

Copyright, Governmentality and Problematism: An Exploration*

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Abstract

The Copyright Act covers a large range of subject matters; it includes civil and criminal actions for infringement and appears to envisage a wide range of potential infringers – from a child downloading music to international criminal cartels engaging in large scale piracy of movies. The Act’s breadth suggests that an appropriate framework for its analysis is Foucault’s governmentality. Such an approach is not straight forward. The Copyright Act, for example, may be seen as a unifying set of practices; alternatively, it is arguable that copyright is not unified by a single “problematization”. That Parliaments have enacted a number of legislative instruments under the broad category of copyright, does not necessarily mean that all the practices associated with the instruments are directed at the same government rationalities. The copyright regime, for example, may be understood to maintain practices of self-expression, to accommodate changing technologies; and to sustain, in part, the economic order of society. In order to gain a more nuanced perspective of the problematisations of copyright, and therefore, of the regulation of conduct creative individuals, a thorough genealogical investigation of copyright practices needs to be undertaken – an investigation that may be based on the theoretical understandings presented in this article.

Introduction

Copyright, and concerns over its enforcement, is a topic of much debate with one commentator suggesting that ‘copyright law is in crisis’.¹ The argument in this article is that one reason for this perception is a limited understanding of how this area of law works in practice. Copyright is an unusual area of statute law in that its provisions cover a large range of subject matters, from literary works and performances through to broadcasts;² it also includes civil and criminal actions for infringement and appears to envisage a wide range of potential infringers, from a child downloading music to international criminal cartels engaging in large scale piracy of movies. The *Copyright Act 1968* (Cth) (Copyright Act) also enables a diverse range of parties to own copyright in material they’ve created and/or to enforce copyright. The breadth of the

¹ Deazley (2003), p 106.

² Other areas of law, such as contract and tort, apply widely as well. These areas tend to be common law, rather than statute-based and, to a larger extent, regulate particular relationships – a potential tortfeasor and her or his “neighbour” or the relationship between two contracting parties.

Act's application means that an appropriate framework for its analysis is Foucault's "governmentality".³

The characterisation of copyright as a monolithic, coherent, institution may, however, be premature from a Foucaultian standpoint. That Parliaments have enacted a number of legislative instruments under a broad category, such as "copyright", does not, necessarily, mean that all the practices associated with the instruments are directed at the same government rationalities. More formally, not all practices may go to the same problematisation. The Copyright Act, nonetheless, *may* be seen as a unifying set of practices. Only a careful, historically contextualised, reading of the practices associated with copyright will allow for a nuanced perspective on the monolithic, or diffuse, nature of the institution.⁴

The complexity of the Copyright Act,⁵ however, means that this piece is introductory. A more thorough understanding of the relationships between those (partially) constituted by copyright law would require in-depth genealogies of the law itself and of the practices of the individual subjects constituted by the Copyright Act, a project outside the scope of an article such as this. The goal, here, then, is to explicitly link the ideas of Foucault with the copyright regime and to provide the groundwork for future work.⁶ In short, the aim is to provide more evidence of the 'age of uncertainty'⁷ of copyright; albeit evidence with theoretical foundations that, it is hoped, will support more methodologically rigorous research into this area of modern practice.

Governmentality from a Theoretical Perspective

The first step in this examination of the operation of copyright law is an introduction to two aspects of Foucault's thought. The first is that of "governmentality". The importance of this idea arises from the need to acknowledge the multiplicity of forces acting on a given individual in any activity being carried out by the actor. The second concept is an example of a type of government rationality – "problematisation" – that

³ Foucault (1991a).

⁴ Work has already commenced in this area. For example, copyright law has been characterised as a 'contingent legal invention aimed at solving a specific set of often gritty and intractable problems': Saunders and Hunter (1991), p 497.

⁵ In 2005, there were 1,597 subsections to the Act: Caine and Christie (2005), p 192.

⁶ Others, for example Sherman (1995), have implicitly linked copyright with Foucault's ideas; however, this article is among the first to apply, in a methodical fashion, Foucault's concepts with the detail of copyright law.

⁷ Bowrey (1996), p 328.

is a key technique for understanding and analysing governance from a Foucaultian perspective.⁸

Governmentality

Foucault's described his notion of governmentality, his understanding of the predominant form of governance today, as meaning, in part:

The ensemble formed by the institutions, procedures, analyses and reflections, the calculations and tactics that allow the exercise of this very specific albeit complex form of power, which has as its target population, as its principal form of knowledge political economy, and as its essential technical means apparatuses of security. The tendency which ... has steadily led towards the pre-eminence over all other forms of this type of power which may be termed government, resulting, on the one hand, in the formation of a whole series of specific governmental apparatuses, and, on the other, in the development of a whole complex of *savoirs*.⁹

Foucault later described 'governmentality' in terms of 'techniques and procedures for directing human behaviour ... [that could be the] government of children, government of souls and consciences, government of a household, of a state, or of oneself'.¹⁰ Governmentality can be understood as both the (self-)governance of individuals, (through internalised controls and the individual's discursive constitution – the conduct of conduct) and the multiple government rationalities that are engaged in order to govern the population.¹¹

Three aspects of the theory need to be highlighted. First, governmentality exists as an "ensemble formed by the institutions, procedures, analyses and reflections, the calculations and tactics ... a whole series of specific governmental apparatuses, and ... a whole complex of *savoirs*".¹² Governmentalist practices, therefore, are diffuse throughout society; there is not a single organ of governance and there is not a single, pervasive, ideology of governance. Law, then, is 'increasingly incorporated into a continuum of apparatuses (medical, administrative and so on) whose functions

⁸ In the academic literature, the term "governance" is a complex term with different connotations that depend on the theoretical perspective adopted by its user. For a discussion of this point, see Walters (2004). It may be noted that commentators consider governmentality 'to be far from a theory ... of governance': Rose, O'Malley and Valverde (2006), p 85.

⁹ Foucault (1991a), pp 102-103.

