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Negotiating an ethical commons of expression

Melissa Laing

"The individual sense of wrong stimulated the moral growth of society at large; and in due course of time, after a strenuous struggle with those who profit by the denial of justice, there comes a calm at last, and ethics crystallize into law." Brander Mathews, 1895

"Lyman Ray Patterson, a leading copyright historian, once categorised the historical development of copyright law as the development of a series of fragmented rules rather than principles - 'There is no set of clearly defined principles for copyright.'" Simon Stokes, 2012

In first decade of the 1700's, with the European guild system in decline, the reproductive capacity of the printing press set in motion formative copyright debates resulting in England in the *Statute of Anne* (1710).[3] This statute vested the ownership of an expression of an idea, in written or visual form, in the individual as author rather than in the publisher, or the community. As such it explicitly linked authorship to ownership, not of the manuscript or the printed text, but of the immaterial expression itself. It also linked immaterial cultural and intellectual expression to the capacity to generate economic gain. The propositions within copyright legislation - that an author inalienably owns the product of their labour, can leverage economic gain from it or dispose of it as they will (most commonly by licensing or selling it), and can prevent anyone from using it without permission - are now enshrined in the Anglo-American and European legal systems as well as in our contemporary understandings of the distribution and use of intellectual or cultural material. At a point in time when lobbying by industries that benefit from copyright legislation centres around increasing its scope and restrictions, it is important to reflect on the original context for the introduction of copyright and how its embedded ideas still inform contemporary debates.

Early printing fell under the highly regulated guild system which issued licenses to printers to operate, ensuring their monopoly rights to texts with an understanding that the guild and printers would undertake censorship of printed matter. However in England this system was allowed to lapse at the beginning of the 18th century. In the wake of this deregulation, works written and sold to one publisher were reset and printed within weeks by another publisher. Emotively arguing that this was akin to theft or piracy, the printers lobbied for a system which protected their monopoly rights, linking these protections to the well being of the author. The result was the *Statute of Anne*, which formally vested the ownership rights of a text in the author, or in their assignees, for a period of 14 years, with a further reversion of the rights to the author for a second period of fourteen years, making a total of 28 years of copyright protection. In the preamble to the statute a limited term of restricted use was justified on the grounds that it would provide a financial incentive for the "Encouragement of Learned Men to Compose and Write useful Books".[4]

Significant changes have occurred in copyright legislation since 1710. Whereas in the early period of copyright legislation, demonstrating a small amount of added labour was sufficient to qualify the reworking of an existing work as a new work, contemporary legal opinion places the emphasis on what has been taken, not what has been added. This reifies the principle of originality linked to the idea of individual authorship, and denigrates the idea of influence. However, it is a banal truism that any work is a product of its cultural context and creative antecedents. Embracing this, art historian Michael Baxandall argued against the pejorative use of the term influence. Positioning X as the earlier or older work and Y as the later work made after X, he wrote:

> " If one says that X influenced Y it does seem that one is saying that X did something to Y rather than Y did something to X. But in the consideration of good pictures and paintings the second is always the more lively reality. …
> If we think of Y rather than X as the agent, the vocabulary is much richer and more attractively diversified: draw on, resort to, avail oneself of, appropriate from, have recourse to, adapt, misunderstand, refer to, pick up, take on, engage with, react to, quote, differentiate oneself from, assimilate oneself to, assimilate, align oneself with, copy, address, paraphrase, absorb, make a variation on, revive, continue, remodel, ape, emulate, travesty, parody, extract from, distort, attend to, resist, simplify, reconstitute, elaborate on, develop, face up to, master, subvert, perpetuate, reduce, promote, respond to, transform, tackle … most of these relations just cannot be stated the other way round – in terms of X acting on Y rather than Y acting in X. To think in terms of influence blunts thought by impoverishing the means of differentiation."[5]

Similarly, current copyright law impoverishes people's ability to creatively respond to what touches them.

In his essay *Toward a Theory of Copyright: The Metamorphoses of 'Authorship'* Peter Jaszi argues that copyright, as the licensing of the right to reproduce a written text or visual piece, effectuated a transition of the manuscript as particular expression of an idea, into an abstraction of the intellectual property as a tradable commodity. The rights to reproduce the immaterial contents of the manuscript were more important than the material object of the manuscript. In a Marxist reading he asserts that "[t]he terminology of the 'work,' denominating a free-standing abstraction as the subject of literary property, emerged only in the mid eighteenth century … In effect, the 'work' was the commodity form or objectification of the 'author's' labor, and the publisher was able to realize the surplus value of that labor."[6] Sitting in-between the constructed poles of creator and consumer sits the logic of economics, initially the principles of payment for labour and return on investment, which then move into the right to privatise and capitalise on existing knowledge. It seems that once we accepted the premise that an author (or their licensees) have the right to a monopoly for economic gain, the monopoly's term and scope could only ever grow, not retract. It is demonstrative of this trend that copyright terms have extended from 14 to 28 years in 1710 to between 50 and 70 years after the author's death today. For works produced by a corporation, copyright applies for up to 120 years after creation or 95 years after publication, whichever endpoint is earlier. This means that a large proportion of works created in the 20th century have not yet entered the public domain, unless explicitly released by the author or corporation. These writings, recordings, images and films make up our contemporary cultural context, but cannot legally be used to communicate with, or built upon to create new works, without substantial change. Through these restrictions the copyright system emphasises the consumption of intellectual and cultural expressions above their (re)use.

