

**The Police Logic of Balancing the Interests
in
Copyright Law**

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Abstract

This article examines the use of the phrase ‘balancing the interests’ in political debate relating to copyright law. I argue that this phrase no longer leads to broad debate on the proper balance to be struck between private, public and social interests in copyright law. Rather, today the phrase has come to represent a type of police logic which reflects the private interests of copyright owners and users *as they already exist*. Drawing on the work of Jacques Rancière I suggest that this balance of private interests may be upset by a strategy of ‘subjectivisation’ which challenges the existing distribution of social bodies by making new subjects appear. I conclude that the recent cases of *Telstra Corporation v Phone Directories Company Pty Ltd*² and *IceTV Pty Ltd v Nine Network Australia Pty Ltd*³ represent a surprising and effective use of this strategy by reintroducing the ‘artist’ and the ‘maker’ into copyright law in such a way as to upset and displace the prior claims of copyright owners and users.

‘Balancing the interests’ has become a commonplace phrase in Australian political debate and in this article I consider its use in relation to copyright law reform and how it came to replace the more politically familiar ‘compromise’. I argue that ‘balancing the interests’, unlike compromise, does not demand a sacrifice by the people, nor promise a common historical end. Rather, it provides a reflection of a ‘workable’ balance of private copyright interests which already exists.

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² *Telstra Corporation v Phone Directories Company Pty Ltd* [2010] FCA 44.

³ *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14; (2009) 254 ALR 386.

I argue that in striking such a balance the legislature exercises neither the skills of the judge as represented by Lady Justitia, nor the wisdom of statesmanship as represented by King Solomon. Rather, the legislature takes on the role of Circus Ringmaster who draws attention to and bathes in the reflected glory of a state of balance, a balancing act, which already exists. Drawing on the work of Jacques Rancière, I characterise this as a form of ‘police logic’ – that is, a totalising discourse which legitimates consent by excluding from consideration substantive issues of social meaning as well as those who do not count.⁴

I pose the question of what it might take to upset this balance of private copyright interests. I argue that political consultation and negotiation may be ineffective insofar as they have become just another technique to more finely calibrate the existing balance. Rancière suggests an alternative strategy which he calls ‘subjectivisation’, that is a strategy which challenges the existing distribution of social bodies (the balance) by making new subjects appear.⁵ I argue that the work of writers such as Drahos, Correa and Sell might be characterised as forms of subjectivisation but that, to the extent that their new subjects base their claims on a functional relationship with the copyright work, their attempts to disrupt the balance of private interests of copyright owners and users has been only partially successful.

If subjectivisation is to successfully disrupt this balance perhaps a new subject is needed whose prior legal claim displaces the merely functional claims of the copyright owner and user, or whose functional claims are counted as nought. Alternatively, one might seek to put the Ringmaster in the spotlight as a subject in its own right by demanding a new balance.

This, I argue, is the surprising outcome of the decision of Gordon J in *Telstra Corporation v Phone Directories Company Pty Ltd*⁶ following the High Court’s decision in *IceTV*.⁷ In these cases the judiciary introduced three new-old subjects. The first was the ‘artist’, who displaced the merely functional claims of the copyright owner and user; the second was the ‘maker’ whose claims based on functionality were discounted – that is, excluded from the balance of private copyright interests. The third was the legislature itself who became a subject in its own right. By demanding that a different balance to be struck the judiciary effectively turned the spotlight back on the Ringmaster.

Through this strategy of subjectivisation the judiciary has accomplished what political consultation and negotiation, as well as much academic writing, has so far failed to do. It has put the question of the proper scope of copyright law, as well as the proper balance of public interests, back onto the legislative agenda. Whether this is enough to upset the police logic of balancing the interests in copyright law has yet to be seen.

⁴ J Rancière, *Dis-agreement: Politics and Philosophy* (Julie Rose trans, 1999).

⁵ Ibid 11.

⁶ *Telstra Corporation v Phone Directories Company Pty Ltd* [2010] FCA 44.

⁷ *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14; (2009) 254 ALR 386.

From compromise to balance

The use of the phrase 'balancing the interests' in relation to copyright law is relatively recent and it is notable that it was not used at all in debates on the Copyright Bill 1968.⁸ Prior to the 1990s, the quintessential political term, 'compromise' was used instead in relation to both copyright and patent law reform. In the Second Reading Speech for the Copyright Bill 1968 the Attorney-General Mr Bowen, for example, expressed the hope that the Government had achieved 'a reasonably satisfactory compromise in areas where there are conflicting interests'.⁹

Compromise is not balance. What is important about compromise is that it involves a sacrifice – at least one person has given something up – and this sacrifice is directed towards some end. In many cases this may involve the sacrifice of private, economic interests. Attorney-General Bowen again in relation to the same bill:

Honourable members will therefore appreciate that any alteration in the existing copyright law will affect substantial economic interests which have been built on the basis of that law. The interests affected will be the interests of both producers and users of materials protected by copyright.¹⁰

Traditionally in relation to intellectual property, economic freedom over works is sacrificed to the greater interests of the community. However, even the economic interests of the people may be sacrificed when the interests of the state are at stake. This is what happened in the case of the Patents Bill 1989 (which was meant to simplify the *Patents Act* 1952 without substantially altering its effect) where the economic interests of the people were sacrificed to the emergence of the state on the world stage. In a statement which one cannot imagine an Australian Minister uttering today Barry Jones, then the Minister for Science, Communications and Small Business, began his second reading speech by acknowledging that 'the economic costs of the patent system probably exceeded its benefits'. Yet, he continued, despite this Australia would maintain a patent system so that Australia could be part of the international system:

Some view the (patent) system as some kind of mysterious sacrament which has to be observed if we are to proceed along the path to economic heaven. The (Intellectual Property Advisory) Committee (IPAC) took a more pragmatic view. Faced with conflicting opinions on economic

⁸ In relation to political debates on patent law the only reference to balance I could find was by the Minister for Science, Communications and Small Business who referred to the need for inventors to balance the desire to exploit a new invention against the costs of retooling the factory shop. This is quite a different usage to the one under consideration here. Commonwealth, *Parliamentary Debates*, House of Representatives, 1 June 1989, 3479 (Barry Jones Minister for Science, Communications and Small Business).

⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1968, 1536 (Lionel Bowen, Attorney-General).

¹⁰ *Ibid.*

questions, IPAC recognised that it is imperative that Australia continue to operate a patent system and to participate in the international patent system.¹¹

The Minister may have called this a 'pragmatic' decision but this does not hide the fact that what he was demanding was the sacrifice of Australia's economic interest in the greater interest of the emergence of the state on the world stage. What the Minister was describing was a particularly historical, that is to say Hegelian, dialectic in which the realisation of political freedom is achieved through the sacrifice of other modes of being ... including the 'economic heaven' of control over things.¹²

The sacrifice of history does not mean the destruction of the previous mode of being but rather the sublation of that mode which is taken up in the realisation of the self. In other words, for the greater part of the twentieth century, under the rhetoric of compromise and sacrifice, intellectual property played a specifically historical role in which it was a means to an end rather than an end in itself.

But suddenly, in 1990 everything changed. Instead of demanding compromise and sacrifice the legislature was promising a 'balance of interests'. Instead of working towards the ends of history and the achievement of social and public interests, the legislature was promising a 'workable' balance of competing interests. And these interests were very narrow – they were the interests of the copyright owner and copyright user – public and social interests were rendered irrelevant. If the 'public interest' were mentioned at all it was as a description of this balance.

Since 1990 the refrain of balancing the interests in relation to copyright law reform has been constant and used by all parties. Consider Labor Senator Bolkus on the Copyright Amendment (Digital Agenda) Bill (1999):

Copyright law requires a delicate balance to be struck between the interests of those people who create material for use by others and those people who use the material. Provision must also be made for the interests of copyright communicators.¹³

¹¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 1 June 1989, 3479 (Barry Jones Minister for Science, Communications and Small Business). This was the sacrifice demanded by TRIPS *avant la lettre*... and one which many non-western countries have made post TRIPS.

¹² Hegel's personality theory of property, including intellectual property, is found in G Hegel, *Philosophy of Right*, (TM Know trans, first published 1821, 1967ed). Perhaps the most influential work on contemporary writing on the end of history is Alexandre Kojève, *Introduction to the Reading of Hegel. Lectures on the Phenomenology of Spirit*, (assembled by Raymond Queneau, ed Allan Bloom, trans James H Nichols Jr, first published 1947, 1969 ed) [trans of: *Introduction à la Lecture de Hegel*] see especially fn 14 pp 208-209. This position was popularised by Francis Fukuyama, *The end of history and the last man* (1992).

¹³ Commonwealth, *Parliamentary Debates*, Senate, 17 August 2000, 16579, (Nick Bolkus).

Or compare Labor Senator Stephens on the US Free Trade Agreement Implementation Bill 2004:

Another thing that Labor considers very important and one that we have heard a lot about is the issue of maintaining the fine balance between users and owners of copyright. Any alteration in our copyright legislation could result in significant costs, especially for educational institutions.¹⁴

Even those opposed to the amendment in question rely on the idea of balance. For example, Greens Senator Kerry Nettle (7 December 2004) on the Copyright Legislation Amendment Bill 2004 regarding the US-Australia Free Trade Agreement criticised it on the basis that it was 'unbalanced':

Thanks to the Howard government we now have some of the most unbalanced and restrictive intellectual property laws in the world, with holders or owners of copyright—that is, primarily big business—holding all of the cards at the expense of users and consumers such as libraries, universities, Australian industry and ordinary consumers.¹⁵

There are certain common themes of this rhetoric of balance. First, the balance is always said to be based on evidence provided by extensive consultation with stakeholders. In the Second Reading debate on the Copyright Amendment Bill 2006, for example, the (Liberal) Attorney-General Phillip Ruddock stated that the bill 'is a result of extensive consultation and ... delivers on a number of copyright reviews undertaken in the past few years'. In particular, he noted that the Bill includes the Federal Government's responses to:

... the fair use and other exceptions review, the review of the Digital Agenda Act amendments, the review of protection of subscription broadcasts, the Intellectual Property and Competition Review Committee's review of copyright under the competition principles, the Copyright Review Committee's review of jurisdictional procedures of the Copyright Tribunal, the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs on technological protection measures, and the technical review of all Australian legislation to ensure consistency with the Australian Criminal Code.¹⁶

Second, the object of such consultation and legislative reform is always narrow, even modest – it is to provide a 'workable' balance. Labor MP Duncan on the Copyright Amendment Bill 1992 regarding parallel importation of sound recordings:

¹⁴ Commonwealth, *Parliamentary Debates*, Senate, 4 August 2004, 25694, (Ursula Stephens).

¹⁵ Commonwealth, *Parliamentary Debates*, Senate, 7 December 2004, 106 (Kerry Nettle).

¹⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 1 November 2006, 31, (Philip Ruddock, Attorney-General).

The Government believes that the changes... provide a sensible, fair and workable balance of competing interests.¹⁷

Or Liberal Senator Kay Paterson on the Copyright Amendment (Moral Rights) Bill 1999:

The bill, with the changes that are being moved, forms a balanced package of rights... It is a workable scheme.¹⁸

Third, the rhetoric of balance does not suggest that everyone is happy with the result - agreeing to disagree is one of the characteristics of this mode of political reasoning. Consider (Liberal) Senator Kate Ellison on the Copyright Amendment Bill 2006:

Clearly, not all amendments will be well received by copyright owners, and not all amendments will be well received by copyright users. Copyright law is an exercise in the balancing of rights in the public interests. The government believes that the final bill, together with its amendments, which are the result of significant consultation and scrutiny by parliamentary committee, has got the balance right.¹⁹

These comments almost mirror those of (Labor) MP Daryl Melham in relation to the Copyright Amendment Bill (No 2) 1997 regarding the parallel import of CDs:

Inevitably, the establishment of any copyright law or intellectual property regime involves the balancing of rights, and it is perhaps inevitable in these circumstances that some people will complain about the balance struck by the government of the day. However, the parliament can and does have a responsibility to review that balance and to satisfy itself that the government has got the balance right.²⁰

Balancing the interests, unlike compromise, does not promise a common historical end or even a substantive solution but rather the finding of a 'workable' balance which is an end in itself. But this begs the question of who or what counts in this balance.

