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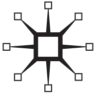

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Part I
Setting the Scene

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1
Liberalism, Realism, Convergence, Consumption and Tensions between Technological and Legal Change

A short parable on copyright

Mark Twain believed in copyright law. An international author, prolific writer and social commentator, he was most vociferous on the issue of copyright regulation for public interest reasons, and extolled the virtues of greater protection of authors' rights. Twain publicly expressed these imperatives well before world trade organizations politicized the need for international governance in the twentieth century.

But Mark Twain was very disappointed in how copyright was regulated in the West. He declared in 1903: 'Only one thing is impossible for God: to find any sense in any copyright law on the planet. Whenever a copyright law is to be made or altered, then the idiots assemble' (1935, pp. 381–382). Twain was frustrated by the disorganizational effects of piracy. As a successful author, he was acutely aware of how copyright law worked in its natural state, and the hazards for authors presented by pirates who sought to plunder the fruits of creative labour.[1]

Indeed, Twain detested pirates, and also blamed the legislature for the weak response to proper copyright regulation and protection. He was fed up with those armed with new and emerging technologies copying his works for free, and worried for the future of his children (as reported in *The New York Times* on Christmas Eve 1908). He looked upon piracy as 'pure robbery'. In 1906, *The New York Times* also published an article on how Mark Twain, prolific writer and self-appointed unsalaried copyright reform lobbyist, intended to 'put pirates to rout'. Despite his best efforts to improve the copyright regime, favourable legislative change was beyond his control.

Twain's views have always been shared by copyright owners – so why is this small bit of history important for an understanding of the political economy of popular media today? They are relevant because the media pirates in Twain's world were not the pirates the reader might have in mind. They were not necessarily the opportunistic backstreet peddlers found in alleyways or, in the modern context, organized commercial pirates in large

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counterfeiting warehouses or rogue Internet operators (the Napsteresque copycats, the wilfully disobedient 'Kazaariers', the cyber-vigilantes and the rapscallion Pirate Bayers). Would they have been the morally derelict teenage downloaders, university student uploaders, holidaymakers returning with pirated goods, and the entire broad spectrum of illegal consumers (parents and children alike)?

Ironically, the pirates Twain was referring to were the publishers (publishing companies) – the legitimate artificial citizens who take things that aren't theirs. Twain considered publishers (the prototypes of the current übercopyright owners and para-copyright dealers) with their new technologies and means of production as pirates because they *profited* from the authors. They profited from something that was not theirs because of the weak copyright framework. His purpose to reform copyright, therefore, was based on a distrust of publishers for they were not altruistic. They were the opportunistic beneficiaries of copyright law.

How preposterous must Twain's interpretation of publishers as pirates sound in today's normative and discursive world of copyright governance? Surely the real pirates are those unlicensed copiers and illegal consumers – not the entrepreneurial publishers. Are these new pirates the natural citizens who voted for the 15 members of The Pirate Party, which was comfortably elected into the German Parliament in Berlin on 20 September 2011 (as reported in *The Sydney Morning Herald*)? It was also reported that this party now joins the several 'pirate parties' in parliaments of other European Union (EU) states, which have been democratically elected to represent constituents (presumably with piratical ideologies). Indeed piracy is a slippery term, and so it must be asked, who are the real pirates? If Twain's perspective appears odd, then the current copyright governance paradigm is nothing short of Kafkaesque.

Twain's dilemma is even more significant today because it suggests the political economy of popular media, historically, has been an ongoing site of struggle for the ownership of popular culture, communication and information dissemination. Copyright as a form of dialectical legal realism continues to present its perpetual unresolved issues.

Whilst Twain's hyperbole about publishers as ungodly robbers may sound absurd or at least unfair, his observation about the futility of any attempt by God to make sense of copyright law is not. It is this level of confusion in contemporary society that makes the identification of the real liberal villains that much more challenging.

Overview: setting the tone, establishing the terms and providing the scope of this book

The intention of this book is to examine developments in popular media and copyright in the light of the challenges, namely piracy and illegal

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consumption. The central question guiding this book asks: what will be the effect of emerging technologies on the future organization of copyright? This question is historically relevant in that, since the inception of modern copyright legislation in 1709 (and the subsequent common law recognition of media piracy as far back as 1769), the flow of illegal consumption over the past three centuries has not been stemmed. The argument raised is that media piracy is illustrative of a plurality of media consumption within a converging legal, technological, economic and ideological universe. If convergence means the union of these various sectors within capitalist society, then copyright is anything but harmonious. And this has led to a crisis in popular media consumption.

