Introduction

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The media and entertainment industries do not uniformly depend on intellectual property rights (as we currently know them). The first English newspapers were published in the century before the Statute of Anne 1710 gave authors the prospect of copyright in their works;¹ and theatre performances from William Shakespeare's 'King's Men' were a feature of everyday life in the time of the Tudors.² Even now, as one of us points out in an early chapter for this book,³ much material of central importance to media and entertainment – namely 'news of the day' – is exempted from copyright protection under the terms of the Berne Convention,⁴ even if expressions of news may be protected as a matter of copyright and in some US states a narrowly cast 'hot news' doctrine for

¹ Although a complex system of regulation was administered through the licensing practices of the Stationers' Company: see Seaton Siebert, *Fredrick, Freedom of the Press in England, 1476–1776* (University of Illinois Press, Urbana 1965) 107–61; Harris, Michael, 'The Structure, Ownership and Control of the Press' in Boyce, George, James Curran and Pauline Wingate (eds), *Newspaper History From the 17th Century to the Present Day* (Constable and Sage, London and Beverly Hills CA 1978) ch.4.

² Although theatre was highly regulated in other ways, including by the licensing of plays for performance by the Master of the Revels, an official of the Lord Chamberlain. In addition, the contractual terms between successful playwrights such as Shakespeare and their theatres typically granted the theatre company exclusive rights in their theatrical works in exchange for performance in the theatre: see Greenblatt, Stephen, 'General Introduction' in Greenblatt, Stephen, and others (eds), *The Norton Shakespeare, Based on the Oxford Edition*, 2nd edn (WW Norton, New York 2008) – and similarly 3rd edn, in four volumes: *Histories; Tragedies; Comedies; Romances and Poems* (WW Norton, New York 2016).

³ Chapter 1 (Sam Ricketson and Jane Ginsburg, 'Intellectual property in news? Why not?').

⁴ Berne Convention for the Protection of Literary and Artistic Works signed on 9 September 1886 (4 May 1896) 331 UNTS 217, entered into force 5 December 1887, last revised at Paris on 24 July 1971 and amended on 28 September 1979, Art.2(8).

free riding on time-sensitive news may be invoked.⁵ A further chapter notes how modern spectacles may be likewise treated as semi-autonomous from intellectual property rights,⁶ although a degree of copyright or 'hot news'-type protection may be found for particular aspects of spectacles – and other chapters note that Shakespearian-style dramatic performances now enjoy some copyright protection even if in practical terms it may be other things, such as the design of theatres, which provides the most significant control over who may and who may not have access to the performance.⁷ Careful scholarly studies have pointed to the fact that, in practice, certain creations, such as fashion designs, chefs' recipes, hairstyles, tattoo designs, stand-up comedy routines, and names used in roller-derby are treated as largely falling within intellectual property's 'negative spaces' (sometimes even where legal rights may formally be constructed around them).⁸ The same may be said of folkloric forms of communication and entertainment,⁹ now dignified with the language of traditional cultural expressions.¹⁰ And the observation may be extended to aspects of what may be termed popular culture as another form of folk culture.¹¹ Yet, all that said, intellectual property is centrally important to much of what we now consider to be the stuff of media and entertainment and, as pointed out in later chapters in this book, even some of these traditionally exempt forms may be in the

⁵ Ibid; Ricketson and Ginsburg (n.3).

⁶ Chapter 2 (David Caudill, 'Emerging rights in live spectacles and other ephemera').

⁷ Ibid. See further, as to dramatic productions and performances, Chapter 7 (Mark Williams, 'One ring to rule them all: rights in live performances') and Chapter 8 (Elizabeth Adeney, 'A matter of respect: the moral rights of the entertainer').

⁸ See for example Raustiala, Kal and Christopher Sprigman, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' (2006) 92 *Virginia Law Review* 1687; Fauchart, Emmanuelle and Eric von Hippel, 'Norms-Based Intellectual Property Systems: The Case of French Chefs' (2008) 19 *Organization Science* 187; Oliar, Dotan and Christopher Sprigman, 'There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy' (2008) 94 *Virginia Law Review* 1787; Fagundes, David, 'Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms' (2012) 90 *Texas Law Review* 1093.