A picture of balance

¹⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 16 December 1992, 3894 (Peter Duncan).

¹⁸ Commonwealth, *Parliamentary Debates*, Senate, 7 December 2000, 21067 (Kay Paterson).

¹⁹ Commonwealth, *Parliamentary Debates*, Senate, 29 November 2006, 114 (Kate Ellison).

²⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 1997, 6311 (Daryl Melham).



For lawyers, the most familiar representation of balance is the scales of justice carried by a blindfolded Justitia armed with a sword.²¹ Many commentators have discussed the paradox of Justitia's blindness – how does she read the scales, should a blind woman brandish a sword?²² Others have reflected on the double play of the sword which represents both the power of the state and the pain of judgement.²³ The scales carried by Justitia are less often discussed. This is perhaps because, as William Ian Miller has suggested, their meaning appears obvious to those of us imbued with the values of law schools and evidence.²⁴ Weighing the evidence is the very process of justice, and until that has been done, judgement is left in the balance. Judgement is made when the scales are tilted by a preponderance of evidence and, for we lawyers, the greater the imbalance, the more sure the justice. Strange then, from a lawyer's point of view, that the legislature might seek to legitimate their reforms by reference to 'balance', unless they too are claiming that their decision flows from the evidence - thereby imbuing their political decision with the legitimacy of legal judgement.²⁵

However, politicians do not stake the legitimacy of their decisions on the weight of the evidence but on the will of the people – and the people do not agree. This inability to agree is the challenge of all political organisation and one which, we are told from Plato on, democracy is particularly unsuited to meet. It is not simply that the tyranny of the majority overrules the interests of the minority but rather that in a democracy everyone is said to have a voice which demands that their infinitely different interests be met. It is not Lady Justitia whom politicians call on to strike a balance between these competing demands but rather the wisdom of Solomon.

In the book of Kings, God appeared to King Solomon in a dream and promised anything he asked for. Instead of asking for a long life, private wealth or the death of his enemies Solomon asks for 'discernment in administering justice' (in the New International Version) or 'understanding to discern judgement' (King James version).²⁶ I your servant, Solomon says, am 'here among the people you have chosen, a great people, too numerous to count or

²¹ For a discussion of the Wisdom of Solomon in relation to legal ethics see Joseph Allegretti, 'Rights, Roles, relationships: The Wisdom of Solomon and the Ethics of Lawyers' (1992) 25 *Creighton Law Review* 1119 also Robert Cover, 'Violence and the Word' (1986) 95 *Yale Law Journal* 1601.

²² William Ian Miller, *Eye for an Eye* (2006) 1.

²³ As Robert Cover reminds us, law is played out on the field of pain and death - '(a)s a result of the judge speaking someone loses his freedom, his property, his children, even his life.' Robert Cover n 20, 1601.

²⁴ William Ian Miller, *Eye for an Eye* (2006), 4.

²⁵ Scales offer up the promise of accuracy and rationality but also of trickery and error (which only blindness might overcome). 'The scales are the signature emblem of the trader, those people who are taken as the torchbearers for a particular view of rationality as economic rationality... It is standard archaeological deduction that when scales are found among the grave goods, the skeleton they accompany was involved in trade... Lady Justice borrows her defining instrument from the defining instrument of precisely those people mistrusted from time immemorial as sharp practitioners.' *Ibid* 5.

²⁶ 1 Kings 3: 11 (New International Version).

number. So give your servant a discerning heart to govern your people and to distinguish between right and wrong.²⁷

The writer of Kings then retells the well known tale of the ‘wise ruling’ by King Solomon. Two prostitutes who live alone in a house appear before the King. The first woman tells Solomon that she had a baby and that three days later the second woman also had a baby. During the night the second woman’s baby died ‘because she lay on him’. The first woman tells the King that the second woman then swapped the babies – putting the dead baby beside the first woman and the living baby on her own breast. In the morning the first woman awoke and saw that the dead baby by her side was not hers. The second woman denies this and a dispute arises, and continues without agreement.

The King sums up the dispute: ‘This one says “my son is alive and your son is dead” while the other says, “No your son is dead and mine is alive.”’ There is no possibility of agreement so the King then says, ‘Bring me my sword’. He gave the order that the living baby be cut in two and that half should be given to the first woman and half to the other.



<http://www.dkimages.com/discover/previews/760/339339.JPG>

The first woman is filled with compassion for her son and begs the King to give the second woman the living baby rather than let him die. The second woman on the contrary says ‘Neither I nor you shall have him. Cut him in two.’ Then, we are told, the King gave his ruling; ‘Give the living baby to the first woman. Do not kill him; she is his mother’.

It might be thought today that the wisdom of Solomon is to have devised a particularly nasty trick to discern the most ‘fit parent’ regardless of who might be the biological mother but this ignores the fact that the writer of Kings refers to the baby as the first woman’s son and that Solomon himself does not equivocate in his decision – ‘she is his mother’. I would suggest another reading in which the wisdom of Solomon is to have determined the truth of what is *directly* rather than by resort to the usual legal procedures of witnesses, sacred lots, purgation

²⁷ 1 Kings 3: 8-9 (New International Version).

or ordeals. This, argues Nelson, is the theological truth of the story – that the wisdom of god is literally inside Solomon.²⁸

Rather than being a trick, Solomon's resort to (and then abandonment) of the sword demonstrates the limits, and even absurdities, of mere legal thinking, as opposed to the wisdom of judgement.²⁹ In the story of Solomon, the truth of what *is* is at the same time the answer to what *should* be. For Solomon, the question of what should be disappears in the question of what is – 'she is his mother'. There is a difference between the judgement of Solomon and the work of political judgement, however, which this story glosses over. In the story of Solomon the parties to the dispute are already determined – they are the two women who come before Solomon and ask for his judgement. In the case of political decisions, however, the question of who is a party to a dispute, of who counts, is itself a political decision which cannot/should not be ignored.³⁰

When politicians speak of balancing the interests in intellectual property law today they do not mean that they have enforced a (political) compromise nor that they have weighed the (legal) evidence. Instead, what they have done is bring to light the balance of interests which *already exists*. In focusing on the *is*, the question of what *should be* is held in abeyance. Furthermore, in making this decision they gloss over the fact that in coming to the decision the question of who counts has already been determined. In the balance of interests in copyright law it is the interests of copyright owners and users which are taken into account – the interests of society, or the public count for nothing. We might say that, today, the wisdom of Solomon amounts to nothing more than the wisdom of surveys and statistics, consultations and transparency– each of these things makes more clear what is, each avoids the question of who counts and what should be.