¹⁰ Rose, O'Malley and Valverde (2006), p 83 quoting the course summary for Foucault's lectures "On the Government of the Living".

¹¹ In his 1978-1979 lectures, Foucault stated that the 'state is nothing more than the mobile effect of a regime of multiple governmentalities': quoted in Jessop (2007), p 36.

¹² Foucault (1994), p 15 n2. "Savoir", in this sense, means a body of knowledge, its rules of formation and the conditions necessary for the knowledge to be enunciated.

are for the most part regulatory'.¹³ Government is achieved through the application of specific types of knowledge (the institutions, procedures, analyses and reflections) to particular areas of behaviour of particular sectors of the population.¹⁴

A “population”, the second key aspect of this form of analysis, can be the entire body of citizens of a given nation (constituted to be “British” or “Australian”), or a smaller body of people, such as the members of a particular educational discourse or profession. The central point of this use of the term “population” is that there is a separable body of subjects that is constructed and transformed by the institutions and practices of a particular discourse. This separable body of subjects is “knowable” and can be the target of inquiry, and more importantly, the target of specific practices of government rationalities. In terms of the understanding of the operation of copyright law, the relevant populations include the users of copyrighted material and those charged with regulating the use of copyright material – such as the Copyright Tribunal. Importantly, for such a population to conduct itself appropriately, its members must identify themselves as members of the population; otherwise, they will not be complicit in the internalisation of the “proper” norms of behaviour.

The relationship between the members of a population and governmentalist practices is final aspect of governmentality considered here. From a Foucaultian perspective, these institutions, procedures and practices of governmentality all play a role in the process of subjectification – the ‘way a human being turns him- or herself into a subject’.¹⁵ Foucault’s assertion that the ‘juridical mode of governance ... is increasingly replaced by ... a power that exerts a more positive influence on life, undertaking to administer it, multiply it, and impose upon it a system of regulations and precise inspection’¹⁶ is based upon the more active, yet largely unrecognised, role that individuals are taken to play in their creation as subjects. Individuals are a necessary part of the process that gives them ‘the rules of law, the techniques of

¹³ Foucault (1990a), p 144.

¹⁴ Such government rationalities are not set and unchanging. Miller and Rose have identified (in an admitted ‘possibly oversimplified way’) ‘three “families” of governmentality’ – that of ‘classical liberalism’ that ‘from the social point of view’; and that of ‘advanced liberalism’: (2008), pp 17-18. The differences between these categories are not important for the introduction of Foucault’s ideas to copyright here, however, they could be more important if a more complete genealogy of copyright was undertaken.

¹⁵ Foucault (1983a), p 208.

¹⁶ Ewald (1990), p 138.

management, and ... the practices of self'.¹⁷ This shift in the understanding of governance represents a change from a conception of legal discourse as sovereign commands to that of a system of norms; in other words, the understanding moves from one based on the notion of regal power to one based on practices of internalised self-regulation.

At the heart of the processes of subjectification is the contention that 'the self is not given to us'.¹⁸ However, 'it is not enough to say that the subject is constituted in a symbolic system. It is not just in the play of symbols that the subject is constituted. It is constituted in real practices – historically analysable practices'.¹⁹ The discursive practices of a given discourse can be understood to produce the permitted actions for the subjects of the discourse.²⁰ These discursive practices act as norms of behaviour:

Under the surface of images, one invests bodies in depth; behind the great abstraction of exchange, there continues the meticulous, concrete training of useful forces ... it is not that the beautiful totality of the individual is amputated, repressed, altered by our social order, it is rather that the individual is carefully fabricated in it, according to a whole technique of forces and bodies.²¹

These practices are not to be understood as commands from a higher authority. Instead they can be understood to operate as accepted and internalised patterns of action. For Foucault, no individual exists prior to discursive inscription, for 'discursive formations *produce* the object about which they speak'.²² This is done through webs of power relations,²³ through the multiplicity of interpersonal relationships that exist in the rearing of children and adults. From this perspective, the mechanisms of discursive control 'homogenise populations through knowledge, separation, observation, and experiment, but do so only by "individualising" people in cells and classroom desks, by examination and experimentation'.²⁴ These internalised

¹⁷ Foucault (1988), p 18.

¹⁸ Foucault (1983b), p 237.

¹⁹ Foucault (1983b), p 250.

²⁰ Foucault, however, was less than clear about what constituted a "discursive practice". A substantial part of his *Archaeology of Knowledge* (1994) was devoted to the analysis of "statements" and his 'Order of Discourse' (1981) examined discursive controls which may be seen to be discursive practices. (The focus of Dent and Cook (2007) was the consideration of *stare decisis* as a set of legal discursive controls.) Further, Foucault's later work – the *History of Sexuality* trilogy (1990a), (1992) and (1990b) – focused on the role of practices in the "care of the self". Whether "statements", "discursive controls" and "practices" are synonymous with "discursive practices" is a matter capable of significant, but perhaps unnecessary, academic debate.

²¹ Foucault (1979), p 217.

²² Cited in Dreyfus and Rabinow (1983), p 61.

²³ Foucault (1980), p 98.

²⁴ Bové (1980), p 29.

practices, therefore, produce an “individual” complicit in her or his own constitution as a subject – we are governed through the ‘regulated freedom’²⁵ of apparent choice,²⁶ through our own roles in the conducting our own conduct.²⁷

Problematization

A key point arising from Foucault’s work is the manner in which the discourses of power engage with that which needs to be governed – the processes of problematization. In the words of Rose:

To analyse political power through the analytics of governmentality is not to start from the apparently obvious historical or sociological question: what happened and why? It is to start by asking what authorities of various sorts wanted to happen, in relation to problems defined how, in pursuit of what objectives, through what strategies and techniques.²⁸

Problematization is both a process of governance and a technique for investigating the acts of the governing. For Deacon, the term ‘refers to the practical conditions that make something into an object of knowledge’.²⁹ Foucault is quoted as saying that it is the ‘ensemble of discursive and non-discursive practices that make something enter into the play of true and false and constitute it as an object of thought (whether in the form of moral reflection, scientific knowledge, political analysis etc)’.³⁰ There is no “natural” problem that requires the attention of the governing (or for analysis) – particular issues “become” problems that need to be the subject of action. Foucault considered problematization, more expansively, as the:

development of a domain of acts, practices and thoughts that seem ... to pose problems for politics. For example, I don’t think that in regard to madness and mental illness there is any “politics” that can contain the just and definitive solution. But I think that in madness, in derangement, in behaviour problems, there are reasons for questioning politics; and politics must answer these questions, but it never answers them completely.³¹

²⁵ Barron (2005) p 976.