⁹ See generally Neuburg, Victor, *Popular Literature: A History and Guide* (Penguin Books, Harmondsworth 1977).

¹⁰ Chapter 17 (Susy Frankel, 'Traditional knowledge as entertainment').

¹¹ For instance, celebrity culture: see Chapter 16 (Graeme Dinwoodie and Megan Richardson, 'Publicity right, personality right, or just confusion?').

process of being brought under the IP umbrella – and logically it might be argued they should be.¹²

At the same time, some fields that were once central to intellectual property seem increasingly to be carving out spheres of protection separate from the intellectual property laws that were originally devised and shaped around them.¹³ For instance, taking the fields of literature, art, music and film, the subject of several chapters in this book, the expansion of fair dealing and fair use defences to copyright infringement has meant that certain types of activities, especially but by no means only those involving parody and satire, may be exempted from infringement of others' copyrights (while retaining a measure of copyright protection for their own subject matter). Considerable diversity may still arise across jurisdictions,¹⁴ but the critical questions are how far these permitted exemptions may continue to expand in the future and whether a degree of jurisdictional harmonization on these, as on other key aspects of copyright law, may eventually be found. (At the very least, as noted in one chapter of this book, we might hope for harmonization on metalegal aspects such as jurisdiction, choice of law and recognition and enforcement of judgments).¹⁵ Speculation continues as to the reasons for these expansions of spheres of freedom from copyright, with some suggesting that they represent a response to aggressive practices of copyright enforcement, including within the domestic realm,¹⁶ while others identify them as a feature of post-modern creative styles¹⁷ or a consequence of certain political agendas concerned with promoting free speech,¹⁸ and

¹² See Frankel (n.10); Dinwoodie and Richardson (n.11).

¹³ Nicely discussed in Sherman, Brad and Lionel Bently, *The Making of Modern Intellectual Property: The British Experience, 1760–1911* (Cambridge University Press, Cambridge and New York 1999).

¹⁴ Chapter 3 (Jonathan Griffiths, 'Fair dealing after *Deckmyn*: the United Kingdom's defence for caricature, parody and pastiche'); Chapter 4 (David Tan, 'Fair use and transformative play in the digital age'); Chapter 5 (Melissa de Zwart, '"Someone is angry on the internet": copyright, creativity and control in the context of fan fiction'); Chapter 6 (Matthew Rimmer, 'The Dancing Baby: copyright law, YouTube, and music videos').

¹⁵ Chapter 9 (Graeme Austin, 'Entertaining foreign copyrights').

¹⁶ See the cases discussed in Rimmer (n.14), especially *Lenz v Universal Music Corporation*, 801 F 3d 1126 (9th Cir 2015) (and amended decision in *Lenz v Universal Music Corporation*, 815 F 3d 1145 (9th Cir 2016)).

¹⁷ The essential argument of Tan (n.14).

¹⁸ As suggested by Griffiths (n.14), giving the example of the recent decision of the European Court of Justice in the *Deckmyn* case: Case C-201/13 *Deckmyn v Vandersteen* [2014] OJ C16/3. As Griffiths notes, the chapter was written

others still point to the particular demands of assertive categories of user, especially the so-called ‘fans’.¹⁹ There may be further explanations as well for the desires of users to circumvent copyright protection, lying in concerns about the peculiar rigidities of historically determined and nationally based forms of copyright protection in the current media/entertainment age – a particular theme of one chapter of this book.²⁰ So, have we reached a point where creativity and access are both seen as potentially hampered by copyright, even in core fields of media and entertainment? We might compare here the way that copyright was established, extended and rationalized in earlier centuries precisely with these fields in mind.