This is delightfully, if absurdly illustrated by the Federal government's recent decision not to lift the existing partial ban on the parallel importation of books despite the recommendations of the Productivity Commission and support of the Competition Minister Craig Emerson who had proposed a 'compromise position'.³¹ This was an issue with potentially profound effects on fundamental aspects of Australian culture and, in recognition of this, interested parties ran sophisticated campaigns regarding the public and social benefits of protecting the Australian publishing industry (on the one side) or making books cheaper and more

²⁸ R Nelson, *Interpretation: A Bible Commentary for Teaching and Preaching. First and Second Kings* (1987), 38-39 referring to 1 Kings 3: 28 (King James Version).

²⁹ Joseph Allegretti, 'Rights, Roles, relationships: The Wisdom of Solomon and the Ethics of Lawyers' (1992) 25 *Creighton Law Review* 1119, 1128. As Allegretti has noted, Solomon's resort to the sword might be seen as a 'gross caricature' of the violence inherent in all legal judgement but this ignores the theological objectives of the tale at 1128. Allegretti himself argues that the tale exemplifies the superiority of an ethics of care over 'rights-oriented thinking' at 1130.

³⁰ In this sense, the judgement of Solomon is more closely aligned to a legal judgement than to a political judgement ... a sorry state when the value of the law has already been dismissed.

³¹ The existing parallel importation ban gave Australian publishers 30 days in which to publish an overseas book and another 90 days to supply it. *Copyright Act* 1968 ss 44A and 112A. The 'compromise position' would have reduced the 30 days to seven days.

accessible to the Australian reading public (on the other). Commentators sought to weigh the social value of reading against the need to have a distinctively Australian cultural voice. Australian publishers argued that the existing balance was 'just right'.³² Booksellers, on the other hand, argued that the existing balance needed to be changed so that they could effectively compete against online booksellers.

This broadly based discussion of what should be continued even after the government's decision was made, when the decision was widely condemned on the basis of competition policy, history and social values. Michael Sutchbury of *The Australian*, for example, wrote:

(The decision) signals that the Rudd government is no Hawke-Keating government and that it is now open season for rent-seekers to plunder the general interest.³³

Ex liberal staffer Christian Kerr of *The Australian*, on the other hand, criticised the decision on the basis that it betrayed the working class, rather than that it betrayed competition principles:

by maintaining the privileged position of publishing yesterday, the Rudd government has betrayed the party's articles of faith.

The Labor Party is more a product of Methodism than Marx.

Kerr conjured John Stuart Mill to promote the values of working class self help, self improvement, and the value of books:

(The early labour movement) knew about the greater worth of self improvement – and the greater worth of books.

The Kevin Rudd Labor Party knows the worth of luvvies.³⁴

In the end all these arguments counted for nothing. Although the government agreed that competition was a good thing, and that the existing partial ban put Australian booksellers at a competitive disadvantage, they rejected the call to lift the ban on the basis that the booksellers

³² As Tom Dusevic put it in *The Australian* 'One of the arguments used by the publishers was part cheek, part misty-eyed Labor nostalgia.' He quotes Jose Borghino, the in-house advocate of the Publisher's Association: 'We said the 1991 reforms, introducing the 30 day and 90 day rules on availability, had transformed the local publishing industry... And it was bloody good.' Of course, Dusevic, points out, Borghino neglects to say that publishers and authors had tried to stop those reforms at the time. Tom Dusevic, 'Publishers win the day in a thriller', *The Australian*, November 12, 2009, p 4.

³³ Michael Sutchbury, 'Decision betrays lack of spine', *The Australian*, November 12, 2009 p 1.

³⁴ Christain Kerr, 'Labor panders to luvvies', *The Australian* 12 November 2009, p4.

were *already* so disadvantaged that nothing could save them from the competitive ravages of online book selling. Dr Emerson himself had to proclaim the government's position:

Competition from internet and online booksellers will apply competitive pressure on both price and availability, so we decided it wasn't warranted to change the regulations.¹³⁵

In other words, in the balancing of the interests in the debate on the parallel importation of books the government reflected the balance of what is rather than what should be. Not only were broader matters of social meaning excluded from the final decision but the dying body of the booksellers weighed next to nothing in this balance.

This was not a one off event but rather the repetition of a form of political reasoning which, as we have seen, has been familiar since 1990. It has been used to justify changes to legislation as well as decisions not to change legislation. It is used even where the issues of substance, social meaning and principle appear obvious. Consider the 2006 debate on whether a new defence of fair dealing for the purposes of parody or satire should be included in the *Copyright Act* (Cth) 1968. Since the time of the Greeks, democracy and parody have developed hand in hand, and the skills of satirists and parodists have traditionally been called upon to engage the people in the democratic process. Furthermore, a love of parody and a facility in its use are thought to be part of the great Australian character – represented by the larrikin who doesn't take anything too seriously. The question of whether there should be a fair dealing defence for parody or satire would therefore seem to beg for a principled decision of what should be based on the central role of parody and satire in a democracy, its role as a vehicle for free speech, and its ability to express the Australian character. However, this did not happen. Despite the fact that stakeholders and commentators did raise these issues the government introduced the defence not on the basis of any principle but on the basis that the defence *already* existed.

In coming to this decision the government simply reflected the decision in *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd*³⁶ where the criticism and review defence under the *Copyright Act* (Cth) 1968 was interpreted widely enough to encompass parodic use, whilst satiric use was said to be unlikely to amount to a copyright infringement at all. This was because, as the judge explained, satire usually does not contain any reproduction of copyright material. The new statutory defence did not interfere with the copyright owner's interests because these interests had already been interfered with. The new legislative balance reflected a balance of interests which *already existed*. As the Australian Subscription Television and Radio Association in its submission to the Standing Committee on Legal and

³⁵ Quoted by Lenore Taylor, 'Rudd dodges reform of publishing industry' *The Australian*, November 12, 2009 p 4.