This investigation is primarily concerned with technology, copyright and popular media in Western nations[2] where liberalism underpins societies as the dominant political ideology. Of interest is the fact that modern conceptions of liberalism, copyright laws, popular media and technology have evolved concurrently, but not necessarily harmoniously. And in the past century when mass production of modern popular culture (especially various audio-visual media) became a dominant mode of advanced capitalist cultural production, both the organizational and disorganizational effects of technology on copyright law became apparent.

One fundamental tenet of liberalism that is important for understanding popular media is that liberalism is concerned with ensuring individuals are able make their own choices rather than having them imposed on them by society, the state or corporate citizens. Specifically, liberalism places emphasis on personal autonomy and individualism (a natural state of being). It follows that a laissez-faire approach to the manner in which popular media products are consumed by individuals should be encouraged in liberal societies. Indeed, the initial substantive conceptions of copyright under common law also encapsulated a somewhat laissez-faire, non-interventionist or residual institutional approach because copyright as a private, personal and natural legal right was originally designed to restrain use *only* if matter had never been published. Writing about the circumstances prior to 1842 in Britain, Slater (1939, p. 206) states, '[i]f the author once gave it to the world, he had no remedy against the one who chose to pirate it'.

It is fair to observe that liberalism, common law copyright and laissez-faire economics are natural states. Conversely, it will be argued in terms of popular media governance – institutions and associations involved in business and corporate activity – that the role of government and the enactment of statutes for the regulation of copyright and corporations are seen as unnatural since they purport to change, control or otherwise limit the behaviour of individuals.

What lies at the heart of the issue is that liberalism encourages freedom of expression and freedom from interference. Liberals traditionally resist

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absolutism and challenge centralized control. Consumption of popular culture is regarded as a personal or individualistic experience, irrespective of the fact the bulk of popular culture has been mass-produced by a dominant handful of corporate media players over the past century. That is, while popular media might be described as the consumption of intrinsically personal pleasures, these pleasures traditionally and historically have been technologically determined and legally controlled, both cumulatively and conjunctively, by large corporations (state or privately owned).

Cultural consolidation by corporations is a feature of the status quo in advanced capitalist societies. It is argued that unquestioned and unchallenged control of popular media appears to be ideologically at cross purposes with notions of personal liberty and the pursuit of freedom of expression. The tension that arises is the result of centralized or dominant control of popular media by unnatural or artificial citizens.

Focus is on the two established major popular entertainment media industries, film and popular music ('pop'). To a lesser extent the computer games industry will also be considered because it falls under this broader digital audio-visual entertainment media rubric. These industries are culturally relevant for three interconnected reasons. The first is multinational corporations control these dominant modes of cultural production, and the subsequent copyrights attached to the products (hence the term 'copyright industries' to describe these industries). Second, new technologies, namely the Internet and file-sharing software, are inextricably linked to the manner in which these products are currently being consumed. The third reason for limiting the scope of these popular media is that the bulk of media piracy (and the alleged subsequent loss in revenue) is sustained by these copyright industries. In relation to these three reasons, the literature supports the general presumption that as the major players control the bulk of commercially available entertainment media, then it stands to reason that most of the financial harm is being experienced by these comptrollers of popular culture in the West.

Given the above contextual setting, the central argument is that technology has significantly influenced the organization of popular media in their commodified forms. This book expands on this basic proposition by presenting a comprehensive analysis of the interaction between the politico-economic and legal issues and the underlying political ideological environment in which popular media are consumed. It argues that problems between advancement and copyright law in liberal democratic capitalist societies have always existed because emerging technologies are a double-edged sword. And when conditions become unpredictable or unstable (as in the current phase involving omnipotent digital products as opposed to analogue or mechanical devices), a fragile tension in the relationship between innovation and consumption is formed. Indeed, digitalization has in recent years effectively threatened any positive relationship corporate media enjoyed with

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technological advancement. It is suggested this will continue to undermine any successful maintenance of copyright that dominant players have enjoyed for exclusive and perpetual revenue generation.

What flows from this assertion is the need to examine the practical, or rather, *real* effects of the manner in which major popular media copyright controllers are organizing their products. This broad focus is important as the doctrinal evidence supports the contention that recent universally accessible digital technologies have raised questions about future legal preservation and protection of copyright in an era of highly advanced digital piracy and universal consumption.

Copyright protection mechanisms and supervision processes are highly integrated. They focus on sophisticated (and aggressive) management of intellectual property for repeated exploitation for decades after acquisition. Yet consumption (legal, quasi-legal or illegal) is a relatively simple process. The film, pop and computer game industries provide excellent case studies for such centralized protectionist behaviour in an era where basic free or low-cost access to products is easily provided. Recent doctrinal developments and empirical data concerning these media industries suggest overall maintenance of copyright has become generally disjointed, ad hoc and relatively inconsistent. In short, there is no cogent evidence to suggest that modern copyright protection can successfully prevail over innovative change.