When immaterial expressions are thought of as a commodity created by labour, the protection of monopoly rights over them seems reasonable. However, there is a growing argument against absolute property rights and for the protection of both the public domain and the principle and practice of the commons, pushing for the freeing up of the dissemination and use of works. Where Brander Mathews' 1895 formulation on the development of copyright (quoted at the beginning of this article) outlines a premise in which the individual sense of wrong led to a shift in societal attitudes, and from this a change of law - the creation of copyright - the current 'sense of wrong' is swinging back against copyright. Today, contemporary copyright legislation, and other intellectual property laws such as patents, are often compared with the historic acts of enclosure, which effected the transfer of communally used public land, or commons, into private ownership between the 16th and 19th centuries. This comparison refers both to the denial of a previously available resource and the wealth that was generated for landholders, but also to the revocation of a relationship of care and guardianship that a community had previously enjoyed. The emotive value of such a comparison

rests on the history of social trauma caused by loss of livelihood and the resulting rebellions. The commons here enclosed are the intellectual, artistic and scientific knowledge and creations that contribute to our 'common' social and cultural framework that we build upon. What is enclosed is not just an individual expression of an idea, but all the common knowledge that was built upon to create the work. There are individuals and groups who object to the excessive control and influence exercised by large corporations whose business is based on leveraging financial gain out of creative works they have funded and/or licensed. They campaign against, outright ignore, or opt for alternate models for copyright, or copyleft, such as Creative Commons and open source licensing. Some staunch opponents of the intellectual property system argue that information should be free to be copied, adapted and redistributed by everyone, i.e. to exist in the public domain.[7]

The phrases 'public domain' and 'commons' are often conflated, however there are crucial differences in the concepts they refer to. The public domain, in the discourse of intellectual property, explicitly refers to works that are no longer held under copyright, either due to the expiry of the copyright term, or due to their release from copyright by the designated author(s). Under public domain there is no restriction on reproducing the work, creating a derivative work, and, in a commercial context, exploiting the work for gain. The public domain exists in a binary relationship to the paradigm of copyright, creating a situation where the immaterial property of a work - its 'unique' expression of an idea - is either free for all or owned as private property. In contrast, the history and conceptual basis for the commons rests on the principle that something is held in common and managed by a community. As such each common evolves its own behavioural norms, expectations and courtesies, with the attendant possibility that it could evolve into a closed community. Indeed, it is this propensity for communities to become closed that must be carefully thought before embracing the concept of the commons as a cure-all. Stavros Stavrides in an interview with Massimo De Angelis argued, "we have to establish a ground of negotiation rather than a ground of affirmation of what is shared. We don't simply have to raise the moral issues about what it means to share, but to discover procedures through which we can find out what and how to share. Who is this we? Who defines this sharing and decides how to share? What about those who don't want to share with us or with whom we don't want to share? How can these relations with those 'others' be regulated? For me, this aspect of negotiation and contest is crucial, and the ambiguous project of emancipation has to do with regulating relationships between differences rather than affirming commonalities based on similarities."[8]

In New Zealand the questions of copyright, public domain and the commons should be further complicated by the issues raised by Māori. These issues have been articulated in the 1991 Wai 262 claim to the Waitangi Tribunal, numerous hearings, discussions

and writing as well as the Waitangi Tribunal report released in late 2011. While the majority of the report addresses Māori kaitiakitanga or customary guardianship of New Zealand's flora and fauna the first chapter focuses on the Māori kaitiakitanga relationship to taonga. While taonga can refer to "anything that is treasured", including "tangible things such as land, waters, plants, wildlife, and cultural works; and intangible things such as language, identity, and culture, including mātauranga Māori itself", in this context the word is used to designate "artistic and cultural works that are significant to the culture or identity of Māori iwi or hapū."[9] Kaitiakitanga is "the responsibility to nurture or care for something or someone," in this instance traditional artforms, "unselfishly, with right mind and heart, and with proper procedure."[10] It expresses communities' obligations and relationships of care arising out of kinship. While kaitiakitanga does not designate an individual property right generated by an authorship role, it does designate a community's authority to permit the use and dissemination of the knowledge or taonga. The kinship and kaitiaki relationships to taonga persist well after the initial creator of a work has died.