³⁶ *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 184 ALR 1.

Constitutional Affairs, the Bill created ‘certainty for copyright users while not diminishing the rights of copyright owners’.³⁷

Now, it could be suggested that there is nothing surprising in saying that law will mirror the balance of interests as they already exist in the world. This was certainly the position taken by Roscoe Pound in his classic works on the nature of interests. Pound classified interests as 'individual', 'social' or 'public' interests where individual interests encompass individual physical and spiritual existence, domestic interests and individual economic life.³⁸ Social interests are the interests of the community at large (general security, the security of political and social institutions, general morals, social resources and general progress)³⁹ and public interests are the interests of the state as a juristic person.⁴⁰ For Pound, interests are real and primary to law, which simply reflects what already exist:

(The law) does not create these interests... they arise, apart from the law, through the competition of individuals with each other, the competition of groups or societies with each other, and the competition of individuals with such groups or societies. The law does not create them, it only recognises them.⁴¹

Pound argues that the law has a specific role to play in relation to these competing interests:

The legal system attains its end by recognising certain interests – individual, public, and social, - by defining the limits within which these interests shall be recognised legally and given effect through the force of the state, and by endeavouring to secure the interest so recognised within the defined limits.⁴²

For Pound, it almost goes without saying that the strict concern of the law is not individual or even public interests but rather social interests, 'since it is the social interest in securing the individual interest that must determine the law to secure it.'⁴³ Pound, as an American jurist, characterises copyright as a law relating to a social interest in cultural progress⁴⁴ and patent law as a social interest in the encouragement of invention.⁴⁵ In other words, Pound

³⁷ Submission 28, p 3 as cited in Standing Committee on Legal and Constitutional Affairs, Senate, *Copyright Amendment Bill 2006 [Provisions]* (2006) 26 .

³⁸ Roscoe Pound, 'Interests of Personality' (1915) Vol XXVIII no 4 *Harvard Law Review* 343, 349.

³⁹ Roscoe Pound, 'A Survey of Social Interests' (1943) Vol LVII No 1 *Harvard Law Review* 1.

⁴⁰ Pound, n 37, 344. In Pound n 28, 1, 1 fn 2 Pound acknowledges that he has used the classification suggested by RV JIhering, *Der Zweck im Recht* (1877) 467-483.

⁴¹ Pound n 37, 343-344.

⁴² Ibid 343.

⁴³ Ibid 344.

⁴⁴ Pound n 38, 32.

⁴⁵ Ibid 31.

treats the law as an exercise in sovereignty – directed to the ends of sovereignty and the state rather than as a technique to secure the ends of the thing to be regulated.

What distinguishes the balance of interests in copyright law today from Roscoe Pound's balance of interests is not the fact that law reflects the balance of interests which already exists (Pound knew this) but that questions of social and public meaning are excluded from the count. The interests which count are the interests of copyright owners and copyright users and the success of the copyright system has become an end in itself – a 'workable balance', as they say. No wonder, as Peter Drahos has commented, that intellectual property law reform has been reduced to a 'game of inches', concerning for example, 'the right level at which to set the standard of (patent) inventiveness'⁴⁶ or just how many weeks an Australian publisher might have to publish a book before parallel importation restrictions are lifted.⁴⁷ No wonder no-one is completely happy with the result.

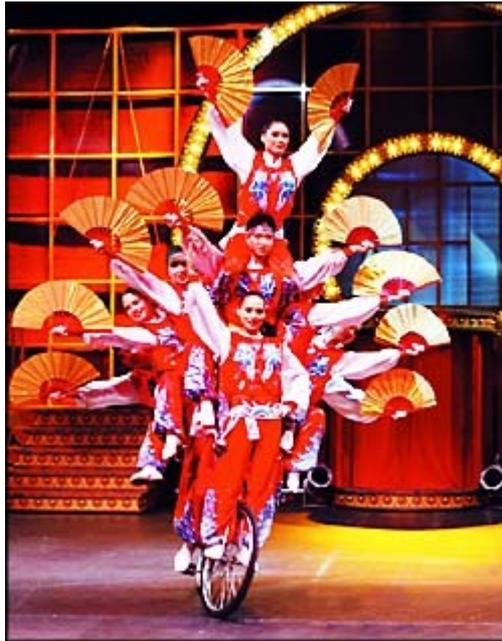
Instead of Lady Justitia armed with a sword, or King Solomon in the act of judgement, we need another picture of balance where only certain interests and parties count. I would like to put before you the picture of an acrobatic troupe poised on a bike.

Within traditional circus lore the acrobat represents mastery over one's own body rather than mastery over the external world and in this sense the acrobat is a particularly ahistorical figure.⁴⁸ The beaming smiles and glowing eyes of the acrobats as they look straight ahead may suggest that they are riding into a glorious future but this is simply a performance – the circus ring is round and they are going nowhere.

⁴⁶Peter Drahos, 'Submission to Senate Community Affairs Committee Inquiry into Gene Patents' which is Chapter 11 of his then forthcoming book *The Global Governance of Knowledge: Patent Offices and their Clients* (2010).

⁴⁷ The game continues - booksellers are now demanding that in order to change the balance, Amazon.com should be required to pay GST on books.

⁴⁸ Tim Boucher, 'The Acrobat', *Circus Characters, History, Archetypes and Symbolism* <http://circuscharacters.org/>.



Chinese Golden Dragon Acrobats.

http://frank.mtsu.edu/~proffice/Reco rd/Rec_v12/rec1215/acrobats.jpg

Further, the acrobatic performance represents a working balance achieved from the organisation and harmonisation of bodies and things which already exists. To achieve this balance the acrobats may have flexed their muscles, put on a face and almost certainly quarrelled. Perhaps not one of them is perfectly happy with the result - one may have wanted something more ambitious, another thinks they have taken too great a risk, another may have preferred to be on the top rather than bearing the weight of others. But overall it is a workable balance which reflects the skills and abilities of those performers who count.