An objective analysis of the actual *success* of copyright supervision and subsequent protection remains underdeveloped in the literature. Furthermore, substantive literature on the combined disorganizational effects of innovation for illegitimate and legitimate consumption is virtually non-existent. Significant recent developments in the case law are identified as the literature is not conclusive in terms of explaining recent developments. In particular, the interaction between copyright, product protection and consumer behaviour has not been comprehensively developed. Existing research is focused on stemming and controlling illegitimate consumption, namely piracy. The literature does not adequately explain the reasons for the decline in success rates for the prevention of further copyright disorganization. This book remedies this deficiency by proposing that several legal and technological factors in liberal democratic society are affecting the political economy of popular media industries and their respective capacity to control illegal consumption.

It is suggested that some of these factors are beyond the control of specific industry and regulatory regimes because: (a) not all challenges are illegal, and (b) consumers do not necessarily deem unapproved consumption as deviant behaviour. In particular, Internet service providers (ISPs) by virtue of their business or undertaking are hollowing out or diluting any potency that copyright laws technically possess. This is occurring through a range of concurrent convergence developments, including legislative incompatibility between technology laws and copyright laws (the neighbouring laws and

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digital rights debate), and current digital products legitimately available to law-abiding individual citizens (consumers freely accessing the Internet and enabling software). The recent Hollywood film industry case against iiNet provides clear and unequivocal evidence for these propositions.[3]

For the first time in legal and innovation history, independently evolving products, namely file management, replication devices, social networking and related protocols via the Internet, and related computer hardware have concurrently affected traditional modes of media access and consumption. En masse illegal peer-to-peer (P2P) consumption can hardly be construed as deviant or antisocial behaviour in any strict criminal or even quasi-criminal context simply by virtue of the number of media consumers online engaging in such behaviour. And it would be an infinitely futile task to profile a typical illegal downloader given the broad-spectrum antecedents of illegal consumers. It is argued, given the decentralized and somewhat atomistic process of file-sharing, that these recent modes of media consumption are consistent with classic liberal behaviour.

Despite the generally negative publicity and adverse inferences cast on replicating devices, some of these effects are positive or enabling. The first significant observation is that many of these technologies are perfectly legal and have developed free from any popular media influence imposed by the major players. Innovation has universally enabled consumers to explore media products freely and without corporate influence. Recent technologies have affected the status quo. It will be asserted that when corporations restrict access to cultural products they are acting as cultural gatekeepers. They are effectively censoring, or rather dictating and limiting, what an individual may wish to watch or listen to. Similarly, where the deletion of a back catalogue occurs due to a lack of commercial viability, or one film is promoted over another for commercial reasons, then these actions might be construed as fundamental restrictions on an individual's right to choose from a wide range of media. This crisis of liberty leads to a quest for self-sufficiency through self-determination via enabling technologies. The Internet is the most ideal forum for news, information and links to various sources of legal and illegal access to popular media. It appears quite rational for individuals to source products beyond the cultural gate if limitations are perpetually placed on them as consumers. In other words, consumers might feel compelled to defend their natural right to choose freely in the face of a corporate ruling elite that refuses to make products available for economic or other reasons. Any subsequent duplicitous behaviour appears to prima facie co-exist with legitimate use. I argue that the rationale for purported illegal consumption extends beyond the obvious legal or illegal dichotomy.

The dilemma is that when an individual explores cultural products that are outside traditional modes of supply access or consumption, she or he is

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deemed to have committed a technical breach of statutory copyright law by infringing the rights of the copyright owner (as no permission was sought). In advanced capitalist states where copyright laws are particularly complex, those rights are generally not vested in natural or ordinary citizens, but rather in artificial corporate entities. The sheer volume of illegal consumption suggests consumers of popular media – that is, multinational, transglobal citizens enjoying a near perfect monopoly – struggle with the concept that popular media industries might suffer harm. It will be argued that in some instances ordinary citizens, as consumers, generally do not construe their infringing behaviour as deviant or antisocial and do not see their actions as harmful or detrimental in the ordinary sense of the word. If they do, then it is contended that prosecutorial action combined with educational policies and anti-piracy technology ought to have completely curbed, or at least substantially minimized, illegal consumption in this current climate of technological change and enlightened state of information and entertainment consumption. Liberal attitudes and beliefs held by individuals in the West correctly represent actual conceptions of popular media consumption and transcend beyond corporate conceptions of copyright and popular culture as an industry.

Technology's democratizing effects have blurred the boundaries between illegal and legal consumption. The interaction between these two modes of convergence of both illegal and legal consumption has not been fully addressed in the literature in any politico-economic and legal context. The positive and negative impacts of emerging technologies have together created a serious dilemma in terms of product commodification for the major controllers of media. The ultimate diminishing effect for copyright as a (lucrative) form of intangible property is the significant decrease in its intrinsic value; in other words, combined developments that have led to consumer disorientation and copyright industry disorganization.