²⁶ No matter how shallow that freedom is: Rose (1999a), p 97.

²⁷ ‘Individuals are constituted as active participants in the network of relations that form them’: Barron (2005) p 975.

²⁸ (1999a), p 20.

²⁹ Deacon (2000), p 131.

³⁰ Rabinow and Rose (2003), pp 12-13.

³¹ Foucault (1997), p 114. Foucault’s work, *Madness and Civilisation* (1971), persuasively argued that “mental illness” is a construct of relatively recent vintage. He does not discount the behaviour of those diagnosed with such an illness, but considers that the notion of “mental illness” was not waiting to be discovered by medical practitioners – it was created as an “object of thought” capable of analysis and diagnosis. See, further, his *Birth of the Clinic* (1973) for a history of the rise of the medical profession and the associated practices of diagnosis.

The process of problematisation, then, is the formation of problems, for and by governors (whether as elected legislators, administrative bureaucrats or self-governing individuals³²) that cannot have resolution.³³ The maintenance of the problem perpetuates the existence of the government and the forms of governance. This idea of problematisation, therefore, enables the consideration of any act of regulation/governance as a construction, with specific (perhaps unvoiced) objectives, that is tackled with particular strategies and techniques.

As a technique for investigating practices of governance, problematisation relates to the manner in which a new history of a given “problem” may be generated – a history that is, necessarily, distinct from the traditional historical understanding of the issue.³⁴ The focus of this mode of investigation is the ‘unsettling [of the] received understandings about the value and necessity of [the current social] arrangements and [the] pointing towards fault-lines within and between them that might permit them to be prised open and re-imagined’.³⁵ This approach is behind the application of Foucault’s ideas to copyright; the goal, here, is to look anew at the practices associated with copyright to presage a re-imagining of the regime that will shed light on its underlying problematisation/s.

Copyright and Governmentality

The balance of this article is to apply Foucault’s theories to the complex system of copyright in order to better understand the manner in which copyright operates to delimit the actions of those who have internalised copyright practices.³⁶ As mentioned above, the copyright regime is unusual in that it is statute-based and aimed at almost all people and organisations. The law itself may be seen to play a significant role in the conduct of conduct in this space, despite the ‘modest conception of the role of law

³² For a discussion of ethics and problematisation, see Faubion (2001); Dean (1996); and Foucault (1992), in particular, pp 9-13 for a discussion of the goals of his study on the problematisation of sexuality.

³³ The scale of problematisations is not clear from the literature. According to Dean, problematisations as ‘situations in which the activity of governing comes to be called into question’ are ‘something relatively rare’: (1999), p 27. Other commentators, however, are less clear as to the scale or frequency of problematisations.

³⁴ Castel (1994), p 237.

³⁵ Barron (2005). P 997.

³⁶ A preliminary question may be the extent to which Foucault’s ideas, stemming from the continental traditions of governance, apply to English law. See Dent (2003) for an overview of the history of English law, from a Foucaultian perspective, as a basis for its application of Foucault’s archaeological method to a history of negligence law.

in the ordering of society'³⁷ in the governmentalist literature. While the law, in the form of statutes, is but one of many different government rationalities that operate in a given space, law does, nonetheless, constitute knowledge.³⁸

One particular aspect of copyright that supports the use of this framework is that, despite it being the creation of statute, there is no state institution that has been the centralising focus of governmentalist practices in this area – that is, there is no police force, hospital system or, in Australia, a dedicated government department. Copyright, then, is its own institution.³⁹ The Act itself, therefore, has a central role in the constitution of, and practices around, copyright. In order to better understand the manner in which copyright acts to regulate members of society, first there has to be an understanding of the target population; and second, there must be an exploration of the problematisations that are at the heart of copyright.

Copyright Actors, Subjects and Practices

A distinction has to be drawn between the categories of actors referred to explicitly in the Act (that includes creators, copiers and enforcers of copyrighted material) and the target subjects, or population, “imagined” by the Act.⁴⁰ A population must be a body of subjects transformed (through internalised norms of behaviour) by a set of practices. There is, of course, a relationship between copyright actors and those subjects that are, individually, transformed by copyright law – this relationship is the focus of this section.

Copyright actors The most obvious copyright actor is the person who produces copyrightable material. Almost any individual may produce such material which may, *inter alia*, be in the form of a literary, dramatic, musical or artistic work, a sound recording, a broadcast or a film. Such individuals could create by themselves⁴¹ or they

³⁷ Scott (2003), p 11.

³⁸ Valverde (2003), p 6.

³⁹ Foucault argued that ‘power relations have been progressively governmentalised, that is to say, elaborated, rationalised and centralised in the form of, or under the auspices of, state institutions’: (1983a), p 224.

⁴⁰ It may be noted that, for the purposes of this section, the focus is on copyright actors and subjects as currently understood. It is in the following section, on copyright as problematisation, that historical aspects of copyright (and therefore historical understandings of copyright subjects) are introduced.

⁴¹ It is arguable that our contemporary idea of creator, for the purposes of copyrightable material, is substantially linked with the modern era. This is obvious when it comes to those who create cinematograph films, sound recordings and computer programs. It has also been suggested that the notion of the “author” is also of relatively recent vintage. Woodmansie links the emergence of the “author” in the modern sense [with] the emergence in the eighteenth century of writers who sought to

may work within corporations, non-profit institutions and government; though, in many cases, the copyright will be owned by the organisation.⁴² The owners of copyright may, in turn, bring an action in the courts for a breach of copyright against the second category of copyright actors – the infringers of copyright. Almost as many individuals may infringe copyright as may create copyrightable material.⁴³ Infringement may come in the form of photocopying a poem, making two copies of a sound recording (for example, one for a portable player and another for the car stereo), or making thousands of unauthorised copies of movies for sale at markets.