The theme of the limits of rights is further explored in the three chapters of this book which deal specifically with games, a particular example of an entertainment form which has evolved significantly for the internet environment. For instance, the chapter on Lego²¹ shows how that company has successfully moved away from its traditional stringent reliance on patents to a more flexible approach to developing partnerships with creative users and placing more reliance on trade marks and, to an extent, copyright (effectively transforming itself into a media company).²² The chapter on videogames²³ suggests that users resist being constrained by the rules imposed by game creators in the name of copyright which may in any event prove inadequate to shore up their control if tested in court.²⁴ The chapter on game show formats²⁵ also points to the challenges for copyright law in capturing the essence of the successful format, with the result that these formats may be exploited in multiple ways sometimes outside the control of their originator – and yet there is still a flourishing game show industry. It is interesting that those

before the United Kingdom’s referendum on membership of the European Union in June 2016.

¹⁹ A point made by de Zwart (n.14).

²⁰ Chapter 10 (Peter Yu, ‘A seamless global digital marketplace of entertainment content’).

²¹ Chapter 12 (Dan Hunter and Julian Thomas, ‘Lego’s system of play meets intellectual property: from the engineered object to digital media’).

²² Although the authors point out that trade marks (and to an extent copyright) continue to be relied on.

²³ Chapter 13 (Daithí Mac Síthigh, ‘The game’s the thing: property, priorities and perceptions in the video games industries’).

²⁴ Although Mac Síthigh suggests that appropriately fashioned intellectual property rights may play a useful role (and contract may also be relevant): *ibid.*

²⁵ Chapter 14 (Lindy Golding, ‘Opportunity knocks for dramatic copyright in television formats’).

in the business of commercializing formats have not gone as far as to test the law's currently rather fragile protection of business methods²⁶ by suggesting that patenting might be a suitable alternative.²⁷ We might compare here the way that in earlier times popular items of media and entertainment such as playing cards,²⁸ kaleidoscopes,²⁹ board games,³⁰ domestic snapshot cameras³¹ and indeed Lego bricks were routinely made the subject of patents (or registered designs). On the other hand, as the experience of Lego also shows, patents (and designs) can be a blunt regulatory tool, not naturally attuned to flexible innovation and collaborative approaches³² – albeit these may sometimes emerge. Moreover, the recent Apple-Samsung patent and design ‘wars’ serve to remind us how fine the dividing line is between competition, piracy and innovation, and how costly and drawn-out are the systems of dispute resolution required to vindicate entitlements (part of a longer tradition of intellectual

²⁶ In the USA, for example, see *Alice Corporation Pty Ltd v CLS Bank International*, 134 S Ct 2347 (2014), and in Australia see *Commissioner of Patents v RPL Central Pty Ltd* (2015) 328 ALR 458 (application for special leave to appeal to the High Court dismissed 5 May 2016). See further Seidenberg, Steven, ‘Business-method and Software Patents May Go Through the Looking Glass After Alice Decision’ *ABA Journal* (Chicago, 1 February 2015), accessed 2 August 2016 at www.abajournal.com/magazine/article/business_method_and_software_patents_may_go_through_the_looking_glass_after.

²⁷ Although for an earlier suggestion that they might, see Moran, Albert, with Justin Malbon, *Understanding the Global TV Format* (Intellect Books, Bristol 2006) 126.

²⁸ See, for example, the alphabet playing card deck: US Patent No 5417432 A (issued 23 May 1995), accessed 2 August 2016 at www.google.com/patents/US5417432. And for the early case of *Darcy v Allen* (1602) 11 Co Rep 84, 77 ER 1260 involving a patent on playing cards see Fisher, Matthew, ‘*Darcy v Allen*’ in Heath, Christopher and Anselm Kamperman Sanders (eds), *Landmark Intellectual Property Cases and Their Legacy* (Wolters Kluwer, The Hague 2011) ch.5.

²⁹ See ‘Kaleidoscope Patents’ (*The Kaleidoscope On-Line Book*), accessed 2 August 2016 at www.thekaleidoscopebook.com/thescopbook/scope-resources/kaleidoscope-patents.

³⁰ See for example board game apparatus (the Monopoly board game): US Patent No 2026082 A (issued 31 December 1935), accessed 2 August 2016 at www.google.com/patents/US2026082.