The unresolved issues elaborated in the following chapters focus on whether traditional and legal modes of media consumption can be reconciled with illegal consumption, apropos media piracy, as a core feature in the consumption of popular media. If this is correct, then illegal consumption can hardly be construed as subversive or counter-cultural. An extreme liberal view might even suggest that such innovation is liberating because of its emancipatory potential.

To test these propositions, the research behind this book is doctrinally and empirically grounded. The inferences drawn and conclusions reached attempt to determine to what extent different technologies can be regarded as the primary catalysts to challenge the corporate control of the media. If the dominant few intend to identify and manage these changes in terms of their corporate model, then they must understand the dynamic nature of interacting technologies.

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The relevance of the study of political economy to copyright in popular media

The application of political economy to copyright is useful for various reasons. Firstly, it provides a broad and unifying disciplinary framework for any multidisciplinary approach that requires an examination of several interacting subjects involving consumer behaviour (organizational studies), corporate control of popular media (communications), law (legal studies), policy and governance (political science) and popular culture generally (sociology). Secondly, using political economy to study of the production and consumption of popular media is also politically relevant because its roots, like liberalism, are firmly embedded in nineteenth-century notions of individuality, morality and liberty. Thirdly, it underscores various interrelated traditional disciplines, namely political science, law and economics. It is therefore the most appropriate field in which to analyse the interaction between corporate citizens and individuals in a world of digitalization and convergence. The themes and definitions situate the debate within this field of study.

Therefore, the book's framework is an analysis of the interaction of the fundamental ideals of liberalism and the principles of legal realism and are set out as follows:

- convergent consumption (cultural products in popular media industries and the nature of sociocultural shifts, including changing audience habits, attitudes and beliefs about consumption),
- copyright and digital legislation convergence (copyright laws and digital rights management policies, copyright governance and the organization of popular media industries as copyright industries, including national and international legal and regulatory change),
- convergent corporate media industry (influence on competition law and policy, globalized corporate governance, and the corporate response to copyright developments), and
- technological convergence (economic development and advancement in an era of digitalization).

Political theme: liberalism, consumers and copyright

It is important to acknowledge at the outset that liberalism and primary notions of copyright are relatively compatible. Indeed it is fair to state that freedom and copyright are both founded on natural rights. In 1690 the father of liberalism recognized that 'every man has a property in his person. This no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his' (John Locke, 1967, sec. 27).

The tenet of liberalism that is important for understanding popular media and consumption is the emphasis on freedom (also known as negative or individualistic freedom). The modern sense of this freedom from interference

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ideology may be traced back to John Stuart Mill's nineteenth-century principle of harm and Isaiah Berlin's *Four Essays on Liberty* (1969) where these nineteenth-century principles lay the foundations for modern liberalism. Liberalism is concerned with limiting the extent to which entities and institutions regulate individual behaviour.

The state, through the legal system, sets the limits on interference by establishing the principle that the only end for which it is legitimate to interfere with the liberty of an individual is to prevent harm to others by way of a *morally* driven legal code (for example, preventing acts of criminality against persons or property or any form of physical or financial harm). Limits to interference also apply to all artificial agencies including corporations: 'The defects, therefore, of government management, do not seem to be necessarily much greater, if necessarily greater at all, than those of management by joint-stock [company]' (J. S. Mill, 1982, p. 11).

Specifically, liberalism places reliance on personal autonomy because of this natural right. Individuals are understood to enter into an implicit social contract by which they sanction the activities of governments that protect their life, liberty and property. The idea that individuals exist in a natural state prior to being a part of society implies that the activities of individuals are natural. As a consequence, business and corporate activity and the processes of government are seen as unnatural because they change, control or otherwise limit the behaviour of individuals. In other words, entities are veiled by artificial corporate structures, and their moral attitudes and beliefs (if any) are unclear or at least different to natural conceptions of morality. This is not to suggest that artificial citizens' corporate executives and delegated representatives are devoid of morality. Indeed, personal attitudes and beliefs may differ from those of the corporation as an organically whole organism. But companies duly incorporated under corporation laws reflect corporate citizenship, and it follows therefore that entities are governed as persons with distinct legal rights. Copyright governance is one such arena where the elevation of artificial citizenship over natural citizenship is clear. Historically, humans have been bound buy a moral code. Unnatural behaviour (for example, criminal conduct) has been largely constrained by informal and formal traditions, norms, customs, cultural practices, religion and laws – some of which remain unchanged (for example, capital punishment and imprisonment as a form of deterrence). Whilst terms such as corporate governance and corporate social responsibility suggest, at least on a formal level, that a moral code could be applied to artificial citizens, the practical reality is that a comparable natural moral code cannot be applied to artificial citizens when comparing their behaviour with that of individuals. (Entities can never be imprisoned for any deterrent effect.) Artificial citizens therefore exist in an unnatural setting because it is impossible to measure whether they possess a moral code. These fundamental differences in citizenship lay the foundations for tensions in the copyright governance framework.