The third group of actors is those that are involved in the operation of the copyright regime as an economic institution. Two sub-groups may be highlighted, collecting societies and the Copyright Tribunal. The former are bodies set up to collect royalties, on behalf of the creator of copyrighted material, from publishers of the material. An example is the Australasian Performing Right Association⁴⁴ (APRA) which collects, and distributes, royalties from the broadcast and public performances of sound recordings. The second sub-group, the Copyright Tribunal, determines remuneration and royalties payable under the Act, and therefore, collectable by societies such as APRA. That these actors, and groups, are subject to the Copyright Act does not, necessarily, make them target subjects from a Foucaultian perspective.⁴⁵

Copyright populations and practices What differentiates actors from subjects is the practices internalised by the latter group. The mere labelling of a category of actors in a piece of legislation does not mean that the actors internalise practices associated with the law; they do not, just on the drafting of an Act, become a subject in the

earn their livelihood from the sale of their writings to the new and rapidly expanding reading public': (1994), p 36.

⁴² *Copyright Act 1968* (Cth) s 35.

⁴³ It is arguable that people cannot operate as members of society without copying. Recent research has discovered a "mirror neuron", a part of the brain's hardware, that enables babies and people to copy the behaviour of others (see, for example, Rizzolatti and Sinigaglia (2008)). This may suggest that it is "natural" to copy the actions, and therefore work, of others. From this perspective, copyright may be seen to operate to regulate a behaviour that is central to our processes of learning – particularly when significant aspects of the education system are in the form of rote learning. For a discussion of the development of education practices, see Foucault (1979).

⁴⁴ The Association is a copyright collection society for the purposes of *Copyright Act 1968* (Cth) s 135ZZB.

⁴⁵ There may appear to be links between the categories of copyright subjects described here and the 'enunciative modalities' defined by Foucault in his *Archaeology of Knowledge* (1994), pp 50-55; see also Dreyfus and Rabinow (1983), pp 67-71. These modalities, or the categories constituted by the 'processes of rarefaction' of Foucault (1981), p 61, require that the differing speech positions exist within a single discursive formation or system of dispersion. It is not clear, as will be discussed below, that copyright functions as such as formation or system.

Foucaultian sense of the word. Those subjects in the copyright sphere include a sub-set of the creators of copyrightable material and the users of such material – the ‘juridical subjects whose conduct is limited by [copyright] law’.⁴⁶ Whilst practices are central to the constitution of these subjects, these practices do not only arise from the Copyright Act itself. This section will highlight the copyright practices associated with particular subjects and, further, the manner in which practices are shared across different groups of subjects.

The sub-set of creators who are subjects of the Copyright Act (or a ‘sub-population’⁴⁷ of copyright subjects) are those who are motivated by the incentives offered by the Act.⁴⁸ Individuals may create with no thought of copyright in mind; that is, the Copyright Act does not play a role in the creative process itself. Some people, such as academics, create because they are paid a salary;⁴⁹ some people create because they are motivated by potential future earnings (such as through copyright royalties) and others create for the “love” of it – or, in economic terms, they are intrinsically motivated.⁵⁰ Some creators, however, only create because of the incentive offered by the Act.⁵¹ It is the internalisation of the incentive that renders some creators a copyright subject – in this sense, the Act regulates creators in that the “carrot” of protection is aimed at modifying the behaviour of individuals for them to create more.⁵²

⁴⁶ Rose, O’Malley and Valverde (2006), p 85. The authors highlight that the ‘governed are, variously, members of a flock to be nurtured or culled, juridical subjects whose conduct is to be limited by law, individuals to be disciplined, or, indeed, people to be freed’.

⁴⁷ Dean (1999), p 28.

⁴⁸ It also has been noted in the literature that copyright law is ‘remarkably unaccommodating of the actual process of creating works of authorship’: Litman (1991), p 236. Litman considers this insight and the application of the law against an understanding of the current theories of copyright and argues that the ‘public’s perception [is] that the copyright system is “out of whack”’ (p 248). This conclusion supports this article’s consideration of the multiple practices associated with the copyright regime.

⁴⁹ Academics, for example, are paid to create copyrightable works in the form of journal articles and books. Any royalties from copyright, in most cases, will be much smaller than the amount they receive as a salary.

⁵⁰ For the economics of the effect of copyright and other incentives on creators see Plant (1934); Landes and Posner (1989); Frey (1999); and Shavell and van Ypersele (2001).

⁵¹ Nadel (2004), p 787.

⁵² The “author as donkey” metaphor reflects a previous level of understanding of creators and copyright generally. One US commentator considered that there had been a ‘failure’ on the part of ‘legal scholars ... to theorise copyright’ because of ‘their tendency to mythologise “authorship”, leading them to fail (or refuse) to recognise the foundational concept for what it is – a culturally, politically, economically, and socially constructed category rather than a real or natural one’: Jaszi (1991), p 459. Since Jaszi wrote this, there has been some work on this issue (a number of these pieces are referred to in this article); his point is, however, still, to a large extent, valid.