The conflict between the principles underpinning copyright and the tradition of kaitiakitanga arrises out of the binary relationship of individual property and the public domain. The report states "[c]urrent laws and policies were not designed to recognise and support the relationships of kaitiaki with their taonga works or related traditional knowledge. Others can acquire IP rights over taonga works and related knowledge – for example, through trade mark or copyright laws – with little or no consideration for kaitiaki interests. Others can also use and control taonga works or related knowledge, sometimes in offensive or derogatory ways, without informing or seeking the consent of iwi or hapū whose identities those works reflect."[11] Additionally, often the taonga have no identified creator, or are ephemeral, spoken or sung rather than recorded or written and as such never eligible for copyright. As Barry Barclay wrote in his book *Mana Tuturu*, "Collective ownership and the lack of the hero inventor in the present are not only outside the ken of the present general law on intellectual property but are antagonistic to its fundamental mission, which is to grant for a short, fixed period privileges in the market place to a single individual or company."[12] The black and white nature of copyright legislation, in which intellectual and creative expressions are either owned as property to be sold, leased or licensed, or free for all to use without restriction, does not currently leave room for prolonged community care for traditional knowledges.

The Wai 262 report seeks to find ways in which the principles of kaitiaki can work with existing intellectual property law in New Zealand, both by preventing individuals or for-profit corporations from gaining control over mātauranga Māori or taonga works, and ensuring appropriate use of mātauranga Māori or taonga works by others. It proposes that this could be achieved by creating consultancy bodies who would

assist tauiwi in negotiating the appropriate permissions and ethical use of mātauranga Māori or taonga works. While the report on one level proposes a significant change in practice, in that it calls for the modulation of intellectual property to recognise the principle of enduring kaitiakitanga, it is also conservative as it seeks to work within the existing realm of international intellectual property law. Given that intellectual property law including copyright law has progressively moved towards more and more restrictive articulations of ownership, working with these laws also means fitting kaitiakitanga to the principles of private property and economic gain that dominate our conception of intellectual and creative expressions.

It is not enough simply to modify current law in an effort to claim back respect for cultural context and create a vigorous cultural commons. We must reconceive the grounding principles of the debate. Instead of attempting to reconcile these three frameworks: copyright, kaitiakitanga and the commons, would it be more productive to consider an ethics in relation to intellectual and cultural expressions? We can see the beginnings of this approach in the late 19th century in Europe, with the recognition of the moral rights of an author. Formally enshrined in the *Berne Convention for the Protection of Literary and Artistic Works as amended in 1928*, the rights of the author include "the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."[13] New Zealand, who was first contracted to the convention by the United Kingdom in 1887, independently endorsed the convention with these amendments in 1928. However, like other copyright principles, moral rights still rest on the ability to identify an author who then acts to defend their rights, and the conception of the 'work' as unique and original. If we return to Michael Baxandall's commentary on the restrictive way we frame originality and influence it can be argued that the moral rights of an author also prevent many of the actions that he lists.

The development of the many alternative licensing systems aimed at sharing software and creative content, such as GNU General Public License and the Creative Commons licenses, are aimed at explicitly allowing an intellectual or creative expression to immediately enter into the 'commons' in a managed fashion and remain available to other users. For Lawrence Lessig, one of the founders of Creative Commons, the issue lies in "whether [any given] resource should be controlled or free", where a resource "is 'free' if (1) one can use it without the permission of anyone else; or (2) the permission one needs is granted neutrally".[14] This principle of neutrality derives from the philosophy of legal positivism which emphasises the fact of the law as it applies to all, above the consideration of the laws' relative merits on a case by case basis. Additionally, these permission based systems are built upon copyright holders' existing right to license their property, a right that presupposes the double factor of a

unique 'work' and an identifiable author. In fact, the six commonly promoted Creative Commons licenses all contain the clause that the initial author must be acknowledged in the derivative work. This indicates an adherence to an authorship/property rights model made explicit in this description on their website: "Every license helps creators — we call them licensors if they use our tools — retain copyright while allowing others to copy, distribute, and make some uses of their work — at least non-commercially. Every Creative Commons license also ensures licensors get the credit for their work they deserve."[15] The model of licensing to create a commons can be compared to a charitable or philanthropic model where individuals gift goods or capital to the commons. While it allows individuals to choose to share it also legitimates the underpinning property right by emphasising the owner's right to choose. It justifies the choice to share by emphasising the cultural and social capital that accrues to those who share, and whose work is remixed and remade by others.