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In this context it must be asked how individualistic attitudes are expressed in atomistic settings such as the World Wide Web. Liberalism as an ideology appears to thrive in digitalized environments, or rather, virtual environments, given the degree of consumer anonymity compared to that in traditional transactional spaces.

Of particular importance to this book is that this individualistic behaviour typically represents the conduct of ordinary citizens in classic liberal democratic societies where negative freedoms (freedom of choice) prevail. In the case of popular media, corporations have become arbiters of the modes in which products are consumed and prices are set. Empirical data suggests that consumers are relatively informed about how to consume popular media and do not necessarily view illegal consumption of popular media as harmful behaviour. (Individual consumption or one-off illegal transactions must clearly be distinguished from illegal production for profit or some form of pecuniary advantage.) If one, conceptually only, accepts Robert Nozick's (1974) notions of 'night watchman' and 'minimal interference', then a desire to choose illegal or legal consumption of popular culture in a convergent environment might be viewed as a rational choice provided individuals do not derogate from traditional notions of the harm principle.

Legal theme: realism, consumerism and copyright

Legal realism requires an acceptance of the fact that there is a range of non-legal factors that influence legal outcomes. Jones (1961, p. 801) poses the question whether legal realism 'has something unique to offer on the age-old jurisprudential problem of the role of moral ideas in the functioning of law in society'. By introducing morality to the question of whether a prima facie illegal act is right or wrong, legal realism challenges formal conceptions of the law and the dominant positivist position that the law is interpreted in a neutral and objective manner. According to Jones (ibid., pp. 802, 808), legal realism, 'with its emphasis on the inevitability of choice and discretion' and 'emphasis on the tensions that exist in law administration between the demands of the prescriptive rule-formulation and the appeal of the concrete problem situation', is essentially an attack on the formalist account of legal reasoning. The realist view therefore considers social influences and social norms when determining how the status quo ought to be shaped in a particular arena by exposing the political, social and economic influences supporting strict legal formalism.

Such an approach in the field of copyright governance would be concerned with the practical legal question of how popular culture should be consumed in a copyright governance environment clearly dominated by the dominant few. This is important in understanding copyright governance as conceptually it includes a broader definition of copyright that recognizes non-legal influences, such as corporate power and domination in capitalist society, the judicialization of politics, consumer behaviour and morality,

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politics, policy and even the prejudices of individuals as consumers including attitudes towards copyright law.

Legal realism was particularly influential from the 1920s to the 1940s in the West. Interestingly, during this phase of jurisprudential evolution, two substantive politico-legal developments also occurred. Firstly, this was an era of rapid corporate consolidation in the popular music and film industries. It was characterized by weak competition policy and corporate regulation (thereby situating Hollywood at the epicentre (Moran, 1993)). For at least three decades major corporations have dominated popular film and music, both vertically and horizontally, because of weak anticompetition policies (antitrust or trade policies) and legislation, and policies generally, in the Western world (see Gomery, 1986; Balio, 1990). This weak regulatory national and transnational environment assisted in the creation of omnipotent international market oligopolies well before meaningful domestic laws were enacted to monitor and review corporate citizens in the marketplace.

Secondly, corporate interest groups and associations remain influential in the legislative arena in the West. This is evident because the period for the duration of copyright in popular media products has been extended due to forceful petitions by the corporate lobby to increase copyright monopolies. Even in the past few decades, after proper competition policy implementation, this economic landscape has remained largely unchanged.

It follows that governance devices (the machinery for influencing how copyright laws and policy are to be shaped and created) have become politicized in that corporate copyright owners have become the most powerful voice in the copyright governance arena. Applying legal realism to the facts of the political economy of copyright enables the exposure of the exclusive and monopolistic tendencies in which corporate copyright industries thrive. The fact that this dominant position did not change throughout the twentieth century exposes the artificiality of formalist legal rules purporting to provide a balance in the copyright paradigm.

Importantly, a critical realist legal theory underscores the political nature of copyright law. This can be used to justify the continuation of existing power relations in the organization of these industries. It emphasizes the legitimizing function of the law. The relationship between the powerful few who own the copyright vested in popular media and the evolution of copyright laws constitutes this ideology of law.