There is little point in complaining that only the acrobatic and fit are included in the balance. In achieving its working balance only the acrobatic and fit are fit to be counted. In exactly the same way, it is pointless to object that the acrobatic act is without meaning or purpose – the working balance of the acrobats is an end in itself. The logic of the acrobatic act legitimates its own form even whilst excluding all those non acrobatic others.

And where is the state in all of this? The state is not the acrobat nor even the acrobats' trainer but rather the Ringmaster who, according to Tim Boucher, directs attention to the performance and so 'acts as interpreter of events on behalf of the audience'.⁴⁹ The ringmaster may, as Boucher reminds us, step in when an act is not ready – a form of market failure within the context of the circus – but the state is not a steerer, let alone a rower, within the context of the show. Despite the fact that the skills of the ringmaster are not the object of the

⁴⁹ Ibid 'The Ringmaster'.

show, when the ringmaster shouts 'Da dah' s/he basks in the reflected glory of the performers' achievements.

However, there is something amiss when political decision making can be reduced to a circus act - within a democracy the question of who counts and what 'should be' are still important. We therefore need to consider what needs to be done to upset this balance and reintroduce matters of principle into the copyright law reform agenda.

Upsetting the balance

In the rhetoric of balancing the interests we are all copyright owners and users now and every attempt to (re)introduce matters of principle through fairer procedures, community consultation and the collection of evidence is doomed for failure. Community consultation and the gathering of evidence becomes just another technique to more finely calibrate the interests of copyright owners and users so that the legislation will reflect a more perfect balance. Social and public interests are excluded at the expense of a workable balance and this balance becomes an end in itself. The political rhetoric of balancing the interests in copyright law amounts to nothing less than the death of principle in political debate.

Political theorists have many names for this form of political reasoning. Jacques Rancière for example calls it a form of 'police logic'.⁵⁰ Michel Foucault, invoking La Perrière, calls it 'governmentality' - 'the right disposition of things arranged so as to lead to a convenient end'.⁵¹ The end of police logic or governmentality is not submission to the law and the sovereign (or what Pound has called social or public interest), but rather the ends of things themselves:

Government is defined as a right manner of disposing of things so as to lead not to the form of the common good, as the jurist's texts would have said, but to an end that is 'convenient' for each of the things that are to be governed.⁵²

When Rancière refers to police logic he does not mean a repressive regime but rather a totalising order which uses techniques – such as communication, procedure, consultation, medicine and even law itself - to aggregate, organise, distribute and then legitimate consent

⁵⁰ Rancière n 3.

⁵¹ M Foucault, 'Governmentality', in *Power. Essential Works of Foucault 1954 – 1984 Vol 3* edited James D Faubion, translated Robert Hurley and others Penguin 2002, pp 201- 222, p 210. Such theories have a familial resemblance to an earlier concern with the end of ideology and the rise of technocratic. For a specifically Australian take on this issue see Robert Catley and Bruce J McFarlane, *From Tweedledum to Tweedledee: the new Labor government in Australia*, Australia and New Zealand Book Company, 1974.

⁵² Foucault *Ibid* 201, 211. Foucault explains the problem of the common good as a problem of circularity: 'the common good' refers to a state of affairs where all the subjects without exception obey the laws, accomplish the tasks assigned to them, practice the trade to which they are assigned, and respect the established order conforms to the laws imposed by God on nature and men...In every case, what characterises the end of sovereignty, this common and general good, is in sum nothing other than submission to sovereignty' at 210.

whilst simultaneously excluding from the count all that is un(ac)countable or without value according to the ends of the things governed. It is that order which determines what is seen and heard and what becomes merely blur or noise. Policing does not discipline bodies so much as provide a ground for their appearance – it ‘distributes the sensible’, to use Rancière's famous phrase.⁵³

From a political point of view it is no easy matter to upset this balance of interests. Balancing the private interests of copyright owners and users by reflecting what already exists excuses governments from the unpopular work of determining competing social values on matters of principle and ensures that no sacrifice is demanded in the name of a higher good. Further, the balance becomes self-perpetuating. Every time a balance of interests is translated into legal form (at either an international or domestic level) it reinforces and sustains that balance. Law transforms a (possibly fleeting) existing balance of interests into an ongoing system of rights and duties – or in this case, exclusive rights and defences – which sustains that balance through time and space.

In contradiction to those political theorists caught in its thrall, Rancière dismisses community consultation and evidence gathering as political strategies to upset police logic.⁵⁴ Such consultation is not politics itself, Rancière argues, rather politics is that which disrupts the harmony of police logic. For Rancière politics is intermittent and sometimes scandalous and it arrives in sporadic acts of what he calls ‘subjectivisation’. Subjectivisation, he argues, challenges the existing distribution of social bodies by making new subjects appear.⁵⁵ It upsets the balance and is the equivalent of bringing on the clowns in the circus performance.

When Peter Drahos⁵⁶ on global intellectual property, Richard Hindmarsh on genetically modified crops,⁵⁷ Graham Dutfield on intellectual property and the life sciences or indigenous people,⁵⁸ Siva Vaidhyanathan⁵⁹ on copywrongs, or Carlos Correa⁶⁰ and Susan Sell on intellectual property and developing nations for example, plot the strategies by which

⁵³ J Rancière, *The Politics of Aesthetics: the distribution of the sensible* (Gabriel Rockhill trans) 2006.

⁵⁴ Rancière argues that the reliance on consultation is based on a fundamental misapprehension– that is, that the sharing a universal language supposes a universal world, the assumption that because communication relies on understanding it has mutual understanding as its end, n 3 Chapter 3, ‘The rationality of disagreement’ 43.

⁵⁵ Rancière identifies the birth of democracy itself as an example of such a political act of subjectivisation. Democracy, he argues, is that which disrupts the order of privilege or nature based on wealth, virtue or privilege. Democracy is a scandal precisely because it cannot be legitimated by reference to any privilege or principle of community but rather exists as a demand to count those who have no right to be counted – the free. It is not that democracy or politics came to provide a solution to the problems of class struggle but rather, that politics and democracy constituted the ‘people’ as a people who are taken into account: ‘The struggle between rich and poor is not social reality, which politics then has to deal with. It is the actual institution of politics itself. ... Politics does not happen just because the poor oppose the rich. It is the other way around: politics (that is, the interruption of the simple effects of domination by the rich) causes the poor to exist as an entity’, n 3, 11.