³¹ See for example ‘Kodak Film Patent Issues October 14, 1884’ (*United States Patents and Trademarks Office*), accessed 2 August 2016 at www.uspto.gov/about-us/news-updates/kodak-film-patent-issued-october-14-1884.

³² See Hunter and Thomas (n.21).

property wars focused specifically on these types of protection).³³ No wonder then that these rights appear to be developing a more restricted and contestable role in regulating the imaginary world of what may be termed ‘creative play’.³⁴

On the other hand, the movement is clearly not all one way. In many areas, intellectual property rights seem to be expanding and strengthening, both within and outside the mainstream intellectual property laws. As the various chapters in the final section of this book note, emerging or potentially emerging rights can be discerned in areas as diverse as celebrity merchandizing,³⁵ famous trade marks protected against ‘dilution’,³⁶ and the legal protection for traditional knowledge/cultural expressions.³⁷ Here we can see a range of values being served, not only concerned with creativity and innovation but also extending to personality and culture, all mixed up in what two of us have called ‘messy multivalence’.³⁸ Further, as another chapter explores,³⁹ even rights that may be thought of as largely to do with other things, such as ‘privacy’ or ‘data protection’, may at times take on an air of intellectual property, with plaintiffs resorting, for instance, to copyright or trade secrecy laws as an alternative vehicle for protection from exposure in the press.⁴⁰ Perhaps it is not so surprising that plaintiffs might take this approach. The fact that the cases here often centre around publications in the tabloid press highlights how fine the dividing line can be between ‘media’ and ‘entertainment’ in the modern environment, and how information may be personal and, at the same time, commercially exploitable

³³ See Johns, Adrian, *Piracy: The Intellectual Property Wars From Gutenberg to Gates* (University of Chicago Press, Chicago 2009) ch.10 (giving the particular example of the ‘climatic contest’ in the market for ‘rational amusement’ that started with David Brewster’s invention of the kaleidoscope).

³⁴ And yet, for an emerging patent battle over hoverboards, see Mims, Christopher, ‘How Hoverboards Epitomise Our Broken Patent System’, *The Wall Street Journal* (New York, 20 December 2015), accessed 2 August 2016 at www.wsj.com/articles/how-hoverboards-epitomize-our-broken-patent-system-1450674060?.

³⁵ Dinwoodie and Richardson (n.11).

³⁶ Chapter 11 (Michael Handler, ‘Recoding famous brands in advertising and in entertainment products: case studies on the so-called harms of trade mark dilution’).

³⁷ Frankel (n.10).

³⁸ Dinwoodie and Richardson (n.11).

³⁹ Chapter 15 (Tanya Aplin, ‘Filling the IP gap: privacy and tabloidism’).

⁴⁰ Or alternatively endorsement or publicity rights: Dinwoodie and Richardson (n.11).

(or at least potentially) – a point that equally applies to the frequent publications to potentially enormous audiences of highly personal information on ‘social media’ platforms such as Facebook, Instagram, Pinterest, Twitter, Snapchat and WhatsApp.⁴¹ (Not that the blurring of boundaries between news and entertainment is completely new: consider, for instance, the way that the Elizabethan ballad provided a mixture of news and entertainment that crossed social boundaries.⁴²) Some of our authors question the appropriateness of these extensions,⁴³ while others welcome the new realism of the law’s expansionary trends but hope that appropriate balances will be found in limits and defences, also still in the process of being developed (often around free speech).

All this produces a highly regulatory ‘system’ of intellectual property rights. Are we now reaching a tipping point where intellectual property law has become so complex and burdensome that even those who might logically seem to fall within its protection may look for other ways of commercializing their innovations – especially in new media and entertainment fields where there may be more interest in fast entry to markets than in exercising control over (potential) competitors?⁴⁴ If so, it might not only be pockets of fashion, chefs’ recipes, roller-derby, games and the like that operate somewhat outside the intellectual property rubric. Quite large segments of media and entertainment might be left to be ‘regulated’, to the extent they are regulated, by non-legal measures such as technological features and market disciplines.⁴⁵ On the other hand, there

⁴¹ See Duggan, Maeve, ‘Mobile Messaging and Social Media 2015’ (*Pew Research Center*, 19 August 2015), accessed 2 August 16 at www.pewinternet.org/2015/08/19/mobile-messaging-and-social-media-2015/ – also noting the use of platforms such as Snapchat that automatically delete sent messages.