Legal realism recognizes the artificiality of corporations. They are not tangible beings like humans. It is difficult to imagine how policies might be implemented so as to enforce proper moral or ethical values on such 'citizens'. This research advances this basic proposition by suggesting that as corporate citizens can only distinguish between legal and illegal they have no capacity to distinguish the complexity of consumer behaviour in a digital environment. The lack of pragmatism on the part of corporate entities is evident in popular media.

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The objective of a realistic approach to understanding the current problems is to accept the practical realities of how copyright evolved, and the political and economic influences shaping those laws. Applying realism to the study of the political economy of copyright in popular media means a theoretical or rather positivist definition of the concept of copyright law, and that a formalistic understanding of copyright law is not enough to explain the disorganizational effects. In other words, practical things, not formal copyright law, determine the manner in which popular media products are organized, or disorganized as the case may be.

Laws are legitimized through the processes of responsible government and the rule of law. These gives laws the appearance of neutrality and objectivity. But a realist view of copyright laws is that they are hegemonic in that they reinforce the structures by which the powerful dominate subordinate groups. In theory, consumers in liberal societies accept and support the structures that dominate them if they take on the appearance of being value free, objective and fair. For individual consumers, this usually translates to consumption of products that are deemed to be fairly priced, easily or readily accessible in several formats and free from interference or coercion.

However, consumption of popular media in reality is quite complex because, on the one hand, popular media are dominated by a few major actors who have created a distinct set of legal principles yet, on the other hand, consumers possess different or competing values. This creates a divergence that produces different outcomes for consumers and creates an alternative set of legal principles and values. This has led to conflicting issues between copyright law and other legal doctrines and policies.

Convergent consumption

This book is concerned with technology and contemporary popular media in Western society because popular media represent the bulwark of advanced commercial exploitation in advanced capitalist societies. In addition to the description of the typological scope and legal and political themes, further definitions are required to establish the framework for the following chapters. In particular, it is important to define 'popular media' and 'consumption' in the context of a copyright industry overwhelmingly dominated by a handful of multinational corporate citizens. Research relating to the political economy of copyright is a study of the political economy of the consumption of popular culture. In this context it might be convenient to describe the popular media industry and the copyright industry as a synergy of sorts where the embedded component of the intellectual property is attached to the finished tangible product for the purposes of commercial exploitation.

Popular media, for the purpose of this research, is defined as contemporarily influential Western culture capable of being commercially exploited for the *express* purpose of commodification. It becomes popular not by its capacity to become labelled or genre laden,[4] but by virtue of its commercial

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potential as entertainment value. This mode of cultural production dominates the entire global industry.[5]

There is already a substantial body of literature on the sociology of cultural production and notions of 'legitimate culture' (Bourdieu and Passeron 1977) and 'cultural capital' (Bourdieu 1984) in the West. Bourdieu's concept of capital as a *resource* is particularly useful because it incorporates both financial and non-financial elements of culture (the tangible and intangible forms of cultural capital). Bourdieu's works on cultural production, reproduction and legitimization are acknowledged as key sociological concepts in the analysis of power relations in the fields of artistic and literary production.

More specifically, substantive works exist on the political economy of cultural production and notions of 'cultural dependency' (Schiller 1969) and 'cultural industries' (Garnham 1984, 1990). Schiller's works on American corporate power and monopolization in the communications and media industries and the consequent influence on popular culture assist in contextualizing the debate in two ways: first, Western notions of popular culture have dominated the entire globe; and, second, the United States is by far the most influential nation in popular culture (see generally Schiller 1969, 2000). It may have been appropriated as a lucrative economic resource for corporations, but capital as a cultural resource instrumental in facilitating individual freedom and expression is equally identifiable (Bourdieu, 1984; Bourdieu and Eagleton, 1991).

Garnham's work (1990) in relation to ownership concentration and the multinational dimension of cultural industries is particularly helpful when conceptualizing media industries. Furthermore, Petersen and Annand's works (2004) (including works on pop music and pop culture generally (Peterson and Berger, 1990)) on the production of culture and its nexus with technology, law, industry structure and organization is important. These significant contributions in the broader field of popular culture assist in situating the debate about how popular culture is produced, developed and expressed – or, in other words, popular culture's system of organization. Beyond the broader theoretical and sociological framework exists a large body of literature solely concerned with specific elements of the popular media entertainment industries. Issues intersecting technology, copyright and popular media form the core of the investigation into these specific industries.

The forms of popular media examined here are those typically described as multimedia products capable of being digitized, disseminated and played by electronic audio-visual devices, computers and related consoles. They fall under a broader entertainment media rubric and comprise the bulk of popular culture. They are best described as entertainment products (as opposed to those media products associated with critical artistic merit or knowledge value (including newsworthiness)). Mass media products are popular, standardized and generally devoid of 'the pursuit of knowledge'

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(Leet, 2004, p. 11). In this group the most relevant popular entertainment media are film, music and game software.[6] These products are significant because most media piracy and copyright infringement considerations relate to these media.

