technology, jurisprudence and culture. This book draws comparisons with other key jurisdictions, such as Australia,\textsuperscript{87} the United Kingdom,\textsuperscript{88} the European Union\textsuperscript{89} and Canada.\textsuperscript{90} This study examines the progressive adoption of United States standards
in Australian digital copyright law, through the Copyright Amendment (Digital Agenda) Act 2000 (Cth), the Australia-United States Free Trade Agreement 2004, and the Copyright Amendment Act 2006 (Cth).\textsuperscript{91} This book draws parallels with policy developments in the European Union, such as the European Community Copyright Term Directive and the European Community Information Society Directive.\textsuperscript{92} There are cross-references to equivalent litigation in the European Union, including discussion of litigation against peer-to-peer networks in the Netherlands and Sweden; English jurisprudence on digital sampling; court cases over Internet intermediaries in Ireland, Germany and Belgium; consumer actions over personal copying levies in France; litigation over the use of Creative Commons licences in the Netherlands and Spain; and the development of the BBC Creative Archive. Another useful point of reference is Canada, a crossing point for English, Continental and United States influences on the development of copyright jurisprudence. Interestingly, the Canadian Parliament has declined to follow the international trend towards copyright term extension, and has yet to implement digital copyright laws, with Bill C-60 lapsing.\textsuperscript{93} There is also a discussion of how the Brazilian Government has become a champion of Creative Commons licences and open source projects.

This book explores the growing resistance and opposition by consumers to digital copyright in the United States. This study will make a unique practical and theoretical contribution to the debate over digital copyright law by reconceptualizing the role of the user in copyright jurisprudence. Julie Cohen has observed that the failure to consider adequately the role of the user in copyright jurisprudence has resulted in unfortunate consequences for theory, policy and law:

Copyright doctrine, however, is characterized by the absence of the user. As copyright moves into the digital age, this absence has begun to matter profoundly . . . [T]he absence of the user has consequences that reach far beyond debates about the legality of private copying, or about the proper scope of user-oriented exemptions such as the fair use and first sale doctrines. The user’s absence produces a domino effect that ripples through the structure of copyright law, shaping both its unquestioned rules and its thorniest dilemmas. The resulting imbalance – empty space where one cornerstone of a well-balanced copyright edifice should be – makes for bad theory, bad policy, and bad law.\textsuperscript{94}

This inquiry seeks to redress this lamentable void in copyright jurisprudence. It aims to provide a sense of the heterogenous interests represented by consumers in copyright law. It is worth acknowledging that the term, ‘consumer’, is a capacious one, covering a range of characters. Helpfully, Breyer J of the Supreme Court of the United States notes that the potential
users of copyright works covers ‘not only movie buffs and aging jazz fans, but also historians, scholars, teachers, writers, artists, database operators, and researchers of all kinds’. It is also important to recognize that consumers are not just mere ‘culture vultures’, engaged in the mindless, passive, bovine consumption of new artistic forms and technologies. The users of copyright works are engaged in a multitude of activities, including political expression, cultural transformation and technological tinkering. Moreover, the relationship of consumers to the dictates of copyright law is also a complex one, ranging from obedience to resistance and opposition to indifference and ignorance.

This book does not consider copyright law merely as a formal set of rules and principles, which is autonomous from other regimes of legal regulation. Instead, it is sensitive to the broader social context of copyright law. Fiona Macmillan has commented that copyright law is a melting-pot for a wide range of influences:

As the most flexible of the intellectual property rights, copyright is subject to constant pressure to adapt in order to respond to a variety of social, cultural, economic and political demands. These demands are sometimes generated by new developments and sometimes by new perceptions and approaches to older issues. There is, for example, a widespread perception that new information and communication technologies have generated serious problems for the integrity of the copyright regime that surpass previous technological challenges . . . At the same time, economic and political developments, especially those promoting regional and global market liberalisation, have generated pressure for harmonisation and conformity amongst historically diverse copyright systems.