⁵⁶ P Drahos, *A Philosophy of Intellectual Property* (1996); P Drahos and J Braithwaite, *Global Business Regulation* (2000); Peter Drahos with J Braithwaite, *Information Feudalism. Who owns the knowledge economy?* (2002); P Drahos, *The Global Governance of Knowledge: patent offices and their client* (2010).

⁵⁷ Richard Hindmarsh, *Edging Towards Bioutopia. A New Politics of Reordering Life and the Democratic Challenge* (2008).

private interests shape intellectual property law we could simply dismiss their work as just another mirror of a balance of interests which already exists. When writers such as these demand a 'fairer balance' by ensuring community representation on key IP committees, training for IP negotiators in international fora, financial assistance for developing countries to take cases before the WTO as well as 'counter networks of outsiders'⁶¹ we might think that they too are caught in the thrall of community consultation and evidence gathering, that nothing they can say will upset the police logic of copyright owners and users.

However, I would like to suggest otherwise. When writers such as these plot the strategies by which private interests shape intellectual property in their own image they disrupt the totalising, naturalising charm of the police order of balance and instead make manifest the way in which that order is created.⁶² But they also do more. By a process of subjectivisation they recast and open up other possible worlds in which the players are otherwise – no longer simply intellectual property owners and users but feudal lords and serfs;⁶³ 'new insiders for insider governance'⁶⁴ (Drahos); the North and the South (Susan Sell);⁶⁵ biopirates (RAFI) or Pharmas. The process goes both ways of course - video and music pirates did not exist before we created them.

Unfortunately, these strategies of subjectivisation have not been very successful in the case of copyright law and it has proved all too easy to dismiss any dissenting voice as the self interested claim of a copyright owner or user. Those who attempt to upset the existing balance by championing free speech or open access; those who demand a robust public domain or a limit to the extent of copyright monopolies; those who seek to stand on the shoulders of giants, are dismissed as free riders or thieves – that is, copyright users who do not want to pay. Conversely, those who seek to protect their communal cultural heritage from appropriation; those who seek to protect culture from the processes of reification and

⁵⁸ Graham Dutfield, *Intellectual Property Rights and the Life Sciences: Past, Present and Future* (2nd ed 2009); Darrell A Posey and Graham Dutfield, *Beyond Intellectual Property; toward traditional resource rights for indigenous people and local communities* (1996).

⁵⁹ Siva Vaidhyanatham, *Copyrights and Copywrongs: the rise of intellectual property and how it threatens creativity* (2003).

⁶⁰ Carlos Correa, *Intellectual Property Rights, the WTO & Developing Countries: The TRIPS Agreement & Policy Options* (2000).

⁶¹ Peter Drahos, 'Submission to Senate Community Affairs Committee Inquiry into Gene Patents' which is Chapter 11 of his then forthcoming book *The Global Governance of Knowledge: Patent Offices and their Clients* (2010).

⁶² Kathy Bowrey and Natalie Fowell in 'Digging up fragments and building IP franchises', (2009) Vol 1 No 2 June *Sydney Law Review* 185, 192 question the usefulness of 'denaturalising' intellectual property so as to 'locate it in the domain of practical politics': 'Outside of a few elites who regularly fly business class to Geneva,' they ask, 'who needs to be convinced that these (global) bodies push particular agendas and laws that promote particular multinational interests?' at 196. Bowrey and Fowell would prefer a different focus – the problem with such an approach, they argue, is that it, ignores 'more complex jurisprudential questions about the organisation of legal power', 'the role of law in supporting commodification' and 'the limits of positive law' at 185.

⁶³ Peter Drahos with J Braithwaite, *Information Feudalism. Who owns the knowledge economy?* (2002).

⁶⁴ Drahos n 45.

⁶⁵ Susan K Sell, *Power and Ideas: North-South Politics of Intellectual Property and Antitrust* (1998).

commodification; those who champion a creative commons are characterised as potential copyright owners.⁶⁶

The ease of this transformation bears witness to an important feature of the categories of copyright owners and users today. As a form of subjectivity they are 'bare'- that is, almost devoid of meaning. This is not a new insight. As early as 1936 Walter Benjamin pointed out that in the age of mechanical reproduction the relationship between the author and the author's public had become 'merely functional',⁶⁷ that is, every member of the public was a potential author, and every author in turn was transformed into a consumer of the works of mass (re)production. What was prescient in 1936 has become 'viral' in the twenty first century where the functional relationship of the author and the author's public goes by the name of copyright owner and user and the dizzying transformation from one to the other is endless. From twitter to facebook, from gaming to data bases, from student to multinational corporation – we are all copyright owners and users now.

If we are to successfully disrupt the police logic of balancing the interests in copyright law it is not enough to simply introduce more subjects with different functional relationships with works. Instead, we need to disrupt the claims of functionality on which copyright owners and users base their claims and at the same time introduce new subjects whose prior claims are grounded *in law* and whose legal interests displace the merely functional claims of copyright owners and users.

This was the surprising strategy adopted by Gordon J in *Telstra Corporation v Phone Directories Company Pty Ltd*⁶⁸ following the High Court's decision in *IceTV Pty Ltd v Nine Network Australia Pty Ltd*.⁶⁹ In these cases the judiciary not only introduced a new-old subject who displaced the merely functional claims of the copyright owner, they also introduced a new subject whose claims based on functionality were (dis)counted. The first was the 'author' who was the original bearer of meaning in the *Statute of Anne* 1709; the second was the 'maker' of a literary work who is neither an author nor a copyright owner but

⁶⁶ There are many more examples. Online music distributors, for example, made an attempt to appear as a radical alternative to traditional music producers but were quickly reduced to free riders and thieves (copyright users) or technical precursors who opened up the possibility of profitable online music distribution but who could not really expect to benefit from it themselves (copyright owners and competitors). Open source advocates have become a 'business model' for copyright owners rather than a challenge to the property foundations of copyright law. And those who challenge the idea of individual creativity are dismissed as 'consumer rights activists' (as the Senate Committee Report on the Copyright Amendment Bill 2006 put it): 'Generally speaking ... groups representing copyright owners or rights holders tended to support parts of the Bill which strengthen copyright protection ... Conversely, those advocating consumer rights and the importance of fostering creativity and innovation argued that the Bill is weighted towards copyright owners and rights holders to the ultimate detriment of individual consumers and the wider community.' Senate Standing Committee on Legal and Constitutional Affairs, *Provisions of the Copyright Amendment Bill 2006*, Commonwealth of Australia, 13 November 2006, p11.