The second group of copyright subjects considered here is the users of copyrighted material. There is an obvious overlap in the practices internalised by the creators and the users of copyright material – not surprising as many who use copyright material do so in the process of creating new copyrightable material.⁵³ Most of the practices relating to the creation of copyrightable work do not stem from the Act. The Act, for example, does not contribute to the internalisation of writing, photography and musical practices – these are either learned through the education system or trial and error. The Act does, however, provide limits as to the degree to which a copyrighted work must be copied for the copying to constitute infringing behaviour;⁵⁴ anything less does not constitute infringement. That is, the regime allows for the copying of an amount of copyrighted material in order to facilitate the production of new material. Further, the Act provides for specific exceptions where part of a work may be copied without constituting an infringement – these include copying for the purposes of: research or study, criticism or review, and parody or satire.⁵⁵

The behavioural norms currently encouraged by the Act, then, are not simple prescriptions. It is not as straightforward as “Thou Shalt Not Copy”.⁵⁶ Adding to the complexity of the discursive operation of copyright are the other, internalised norms relevant to the conduct of the copyright regime. Other practices would arise from an individual’s family (did the parents regularly record television programs? Was a parent’s income copyright dependent?); school (what practices were taught with respect to the photocopying of material?); friends (did the peer group regularly copy music – either via tapes or iPods?); and work (were there notices over photocopiers?). Strategies of governance include warning notes on DVDs, the prevalence of the © symbol and publicisation of prosecutions and infringement actions for breaches of copyright. It is unlikely that a person would grow to adulthood in a Western society and not be aware of the existence of copyright and have some idea about what the

⁵³ If copyright is best seen as a collection of multiple problematisations linked to particular technologies of production or reproduction of copyrightable material (a characterisation that would only be possible after a genealogical investigation of copyright practices), then a person who uses a literary work in a film or broadcast may be better seen as a copyright subject in two distinct copyright formations rather than as the subject of a monolithic copyright institution.

⁵⁴ The reproduction of copyrighted material is only an infringement if a ‘substantial part’ is copied: *Copyright Act 1968* (Cth) s 14(1). See generally *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (No 2)* (2005) 216 ALR 631 (discussing the meaning of ‘substantial part’).

⁵⁵ *Copyright Act 1968* (Cth) ss 40, 41 and 41A respectively.

⁵⁶ Laddie does assert that one of the justifications for copyright is the Eighth Commandment: ‘Thou shalt not steal’, however, he does not assert that the Commandment provides an appropriate scope for the monopoly protection: (1996).

limits are.⁵⁷ There would, however, be divergent views about the role, and importance, of the regime.

The multiplicity of practices internalised by all in subjects also means that each may act according to different sets of norms at different times.⁵⁸ It is, therefore, possible for a particular person to act as a creator of copyrightable material one moment and an infringer at another; or a creator of some material, owner of different material and publisher of still more material. Each role has an associated set of practices – and these will vary, to an extent, between the settings of each. Not all of these will stem from copyright as an economic institution. For example, a creator of copyrighted literary works who is a government employee will have a different role, in part, to the role as a creator of literary who is an amateur writer of children’s books. Such differences also may be seen in a person’s role as an infringer. The norms internalised, and expressed, as a student who photocopies a whole book are different, in part, to the practices associated with the multiple, unauthorised, reproductions of movies for sale at a market.⁵⁹

This understanding of (self-)governance, as with the processes of subjectification themselves, is based on the active participation of those who are governed. Those involved in the copyright regime, to a significant extent, willingly internalise the basics of copyright (though they may not know the detail of the system or agree totally with every aspect) and most will respect the spirit of the legislation.⁶⁰ This is most obvious for the subjects such as members of the collecting societies and the

⁵⁷ The internalised knowledge of copyright may not complete or accurate. Material from the US (and there is little reason to consider it would be much different in other countries) suggests that ‘there is a significant separation between what people think the law is and what the law in fact is’: Lemley (1997), p 577 citing the work of Jessica Litman. It has, however, been observed that ‘awareness of copyright appears to have increased dramatically with digital technologies’: Hudson and Kenyon (2007), p 204.

⁵⁸ This may be seen to contribute to the understanding that ‘governmentality may be eternally optimistic, but government is a congenitally failing operation’: Rose, O’Malley and Valverde (2006), p 98 citing the work of Miller and Rose.

⁵⁹ Though the two sets could stem from the same motivation if the income from the sale of pirated movies is all that allows the student to afford to study.

⁶⁰ An example of the (self-)governance of this subject to the copyright regime is that of open content licences. In this setting, a number of users of copyrightable material considered that the legal regulation of the material was stifling creativity and decided to encourage the sharing of copyrighted material through less “formal” schemes such as “Creative Commons”. The less formal nature of the scheme reflects a reduced emphasis on the perceived technicality of copyright law. Many of the schemes, however, rely instead on the complexities of contract law to order the relationship between parties. Lessig, for example, argues that the Creative Commons has as its aim the building of a ‘layer of reasonable copyright on top of the extremes that now reign. It does this by making it easy for people to build upon other people’s work, by making it simple for creators to express the freedom for others to take and build upon their work’: (2004), p 282. See also Hunter (2005) for a “call to arms” to challenge the (perceived) current corporate copyright oligopoly.

Copyright Tribunal – the Act dictates the constitution and powers of each. Other subjects also internalise the limits of copyright: students, for example, do not tend to photocopy entire textbooks for their courses even if to do so would be cheaper than purchasing them.

The extent to which people knowingly infringe copyright (the copying of music and recording television broadcasts) may be understood to reflect other (conscious) internalised norms (why shouldn't I copy the CD if I've already paid for it? I'm still only going to watch the show once – I just can't do it when the television station wants me to⁶¹). This, and the theory of subjectification more broadly, suggests that members of society are “totally” governed – there is an internalised norm or practice that is available, and appropriate, for every situation.⁶² In other words, the range of practices that contribute to the conduct of copyright means that amendments to the Copyright Act itself may do little to alter the behaviour of those who are its subjects. This is a core distinction between a copyright subject and a copyright actor: a member of the former has internalised practices relating to the Act that delimit their copying and creating behaviour, whereas the latter group is merely mentioned in the legislation – they may be nominally regulated, however, the law does not directly impact on how they conduct themselves.