Accordingly, this study focuses upon the intersection between copyright law and various other disciplinary approaches, highlighting the points of synergy and dissonance. It is grounded upon an appreciation of the history of copyright law, emphasizing that the current debates over digital copyright echo earlier controversies about the appearance of new technologies. It considers the constitutional validity of the new digital copyright laws, in terms both of the limits of governmental power, and of the impact upon the freedom of political expression. This inquiry is also conscious of the influence of the law and economics movement. It explores the growing influence of competition law, and consumer protection law, in the design and regulation of copyright law. This book acknowledges the powerful discourse of international harmonization. It considers the criss-crossing web of multilateral agreements, regional agreements and bilateral agreements. It notes the influence of international forums, such as the World Trade Organization and the World Intellectual Property Organization.
This book adopts the methodology of analysing the cultural politics of copyright disputes. It looks at the intersection of power, culture and technology. As James Boyle observes, there is a need to focus upon the politics of intellectual property:

Like most property regimes, our intellectual property regime will be contentious, in distributional, ideological and efficiency terms. It will have effects on market power, economic concentration and social structure. Yet, right now, we have no politics of intellectual property – in the way that we have a politics of the environment or of tax reform. We lack a conceptual map of issues, a rough working model of costs and benefits and a functioning coalition-politics of groups unified by common interest perceived in apparently diverse situations.98

The methodology is one of looking at the law creatively: that is to try and identify the social, economic and legal relations that copyright law produces. It seeks to bring to life the real complexity and messiness of the law, as it negotiates the battle over the copyright term and engages with conflicting views and cultures. The spirit of the inquiry is to uncover the disciplinary power of the court and the jurisprudential mechanisms for its exercise. It seeks to analyse what arguments are explicitly acknowledged by the court, and what policy matters are overlooked and ignored. This investigation also highlights the role of *amicus curiae* in bringing policy concerns to the attention of the judiciary. The motivation is that of understanding how copyright law has managed its ‘representativeness’ and the practical implications of the mismanagement of social diversity. In addition to the formal legal process, a number of academics, lobbyists, journalists and commentators have been kibitzing and barracking from the sidelines. This inquiry evaluates the role of public intellectuals in the debate over copyright theory, policy and law making.99

The narrative of this book is bounded by a particular time-frame. The chronology has a distinctive arc. The first chapters recount the early historical debates over copyright term extension, and the initial grappling by judges with ‘time-shifting’ technologies in the 1980s. There is scene setting in terms of recounting the legislative passage of the *Sonny Bono Act* and the *DMCA*. The bulk of the book is squarely focused upon trends and developments in digital copyright law in the new millennium. In particular, there is a consideration of how the law seeks to accommodate and regulate new technologies, such as electronic publishing ventures, consumer electronics devices like iPods and personal video recorders, games consoles such as the Sony Playstation II, peer-to-peer networks, Internet service providers, the multiple functions of search engines such as Google, and open content, such as *Wikipedia*. The conclusion looks forward to future trends in respect of digital copyright and consumers’ rights.
Chapter 1 explores the copyright term extension wrought by the *Sonny Bono Act*. It considers the constitutional challenge by the electronic publisher, Eric Eldritch, to the validity of the *Sonny Bono Act*. In *Eldred v. Ashcroft*, the Supreme Court of the United States held by a majority of seven to two that the *Sonny Bono Act* was within the constitutional power of the United States Congress, and not in violation of the First Amendment. This chapter evaluates the litigation in terms of policy debate in a number of discourses: history, intellectual property law, constitutional law and freedom of speech, cultural heritage, economics and competition policy, and international trade. It argues that the extension of the copyright term will inhibit the dissemination of cultural works through the use of new technologies, such as Eric Eldred’s Eldritch Press and Project Gutenberg. This chapter concludes that there is a need to resist the attempts of copyright owners to establish the *Sonny Bono Act* as an international model for other jurisdictions.