These media form the best case study for an inquiry into piracy. Favourable price-setting, format control, protectionist regulation and copyright control are the essential ingredients in the creation of a corporate-controlled, oligopolistic media market. The justification for limiting the research to these three types of popular media is apparent because the multinational majors who own most of the copyright in film, music and games products experience the bulk of the loss.

Another reason for examining these three modes of cultural capital is that the physical or tangible formats – the content and the devices by which the products are made available to consumers – are almost exclusively owned and controlled by the major players. Leavis (1933) first observed how monopolistic economic power was exercised by anticompetitive popular culture corporations. Adorno and Horkeheimer (1997) went further by arguing the purpose of mass culture was to ensure smoothness in the 'unity of individual and society' (ibid., p. 131) and smoothness in the running of the 'supply' chain of mass-produced lines (ibid., p. 135) thereby enabling 'obedience to the social hierarchy' (ibid., p. 131). In short, these form key elements in the manner in which popular culture is unified for the purpose of commodification. While technological developments will be the subject of discussion in subsequent chapters, it is important to highlight that, until the end of the twentieth century, entertainment media formats were centrally controlled by the major music companies (the 'majors') that controlled the bulk of copyright in popular media. In this respect, vinyl records, cassettes, compact discs (CDs), digital video discs (DVDs) and their respective players are all products (and devices) of the majors. The cultural material embedded in the media products has, traditionally, been retained and owned by the same organizations. These products have been distributed through well-established channels (retail outlets) allied to the major players. Put simply, the makers of playing devices are makers of formats and are the exclusive ultimate proprietors of property vested in commodified cultural products for consumption.

The horizontal and vertical integration of popular media through ownership and control of all technologies has ensured homogenized cultural commodification for a handful of dominant players in each industry. It is apparent that the majors, who own the bulk of intellectual property in these cultural productions, unequivocally control the bulk of popular media in their commodified form.

There are three interconnected reasons for focusing on developments in the West. The most obvious reason is that the available statutory and doctrinal information is generally concerned with illegal consumption in Western

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(liberal or social) democracies. Copyright laws were developed in Europe (under English common law principles and subsequently under French codes). Consequently the first media piracy cases were reported in the Western world. These developments have provided a rich source of information capable of being substantiated and, where necessary, corroborated using accurate data. This is in stark contrast to the relatively underdeveloped empirical data and legal developments in non-Western jurisdictions where primary sources are less capable of adequate scrutiny or validation.

The second reason is that liberalism, as a dominant political ideology, also developed in the West (again, especially under English, French and American influences). This political relationship with the law is important as this investigation explores the politico-legal tensions in popular media in advanced capitalist society.

The third reason is that as the bulk of media products (including previous formats) have been controlled by a handful of Western-influenced multinational corporations, namely corporations from the US, UK, France, Germany and Japan, with subsidiary interests in non-Western jurisdictions, it stands to reason that consumer behaviour in those non-Western nations might largely reflect behaviour elsewhere due to the fact the products are identical. By way of illustration, a CD purchased in Australia, manufactured and issued by Sony Music (Australia), bears no material distinguishing features from the identical CD supplied by Sony Music (Indonesia) (pursuant to the parallel importation amendments to the Copyright Act 1968 (Australia)). The products are internationally standardized and it would be wrong to suggest the legitimate Indonesian product is inferior.

Copyright laws in Indonesia are relatively underdeveloped, but where non-Western developments could add probative value is in terms of understanding the relationship between piracy and Western consumers in emerging economies (the subject of Chapter 7). A brief examination concerning the intersection between non-Western individuals' attitudes – the dominant political ideologies of which are not founded on liberalism – and Western consumers' attitudes is therefore relevant given that so much illegal activity occurs in these jurisdictions.[7]

Who is a consumer and what is consumption? Fornäs, et al. (2007, p. 42) narrowly define consumption as 'that specific kind of interaction whereby people exchange money for goods in an act of purchase, and then use these acquired goods'. The essential factual elements in the consumption process appear include selection, purchase and use (renting, buying and then consuming the products (ibid., p. 43)). Emphasis is clearly placed on financial exchange. Individual producers and consumers are involved in a perfectly rational, private, legal and economic process (a sale) in an organized marketplace.