⁴² See Raymond, Joad, ‘News’ in Doran, Susan and Norman Jones (eds), *The Elizabethan World* (Routledge, London 2011) ch.29, 502.

⁴³ Especially Aplin (n.39); Handler (n.36).

⁴⁴ See Gans, Joshua, ‘Control Versus Execution’ (Keynote address, Media and IP Conference 2015, Centre for Media & Communications Law, Intellectual Property Research Institute of Australia, University of Melbourne, 23 November 2015), noted in Pearson, Mark, ‘How Startups Focus on the Execution of Business Plans, With Less Intent on Controlling IP’, *Journlaw*, 23 November 2015, accessed 2 August 2016 at journlaw.com/2015/11/23/how-startups-focus-on-the-execution-of-business-plans-with-less-intent-on-controlling-ip/.

⁴⁵ See Lessig, Lawrence, *Code and Other Laws of Cyberspace* (Basic Books, New York 1999) ch.7 (‘What Things Regulate’). As to other forms of legal regulation, including competition and unfair competition laws, see Weber Waller, Spencer, and Matthew Sag, ‘Promoting Innovation’ (2015) 100 *Iowa Law Review* 2223.

is also a risk that non-legal constraints can themselves work in uneven ways, benefiting some while imposing significant burdens on others.⁴⁶ Will there be a role for law in limiting these coercive effects? Historically, preserving a sphere of freedom was one of intellectual property law's oldest and most legitimizing functions – for instance the patent system restraining the Crown's 'odious monopolies',⁴⁷ and copyright permitting Romantic and Victorian authors to control the exploitation of their creativity rather than depend on 'insolent' patrons⁴⁸ and markets prone to piracy.⁴⁹ Similarly, we might argue that a basic function of an intellectual property system with respect to media and entertainment *especially* should be to preserve a sphere of freedom for all (not just some) who engage in creative expressive activities.

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⁴⁶ As Lessig also points out, noting that social norms, markets and technologies have at different times and in different places created significant 'threats to liberty': Lessig (n.45) 85–6.

⁴⁷ For a brief enlightening discussion of the beginning of the Statute of Monopolies 1624, see Jacob, Robin, 'Intellectual Property and Competition Law: Can Economists Help?' in *IP and Other Things: A Collection of Essays and Speeches* (Hart Publishing, Oxford and Portland Oregon 2015) ch.8, 78–80; and generally MacLeod, Christine, *Inventing the Industrial Revolution: The English Patent System, 1660–1800* (Cambridge University Press, Cambridge 1988).

⁴⁸ A sentiment expressed in (the author) Samuel Johnson's definition of a 'patron' as '[o]ne who countenances, supports or protects. Commonly a wretch who supports with insolence, and is paid with flattery': Johnson, Samuel, *A Dictionary of the English Language: In Which the Words Are Deduced From Their Originals, and Illustrated in Their Different Significations by Examples From the Best Writers* (in two volumes, printed by W Strahan, for J and P Knapton and others, London 1755–6).

⁴⁹ Of course this is a very simplistic analysis of interests and effects. For a more nuanced account, see Seville, Catherine, *Literary Copyright Reform in Early Victorian England* (Cambridge University Press, Cambridge 1999).

adaptation. We are grateful as well to those who facilitated our meetings, especially our Melbourne colleagues Jason Bosland, Andrew Kenyon and Kwanghui Lim, and our Singapore hosts Irene Calboli, Loy Wee Loon and David Tan. Thanks also to Laura Mann at Edward Elgar for her enthusiastic and constructive commitment to the project and to Claire Richardson for excellent research and editorial assistance. Finally, we acknowledge the generous financial support of the Australian Research Council, the Melbourne Law School–Oxford research partnership, and the Intellectual Property Research Institute of Australia. Without it, the project would have been a far more burdensome enterprise.