Chapter 2 considers the push to reform copyright law in order to protect and safeguard consumer rights in the digital millennium. It explores the significance of the Supreme Court of the United States decision in the *Sony Betamax* case, which recognized that consumers were protected by the defence of fair use when they used the Betamax VCR recorder to copy television broadcasts to watch at a later time (‘time-shifting’). This chapter considers the application of the *Sony Betamax* rule in a number of other contexts: in respect of Replay TV, Clearplay, TiVo, Streamvision and the Slingbox. This chapter also studies the application of the *Sony Betamax* decision in relation to a number of new technologies, such as MP3 players, music lockers, the iPod and podcasting, and satellite radio. Such devices and services enable consumers to store content, such as music and films, in a digital format (‘space-shifting’).

Chapter 3 considers litigation brought by record companies and motion picture studios against peer-to-peer networks, such as Grokster, Kazaa and BitTorrent. It compares and contrasts the regulatory approaches of key jurisdictions, such as the United States, Australia and the European Union. This chapter dissects the Supreme Court of the United States’ ruling in the case of *Grokster* that the peer-to-peer networks, Grokster and Streamcast, had induced copyright infringement. It considers the Federal Court of Australia decision in *Universal Music Australia Pty Ltd v. Sharman License Holdings Ltd (Kazaa)* that the operators of Kazaa had authorized copyright infringement. Finally, this chapter considers the legal implications of the software, BitTorrent. It explores the legal action taken against BitTorrent websites such as TorrentSpy, eDonkey, Razorback2 and Niteshadow.com. Moreover, it focuses upon the raids upon the Swedish website, The Pirate Bay.
Chapter 4 explores the challenges posed to copyright law through the practice of audio and audio-visual mash-ups. In the field of digital sampling, disk jockeys have shown a recent enthusiasm for ‘mash-ups’ – new compositions created by combining the rhythm tracks of one song and the vocal track of another. Most famously of all, DJ Danger Mouse remixed the vocals from Jay-Z’s *The Black Album* and The Beatles’ *White Album* and called his creation *The Grey Album*. In response to cease-and-desist notices, Downhill Battle organized Grey Tuesday, an online protest, in which hundreds of web-sites posted copies of *The Grey Album*. *The Grey Album* poses a number of difficult issues regarding copyright law and digital sampling. It is difficult to conceive of a mash-up consisting of a *de minimis* use, given that it depends upon the extensive use of multiple copyright works. There has been much debate as to whether the defence of fair use should extend beyond transformative uses such as parodies to embrace mash-ups. In addition, there has been discussion about the need to expand compulsory licensing provisions to include not only covers of musical works, but mash-ups. The practice of audio and audio-visual mash-ups could also come into conflict with the provision of moral rights in respect of attribution and integrity in such jurisdictions as Australia, Canada, the United Kingdom and the European Union.

Chapter 5 considers the development of special protections for technological protection measures (TPMs), such as passwords, watermarks, copy-protection, encryption, and access codes, under the *DMCA*. It highlights the impact of digital rights management systems on freedom of speech, access to information, competition law and privacy. This chapter focuses, in particular, upon the so-called ‘civil war’ within the Sony group of companies. Although Sony Electronics was the champion of consumers’ rights in the *Sony Betamax* decision, the Sony content companies have undermined such privileges through the extensive use of digital rights management systems. First of all, it considers the landmark decision of the High Court of Australia on copyright law and TPMs in the matter of *Stevens v. Kabushiki Kaisha Sony Computer Entertainment*. The decision is of considerable importance because this is the first time that a superior court in the world has had an opportunity to rule upon so-called ‘para-copyright’. Second, this chapter considers the controversy over the Sony BMG rookit software. A number of class actions were launched against the multinational company, because its digital rights management system in respect of sound recordings compromised the privacy and security of the home computers of its consumers. The twin controversies highlight the impact of TPMs upon access to information, competition in the marketplace and consumer privacy.