Copyright Act as Problematization/s

Copyright as a single problematization If copyright is seen ahistorically, that is if the copyright subjects and populations described above are considered as outside the reach of their historical antecedents, it is possible to consider the regime as a single problematization. If that problematization were to be labelled, it could be the “problem” posed by the (self) expression of members of the community. The target subjects of this problematization could include the users of copyrighted material and it

⁶¹ For one commentator, ‘where power goes in Foucault, there is resistance as well. With power’s discovery of “everyday life”, these dramas become infinitely more intense, more generalised, more ubiquitous: alongside power, resistance increasingly saturates the public sphere (“social” power), the family and the job (“disciplinary” power), and finally the subject’s very relation to itself (“biopower”) ... as power becomes increasingly more invested in the minute details of our lives, so too have our modes of resistance become increasingly subtle and intense’: Nealon (2008), p 108.

⁶² This may be seen in the assessment that ‘conceptions of governmentality’ have ‘deterministic tendencies’: Kingsford-Smith (2002), p 45. It is arguable that a Foucaultian understanding of subjectification leads to a deterministic model of human behaviour; however, the sheer volume of practices internalised by any given subject (and the virtually infinite ways of expressing them) means that there is, at the very least, the appearance of individual agency and freedom of choice; see further Nealon (2008) pp 101-107.

could include almost every subject constituted as a member of modern (Western, at least) society.

This ongoing “problem” incorporates a number of practices associated with self-expression; each, as with all governmentalist practices (proper conduct), is aimed at the ‘conditions of social and political order’ of the society.⁶³ As such, (regulated) self-expression may be understood as a necessary part of the contemporary, Western, social and political order. This is the result of the fact that governing practices generally, and copyright practices specifically, now are aimed at rendering the ordering of society along economic lines.⁶⁴ Copyright, for example, is, by law, a form of personal property⁶⁵ and one feature of property is the entitlement to exclude others from use of the property.⁶⁶ Copyright, through this exclusionary entitlement, enables the copyright owner to restrict the expression of others if that expression was to reproduce the owner’s material – whether or not the owner is the creator of the copyrighted material.⁶⁷ Copyright, therefore, provides a mechanism through which the self-expression of members of society may be ordered and, to an extent, counted.⁶⁸

There are a number of more specific aspects of the copyright regime that may be seen to reflect the understanding of copyright as a monolithic, ahistorical, problematisation of (self-) expression. These aspects include the idea/expression dichotomy and the requirement of novelty. Both reflect a process of the ordering of the expression of members of society⁶⁹ – with ordering being one of the key forms of discursive control.⁷⁰ With respect to the idea/expression duality, this dichotomy is seen as fundamental to copyright as it delimits the law’s application. Specifically, copyright is

⁶³ Dean (2007), p 106.

⁶⁴ Lemke (2001), p 203. With respect to copyright specifically, Netanel argues that, from an economic perspective, the ‘purpose of copyright, like that of all law, is simply to facilitate an efficient allocation of resources through private ordering ... [a]s such, it undermines, if not radically opposes, the traditional idea that copyright serves to further the public interest in expressive diversity and public education’: (1996), p 324.

⁶⁵ As personal property, copyright may be assigned in the same manner as other types of property (*Copyright Act 1968* (Cth) s 196(1)) and, therefore, in many cases, the owner of copyright will not be the creator of the material; though even after assignment, moral rights may be retained by the creator of the work; see Part IX of the Copyright Act.

⁶⁶ Cohen (1954), p 373. See also Gordon (1993).

⁶⁷ Jaszi (1991), p 463.

⁶⁸ For the importance of numbers to modern governance, see Rose (1999a): Chapter 6.

⁶⁹ The idea that copyright orders expression is not new. Rose, for example, considers that ‘copyright depends on drawing lines between works, on saying where one text ends and another begins’: Rose (1993), p 3.

⁷⁰ Foucault considered practices of classification to be integral to the control of discourses: Foucault (1981). For an application of this idea to the law, see Dent (2005).

understood to not protect ideas, but only the *expression* of ideas.⁷¹ This expression could be in the form of printed words on a page, a photograph, a sound recording or a performance.⁷² This form of ordering allows value to be placed on the expression but not the idea itself.⁷³

There is also a minimum standard for a piece of expression to be copyrightable. The Act states, for example, that copyright subsists in an *original* literary, dramatic, musical or artistic work'.⁷⁴ This requirement of originality has two effects relevant to the problematisation of self-expression. First, it is a form of ordering. That is, originality (or "author-ity"⁷⁵) is necessary in order to provide a sorting mechanism for the multiplicity of expressions created by people.⁷⁶ The second effect ties the economic incentive associated with self-expression to pieces of expression that are different (to an extent) from that which has been produced before. This, therefore, privileges "unique" or "individual" expressions – maintaining the societal practices towards individualisation.⁷⁷

⁷¹ *Hollinrake v Truswell* [1894] 3 Ch 420, 427.

⁷² It, however, does not allow for the rewarding of an idea that took significant intellectual effort that had yet to be written on a piece of paper. Laddie does quote with approval from Tristram Shandy: 'The sweat of a man's brows, and the exsudations of a man's brains, are as much a man's property as the breeches upon his backside': (1996), p 253. Such "exsudations" may take sweat but not necessarily material form.

⁷³ Not all forms of expression, however, are protected by copyright. That copyright lasts for a defined term means that some pieces of expression are protected and others are not. That is, copyright only subsists in a given piece of creative expression for a specific time (currently, up to 70 years from the death of the author for a literary work *Copyright Act 1968* (Cth) s 33(2)). The Copyright Act, now, has little application to a piece of creative expression that was produced by someone who died during the Great Depression. Such a work would be considered to be in the "public domain". This form of ordering privileges the more recent publications with copyright license fees no longer payable to works in the public domain.

⁷⁴ *Copyright Act 1968* (Cth) s 32(1), emphasis added. For a critical discussion of the notion of individuality, see Sherman (1995), pp 34-36.

⁷⁵ It would be remiss not to highlight Foucault's exploration of the concept of the "author" in a piece on Foucault and copyright. His text, 'What is an Author?' (1991b) considers the notion of "author" as an aspect of the internal organisation of a given discourse. That is, the author, as a form of discursive control, provides "author-ity" to a text, it regulates speech within a discourse through perpetuating a distinction between authors and the attributes that vary between authors. A person is an author only if their writings, as a whole, enable differentiation within the discourse.