⁶⁷ Walter Benjamin, 'The Work of Art in the Age of Mechanical Reproduction' (first published 1936), in J Morra and M Smith, *Visual Culture: experiences in visual culture* (2006) 114, 124.

⁶⁸ *Telstra Corporation v Phone Directories Company Pty Ltd* [2010] FCA 44.

⁶⁹ *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14; (2009) 254 ALR 386.

merely the person who facilitates the creation of an electronic database. Although the ‘maker’ of a work is protected under European database legislation and is the owner of the copyright in films, sound recordings and broadcasts in Australia, this maker has not previously made an appearance in Australian law in relation to original works.

In *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* Gordon J held that copyright did not subsist in a telephone directory because copyright law was concerned with protecting the interests of individual authors rather than simply those who received the economic benefit of the work or those who were (functionally) responsible for bringing it into existence. In this case there was no ‘author’, rather the electronic databases in question were made by many people (often not identified), using automated computer software whose architecture controlled the appearance and form of the entry, together with rules and procedures which were either programmed into the software or, on rare occasions, applied by individuals. Telstra itself was not an ‘author’ but merely the functional ‘maker’ of the databases and this was insufficient to grant protection under Australian copyright law.

In coming to this decision Gordon J relied on the reasoning of the High Court in *IceTV Pty Ltd v Nine Network Australia Pty Ltd*⁷⁰ in which the purpose of the *Copyright Act* was said to be to reward *authors* by striking a balance between competing *public* interests – that is the public interest in encouraging the production of works and the public interest in the maintenance of a robust public domain. *IceTV* involved the production of an electronic television guide by IceTV which was updated by referring to Weekly Schedules produced by Channel Nine. Channel Nine objected to the reproduction by IceTV of the time and title information from Nine’s Weekly Schedule in the IceGuide updates. The High Court held that the part taken was not substantial when judged against the central concept or ‘theoretical underpinnings’. In the words of French CJ, Crennan and Kieffel JJ, this theoretical underpinning was to ‘reward... authors of original literary works with commercial benefits having regard to the fact that literary works in turn benefit the reading public’ or, in the words of Gummow, Hayne and Heydon JJ in their co-majority decision, the central concept of the *Copyright Act* is to ‘balance the public interest in promoting the encouragement of "literary", "dramatic", "musical" and "artistic works" ... by providing a just reward for the creator, with the public interest in maintaining a robust public domain in which further works are produced’.⁷¹

In both *Telstra* and *IceTV*, the fact that Telstra and Channel nine employees and contractors had expended considerable labour on the production of the works, the fact that the works were of significant commercial value, and the fact that this labour may have been ‘misappropriated’ by or used by the defendants was immaterial to the balance demanded by

⁷⁰ At 386.

⁷¹ French CJ, Crennan and Kieffel JJ at [24]; Gummow, Hayne and Heydon JJ at [71].

the Act. The private economic interests of Telstra and Channel Nine were of no account in the balance of public interests demanded by the Act.⁷²

Both the High Court and the Federal Court observed that, although other jurisdictions protected the private interests of ‘makers’ of databases, there was no analogous legislation in Australia.⁷³ Gordon J explicitly acknowledged the inability of the court to change this position and said that it was a matter for the Parliament which should be addressed ‘without delay’:

It is not open to me to ignore the express words of the *Copyright Act* to expand protection consistent with that set out in the (European) Directive as summarised by the High Court. That is a matter for Parliament and, in my view, a matter which they should address without delay.⁷⁴

The effect of this decision is twofold. By disrupting the claims of functionality on which the makers of databases have until now relied, the courts have presented a new challenge which requires the legislature to address the proper extent of copyright law once again, as a matter of principle. In particular, the legislature is called upon to decide whether the *Copyright Act* can or should be used to encourage the production of works regardless of whether or not there is an author of that work. But the decision of the court does another thing as well. The courts have put the legislature itself back in the picture as a subject in its own right in the ongoing play of copyright law reform.

The role which the legislature will play has yet to be seen. It may seek to reprise its role as the Ringmaster – simply drawing our attention to a new balance of interests in which the maker of a database plays no part. It may take on the role of a legalistic King Solomon – seeking to divide copyright spoils amongst the maker and the artist, new-old claimants whose broader interests are lost in the legal form. At worst it may practice a type of legerdemain where the discounted interests of the maker are made to reappear at the expense of the ‘artist’ who is transformed in a flash into a functional copyright owner. However, whatever role the legislature seeks to take on it is already in the picture – it has become a subject in its own right. Through this strategy the courts have accomplished what consultation, academic discussion and debate have so far failed to do – it has put the question of the proper scope of copyright law, as well as the proper balance of public interests, back onto the legislative

⁷² There is some question as to whether the High Court’s comments on authors and authorship were *obiter* (an argument explicitly rejected by Gordon J in *Telstra*) and the High Court’s reliance on legal authorities from the United States and Canada and on secondary academic sources may give cause for concern. However, these are not my questions here. Rather, what is of interest is that, in coming to these decisions the judiciary disrupted the balance of interests of copyright owners and users not simply by reintroducing new subjects but by introducing new *legal* subjects whose own claims displaced the copyright owner from the balance.

⁷³ *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14; (2009) 254 ALR 386, Gummow, Hayne and Heydon JJ at [135]; *Telstra Corporation v Phone Directories Company Pty Ltd* [2010] FCA 44 at [30].

⁷⁴ *Telstra Corporation v Phone Directories Company Pty Ltd* [2010] FCA 44 at [30].

agenda. It has called into question the proper role of the legislature. Whether this is enough to upset the police logic of balancing the interests in copyright law has yet to be seen.