What would an ethics for the sharing, caring for, and reuse of intellectual and cultural expressions look like for me? It would involve on the one hand a sincere respect for the importance intellectual and creative expressions can have for the communities they were created within. Those who wished to use any work as fertile soil from which to grow another work, would take the care to respect the intentions and context of that work in their use of it. This respect would recognise the possibility of harm, emotional or spiritual, through careless use and the situations in which a given use is inappropriate. This respect would be unconditional and not time bound. On the other hand, those individuals, groups, communities or companies who create works which have enduring impact on our contemporary culture, such as music, art, film, literature, and even advertising and branding, must recognise that they have a responsibility of unconditional generosity to their listeners, readers and viewers. This generosity would enable people to respond to these creations, rather than ring-fencing them away, saying 'look, but don't touch'. In support of this ethics we would find other ways to support the generation of intellectual and cultural expression that did not depend on an entrepreneurial mentality, one that leads to the exploitation of everything the individual, as entrepreneur, can find.

This reciprocal responsibility to each other of respect and generosity is what Jacques Derrida described as the 'unconditional purity' of a given ethics. In his book *On Cosmopolitanism and Forgiveness*, Derrida, using the principles of hospitality and forgiveness, argues that for an ethics to be able to exist it must have as its "pole of absolute reference" this unconditional purity.[16] However, the ethics "remains nonetheless inseparable from what is heterogenous to it", its limitations, or conditions.[17] Speaking on forgiveness, Derrida argued that "[t]hese two poles, the unconditional and the conditional, are absolutely heterogeneous, and must remain irreducible to one another. They are nonetheless indissociable: if one wants, and it is

necessary, forgiveness to become effective, concrete, historic; if one wants it to arrive, to happen by changing things, it is necessary that this purity engage itself in a series of conditions of all kinds (psycho-sociological, political, etc.)."[18] Understood in this vein respect must be unconditional to have any meaning, as must generosity. However, for them to be embedded in our understanding of how we relate to intellectual and creative expressions, we necessarily also have to engage with conditional forms of these ethics. It is by identifying the unconditional positions that we wish to start from that ethical, albeit conditional, positions can be negotiated. As Derrida wrote "It is between these two poles, irreconcilable but indissociable, that decisions and responsibilities are to be taken."[19]

Notes

1 Brander Matthews, *Books and Play Books* (London: Osgood, McIlvaine & Co, 1895) pp 4 - 5. Quoted in Ronan Deazley, *On the origin of the right to copy : charting the movement of copyright law in eighteenth-century Britain (1695-1775)* (Oxford; Portland: Hart Publishing, 2004) p xvii

2 Simon Stokes, *Art and Copyright* second edition (Oxford: Hart Publishing, 2012) p 11. Stokes quotes LR Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968) p 222

3 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, 1710, 8 Anne, c.19 http://www.copyrighthistory.com/anne.html (accessed 20 July 2012)

4 8 Anne, c.19

5 Michael Baxandall, *Patterns of Intention, On the Historical Explanation of Pictures* (New Haven: Yale University Press, 1985) pp 58 – 59

6 Peter Jaszi, "Toward a Theory of Copyright: The Metamorphoses of 'Authorship'" *Duke Law Journal*, Vol. 1991 No. 2 (April 1991) pp 473 – 474 http://www.jstor.org/stable/1372734 (accessed 18 July 2012)

7 Richard M. Stallman, *Free Software, Free Society: Selected Essays of Richard M. Stallman* (Boston: GNU Press, 2010)

8 Stavros Stavrides, "On the Commons: A Public Interview with Massimo De Angelis and Stavros Stavrides", *e-flux journal*, 17 (June to August 2010) p 6

9 Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wellington: Waitangi Tribunal, 2011)

10 Ibid.

11 Waitangi Tribunal, *Ko Aotearoa Tēnei – Factsheet 2, Intellectual Property in Taonga Works* (Wellington: Waitangi Tribunal, 2011) p 1 http://www.waitangitribunal.govt.nz/doclibrary/public/reports/generic/Wai0262/Wai262Factsheet2TaongaWorks.pdf (accessed 10 August 2012)

12 Barry Barclay, *Mana Tuturu, Maori Treasures and Intellectual Property Rights* (Auckland: Auckland University Press, 2005) pp 82 – 83

13 Article 6bis: Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at PARIS on May 4, 1896, revised at BERLIN on November 13, 1908, completed at BERNE on March 20, 1914, revised at ROME on June 2, 1928, at BRUSSELS on June 26, 1948, at STOCKHOLM on July 14, 1967, and at PARIS on July 24, 1971, and amended on September 28, 1979, http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html (accessed 2 August 2012)

14 Lawrence Lessig, *The Future of Ideas. The fate of the commons in a connected world* (New York: Vintage Books, 2002) p 12

15 Creative Commons, *About The Licenses* http://creativecommons.org/licenses/ (accessed 30 August 2012)

16 Jacques Derrida, *On Cosmopolitanism and Forgiveness* (London; New York: Routledge, 2001) p 44

17 Ibid.

18 Ibid.

19 Ibid. pp 44 – 45