⁷⁶ Foucault (1991b); Rose (1993), p 3. There are concerns over the test of originality. One commentator, quoting Northrop Frye, suggests that 'all literature is conventional, but in our day the conventionality of literature is "elaborately disguised by a law of copyright pretending that every work of art is an invention distinctive enough to be patented": Rose (1993), p 2. Further, it is arguable that there is no such thing as absolute originality any more; in other words, the 'whole of human development is derivative': Laddie (1996), p 259). These comments reinforce the repetitive nature of human practices, in particular discursive practices. For a discussion of the fundamental importance of repetition in law, see Dent and Cook (2007).

⁷⁷ Dean (2007).

Copyright as multiple problematisations The range of categories of conduct to which the Copyright Act may apply suggests that a single problematisation may not be behind all aspects of copyright. A key insight to be gained from a consideration of copyright from a governmentalist perspective is that the Act itself does not have to be seen as a monolithic, internally consistent, form of governance.⁷⁸ It is indeed arguable that the single Act will evidence multiple rationalities aimed at separate, yet connected, issues; in other words, the category of “copyright” could be seen as distinct sets of practices rather than a single classification of regulation. In particular, as the Act incorporates centuries of legal “tradition” and legal change,⁷⁹ it is unlikely that a piece of legislation with such an extensive history, and that has been transplanted around the world, will have a single, central, purpose.

Possibilities for the division of the copyright regime into separate rationalities include the (obvious) breakdown in terms of the different subject matters protected by copyright (literary works, cinematograph films, performance, broadcasts etc) and the analysis of copyright in terms of technologies of duplication of the expressions of subjects (printing, cameras, broadcasts, electronic transmission etc). Such divisions would imply that each time a new technology of duplication is created, or a new category of expressive endeavour, a new “problem” is perceived by the governors.⁸⁰ The potential, direct, link between categories of expression and discrete problematisations is, however, challenged by the passing of the *Dramatic Copyright Act* in 1833 – the first Act to cover rights of performance, despite dramatic works predating, by millennia, printed works.⁸¹

⁷⁸ For a discussion of potential motivations behind the ‘desire to present copyright law in a unified and coherent manner’, see Sherman (1995), pp 44-47.

⁷⁹ Copyright histories go back at least to the 16th century – depending, of course, on how copyright is conceived. This point is expanded below. It is also arguable that, given the centuries old history of the regime, aspects of it may pre-date the governmentalist mode of governance. Governmentality, for Foucault, is a temporally specific mode, though it is not clear when governmentality became the dominant form. Foucault considered that it became prevalent after the ‘administrativist state’ of the fifteenth and sixteenth centuries: (1991a), p 103; however, there was little discussion of the change and the temporal limits of the categorisations of modes of governance may be more applicable to continental, rather than English, governance.

⁸⁰ A link has been made, for example, between the advent of photocopiers and specific actions of governments: Wiseman (2002), p 300. I thank Kim Weatherall for drawing my attention to Wiseman’s work.

⁸¹ It may be that 19th century governors did perceive performances as a new problematisation; however, it would take a genealogical excavation to explore how performances came to be a problem in the 19th century when they were perceived as such in the 18th century at the passing of the Statute of Anne.

A recent example of a governmental response that may be seen as part of a technology specific categorisation of copyright problematisation is the concern over the use of technology to restrict the capacity of the owners of copyright to ‘protect and control their copyright material in a digital environment’.⁸² The issue related to the development of measures to circumvent technological protections used in computer games and movie DVDs to limit the copying of the data.⁸³ The Australian legislative solution, to a globally perceived problem,⁸⁴ was incorporated in the *Copyright Amendment (Digital Agenda) Act 2000* (Cth).⁸⁵ This legislative solution, therefore, may be seen as a governmental response to a technology-specific problem⁸⁶ – the amendment act did not apply to all aspects of copyright law and practice, it only applied to the reproduction of certain types of work reduced to digital form.

The technological differentiation of copyright practices is also supported by the technological conditions of possibility of different categories of copyright protection and the nature of the protected expressions.⁸⁷ The obvious aspect of the former is that copyright did not exist until the mechanical reproduction of books was possible;⁸⁸ further, the regulation of photographs and broadcasts could only become a concern for governments after the invention of visual recording devices and broadcast technology respectively.⁸⁹ To separate out different copyright problematisations on the basis of

⁸² Weatherall (2004), 614.

⁸³ Previous developments had also threatened the income stream of copyright owners (photocopiers, home video recorders, cassette decks), however, this was the first to prompt worldwide action by governments.

⁸⁴ The problem was perceived as global and produced, *inter alia*, two World Intellectual Property Organisation treaties and the US Digital Millennium Copyright Act. For a discussion of this Act, see Ghosh (2003), pp 474ff.

⁸⁵ The government rationalities associated with the problematisation include, but are not limited, to the passing of the 2000 Amendment Act. Others includes the allocation of administrative resources (in terms of police time for the investigation of offences and court time for the enforcement of the Act), funding information programmes about the circumvention of technological protections (Such as through the Australia Council supported Australian Copyright Council) and the continuing engagement with the issue (For example, the *Copyright Amendment (Technological Protection Measures) Bill 2006*). These other practices show that the amendment itself did not “fix” the problem entirely and, therefore, a problematisation is best seen as a set of procedures aimed at the identified issue.

⁸⁶ That is, legislative amendments may be seen as examples of government rationalities ‘constantly undergoing modification in the face of some newly identified problem or solution, while retaining certain styles of thought and technological preferences’: Rose, O’Malley and Valverde (2006), p 98.

⁸⁷ This perspective may be seen to be akin to a ‘technologically determinist reading of copyright’s history’: Bowrey (2007), p 137; however, the notion of problematisation focuses on the manner in which the governors and governed view the role/threat of technology rather than an assumption that the technology itself prompts change.