Chapter 6 considers the increasing litigation by copyright owners against intermediaries of various sorts. In response to subpoenas by copyright
owners under the DMCA, the Internet gatekeepers, Verizon and Charter Communications, have sought to defend the privacy and anonymity of their subscribers in court. The electronic voting machine company, Diebold Inc., demanded that Swarthmore College prevent its students from publishing documents revealing security flaws and software problems in electronic voting machines. Moreover, copyright owners have also brought legal action against a number of alternative pressure points, including Internet search engines, financial institutions and users of peer-to-peer networks. The music industry has sought to take legal action against venture capitalists in order to deprive peer-to-peer networks of capital. In the past few years, the record industry has filed civil lawsuits against hundreds of individuals identified through the subpoena process. The record companies targeted users who were distributing substantial amounts of copyrighted music on peer-to-peer networks, including Kazaa, Grokster, IMesh, Gnutella and Blubster. There has been much legal wrangling over whether such end-users infringe copyright owners’ economic rights of distribution. There has been much litigation as to whether the end-users of peer-to-peer networks have any available defences to such charges of copyright infringement, such as the defence of fair use or the doctrine of innocent infringement. In light of such controversies, academics, stakeholders and policy makers have debated the merits of establishing a personal copying levy.

Chapter 7 explores the legal issues surrounding copyright law and Internet search engines. In September and October 2005, the Authors Guild and the Association of American Publishers filed lawsuits in the United States, alleging that the Google Book Search program had infringed copyright in literary works through its unauthorized scanning and copying of books. In response, Google argued that it had not infringed the copyright of the authors or booksellers. The search engine has also attracted other lawsuits. The Agence France-Presse and other press agencies have alleged that Google News infringed on its copyright because it included photographs, stories and news headlines on Google News without permission. The Californian pornography company, Perfect 10, has also filed a lawsuit against Google, claiming that the reproduction of its images infringes the company’s copyright, trade marks and publicity rights. There has also been litigation over the Internet search engine participating in web archiving and caching with Google Cache. Google has also grappled with copyright issues associated with Internet videos – both with Google Video and YouTube.

Chapter 8 charts the emergence of the Creative Commons, a movement which relies upon contract law in order to put authors’ works into the public domain. It considers illustrative creative endeavours, such as free
and open source computer programming, the digital photography site Flickr, digital sampling and mash-ups, the remixable film *Sanctuary*, the BBC Creative Archive, the Public Library of Science and the online encyclopaedia, *Wikipedia*. This chapter highlights the backlash against the Creative Commons from vested interest groups, including copyright industries, copyright collecting societies and industrial unions. Such grievances are summed up by a critic from *Forbes Magazine* who claimed that the Creative Commons comprised ‘a ragtag bunch of gleaners who claim that copying is “creativity” because they can’t create anything without directly reusing copyrighted material’.115

The volume’s Conclusion applauds the development of a Declaration of Innovation Independence, a manifesto for the reform of digital copyright laws in light of consumer interests.116 It also endorses the push to institute a development agenda within the World Trade Organization and the World Intellectual Property Organization, with the proposed Access to Knowledge Treaty (the *A2K Treaty*).117

NOTES

11. Ibid.
17. The Creative Commons, http://creativecommons.org/.
23. Bollier, David (2005), Brand Name Bullies: The Quest to Own and Control Culture, Hoboken, NJ: John Wiley & Sons Inc.
27. Miller v. Kincaid (1759) 98 ER 210; Tonson v. Collins (1761) 96 ER 169; and Millar v. Taylor (1769) 4 Burr. 2303; 98 ER 201.
35. Ibid., p. 252.
36. Ibid., p. 253.
44. Ibid., 824–6.
46. Ibid., at 265.
50. Ibid., p. 104.
Introduction

60. Ibid., 1029.

63. Ibid., p. 71.
64. Ibid., pp. 185–6.
65. Ibid., p. 195.

72. Ibid., 397.
73. Ibid., 428.
74. Ibid., 428.
76. Ibid., 348.
77. Ibid., 348.
78. Ibid., 348.
80. Ibid., 62.
81. Ibid., 62.
82. Ibid., 62.
83. Ibid., 62.
85. Ibid., 981.
86. Ibid., 981.


91. *Copyright Amendment (Digital Agenda) Act 2000* (Cth).


93. *Lucy Maud Montgomery Copyright Term Extension Bill 2003* (Bill C-36); and *An Act to Amend the Copyright Act 2005* (C-60).


107. *Verizon Internet Services v. RIAA* 351 F. 3d 1229 (DC Cir 2003); and *In re Charter Communications*, 393 F.3d 771 (8th Cir. 2005).