⁸⁸ For a discussion of the early printing of books and the piracy of licensed copies of books, see Johns (1998).

⁸⁹ For a history of the impact that the introduction of radio had on Australian copyright, see Atkinson (2007).

categories of technology, would, however, ignore the shared practices associated with the different technologies.

There is, potentially, a link between categories of work and technologies of duplication and creation. With respect to the matter of protected expressions, technology is fundamental as some forms of expression that are not technologically reproducible cannot attract copyright. An example is the tableau at the heart of the UK decision, *Creation Records v News Group Newspapers*.⁹⁰ A scene was established for a photo-shoot for an album cover, a photographer, unconnected with the shoot, took and published a picture of the scene. It was held that there was no breach of copyright as the tableau, despite the creativity that underpinned it, did not come under the categories of the UK Copyright Act.⁹¹ A connected debate is that relating to the copyrightability of computer-generated works⁹² – the lack of human involvement impacting on notions of originality and creativity in the production of the work. Any genealogy into copyright problematisations, then, would have to engage with the delimitation of practices by, and involving, technological developments.

Another categorisation of potential multiple copyright problematisations would divide copyright into a problematisation of the expression of individual authors and a problematisation with respect to (corporate) publishers. The former can be traced back to the 1709 Statute of Anne⁹³ and the latter to the licensing patents of Tudor and Stuart times.⁹⁴ The concerns for each would be different. The origins of the “publisher problematisation” may be the printers who gained a licence from the Crown may be

⁹⁰ (1997) 39 IPR 1.

⁹¹ Christie (2000). Christie also highlights the inconsistency of copyright offering protection to a pre-written speech that is read out but not to an *ex tempore* speech – despite, potentially, the same level of creativity being used in their creation.

⁹² Copyright does attach to computer-generated works in the UK: *Copyright, Designs and Patents Act 1988* s. 9(3); there is no similar certainty in Australian law: McKeough, Stewart and Griffith (2004), [6.14].

⁹³ This Act was known more fully as ‘An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors and Purchasers of such Copies’: Sherman and Bently (1999), p 208.

⁹⁴ The monopolies provided by the Stationers’ Company, in the seventeenth century, to its members were ‘an exclusive right to market a given text’: Loewenstein (2002), p 28. A seventeenth century court held that the King had, since ‘time out of mind’ used his prerogative over printing to ‘licence some with restraint to others’ (*Stationers v Patentees about the Printing Roll’s Abridgment* (1666) Carter 89, 90; 124 ER 842, 843) – ‘printing was prohibited without the consent of the owner’ of the licence: Davies (1994), pp 7-8. For a more complete history of the role of the Stationers’ Company in the development of copyright, see Patterson (1968).

understood to be furthering the economic interests of the State of the time.⁹⁵ This “problem” may persist today in the form of publishers acting as entities constituted to further the economic rationalities of the governmental state. The problematisation of authors, on the other hand, could follow the schema with respect to individual expression highlighted above.⁹⁶ That is, it, arguably, reflects centuries of refinement of an early modern problematisation which had writing as a key technology of self-regulation in the seventeenth century.⁹⁷ Further, since that time, writing, and therefore the expression of self in a material form, has been an important set of practices associated with proper conduct as a member of modern society.⁹⁸ This categorisation of problematisations would allow for an account of practices associated with moral rights and *droits d’auteur* regimes that do not apply to corporate publishers.⁹⁹ As was suggested in the Introduction above, only a full genealogy of copyright practices will allow for a more definitive description of the problematisation/s that are at the core of the copyright regime.

Conclusion

It is, at least, arguable that copyright, given its age, is not unified by a single purpose or problematisation. This is not a concern for the operation of the law (after all, both in spite, and because, of copyright law, material is still being created and people are still being creative); however, it is important for the understanding of how this area of law (and similar areas) governs those who participate in the system and the material they produce. As has been noted above, copyright law has an unusually wide reach within society. It may be understood to (partially) constitute the conduct of (almost)

⁹⁵ The 1623 *Statute of Monopolies* placed a number of limits on the granting of patents by the Crown. There were, however, a number of important exceptions to those limits. Those exceptions included those covering printing and the production of saltpetre and gunpowder (s. 10); alum mines (s. 11); the licensing of taverns (s. 12); glass making (s. 13); and the smelting of iron ore (s. 14). Most of these categories of patents were closely tied to the policy objectives of the Stuart regime: Dent (2007). It is at least arguable that the printing licences could be seen in the same light.

⁹⁶ Footnotes 63-77 and accompanying text. As an historical note, the prosecution of Edmund Curll in 1727 for obscene libel may also be understood as representing practices associated with the regulation of expression of individuals rather than companies: Saunders (1992), pp 11-12.

⁹⁷ Rose (1999b), p 224. Early practices associated with the regulation of recorded acts of self-expression include the licensing/censorship debates of which Milton’s *Areopagitica* was a part. See, generally, Hoxby (1998); Kendrick (1983); Loewenstein (2002), pp 171-191; and Sherman (1993). I thank Andrew Herpich for his assistance in locating this Milton literature. It may be noted that ‘*Areopagitica* has become celebrated as a universal plea for free expression ... [but] Milton nowhere calls for universal freedom’ Norbrook (2000), p120 – his call was for post-publication restrictions where necessary, rather than pre-publication censorship.

⁹⁸ This regulation of (self-)expression of modern subjects may be seen as fitting Foucault’s assertion that practices of governance delimit the capacity of the ‘body ... to emit signs’: (1979), p 25.

⁹⁹ See generally Grosheide (1994) and Strowel (1994).

the entire population and their ideas that have been reduced to material form. The regime, for example, maintains practices of self-expression, perpetuates individuality, acknowledges the need for a degree of repetition and sustains, in part, the economic order of society. In order to gain a more nuanced perspective of the problematisations of copyright, and therefore, of the regulation of conduct creative individuals, a thorough genealogical investigation needs to be undertaken – an investigation that may be based on the theoretical understandings presented in this article.

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