Convergence in consumption implies *consumption by communication* on the part of consumers, in that the element of *purchase* is subordinated,

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subsumed, subverted, omitted, partially omitted or otherwise diverted by the primary act of communication. The element of *use* remains static, but the process is not a simple private commercial transaction. It becomes blurred. In this transaction, popular media is freely exchanged over space and time without a sense of finality (offer, acceptance and other commercial transaction qualities). Not paying simply means illegal consumption. In a convergent world, popular media exchanges occur concurrently in a legal and illegal capacity – with or without the exchange of money. Traditional boundaries essential in financial transactions thus become blurred thereby complicating the acts of communication and consumption.

Conceptions of mass media are broad spectrum in the sense they include all aspects of cultural consumption (from cinema and live-music attendance to purchasing products or participating in illegal consumption). This definition is narrower than the general notions of mass media as espoused in the literature – it is solely concerned with commodified products capable of being replicated and subsequently consumed gratis (namely recorded formats). Media piracy as a component of consumption convergence involves the consumption, possession, receipt, interference and conversion of copyrighted materials without permission or authorization, be it with or without financial gain. In short, anyone who consumes media illegally is deemed to be a pirate. Popular media piracy is the replication of film, music and game media using non-traditional methods (namely, digital copying tools).

Nowhere is such consumption more pervasive than online. The Internet is not a physical environment and online formats are regarded as virtual. File-sharing with the aid of P2P is not an invention devised, promoted or supported by the major players. In this realm the majors have no desire to pursue file-sharing to commodification. P2P and other related technologies have evolved independently, uniquely and in relative compatibility with the telecommunication industry services (telcos) because of customers' needs for fast and large data usage plans. Not surprisingly, telcos work independently of the popular media industry. For obvious reasons the major entertainment players (especially Hollywood and the music majors) have removed themselves from P2P development.

Given the commercial imperative, it is important to consider to what extent attitudes have changed from pay-to-play to play-for-free through convergence in regulation and technological changes in the West.

Copyright and digital legislation convergence

By definition, copyright laws in liberal democratic societies are designed to encourage and reward the production of creative works, which include literature, art, music, dramatic works, films, videos, broadcasts, sound recordings and computer programs. Copyright is concerned with the protection of the *expression* of the idea. But there are two fundamental misconceptions about the relevance of copyright in the modern corporate-citizenship setting.

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The first relates to the class of copyright that is the specific topic of debate; and the second is about the alleged actual loss of value attributed to copyright abuse.

Copyrights have no manifest material form, notwithstanding that they are capable of being trapped in material form (CD, DVD, book and any other physical or tangible format). Until ideas become realized, copyright remains nothing more than a theoretical construct.

Copyrights are not corporeal chattels (choses in possession). A music album in the form of a CD is a 'thing' as it is in a material form. The copyrights embedded in the album are incorporeal chattels (choses in action) and are intangible. Once copyright moves from the virtual realm (idea) to an actual realm (material world in the form a recording), it is represented as a chose in action rather than a chose in possession. When it is co-mingled with the recorded format and is purchased for good consideration, it has been presented to the consumer in the form of a hybrid incorporeal and corporeal chattel, along with the usual copyright warnings and infringement notices affixed to the packaging. The original creator is the author or composer, but the actual owner of the commodified form (along with the copyrights) who is presenting the CD to the consumer will undoubtedly be the recording company.

What is problematic is that after purchase the material *item* is legally possessed by an individual who quite naturally might think she or he owns the entire item, rights included. These rights might be thought to include the freedom to share, swap, enhance and otherwise interfere with the intellectual property contained in the product. This intermixture has caused a dilemma for individuals, as well as owners of copyright in liberal societies. This attitude or belief pertaining to the relationship between ownership and control requires examination because, as Bourdieu and Eagleton (1991, pp. 115–116) argue, the relations between the individual, culture and production have shifted. The individual as a self-interested consumer has shifted to the centre thereby creating a new social reality.

What is not in dispute is that copyright principles are embedded in the core principles espoused by liberalism, namely freedom from interference in the natural rights of all property possessed by individuals. Copyright is akin to liberty because copyright owners possess exclusive rights to allow the replication of their intellectual property. Authority for this proposition can be found in J. S. Mill's, *Principles of Political Economy with Some of Their Applications to Social Philosophy* (2004, pp. 271–272) where he explains:

> [B]ut in this case, as well as in the closely analogous one of *Copyright*, it would be a gross immorality in the law to set everybody free to use a person's work without his consent, and without giving him an equivalent. I have seen with real alarm several recent attempts, in quarters carrying some authority, to impugn the principle of patents altogether; attempts which,

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> if practically successful, would enthrone free stealing under the prostituted name of free trade, and make the men of brains, still more than at present, the needy retainers and dependents of the men of money-bags.

Originally a common law doctrine, the principles and values accorded to copyright were derived from classical liberal thought where very minimal state intervention was preferred so as to encourage individuals' freedoms. Common law notions of copyright have done nothing more than map out basic rights.

Modern copyright law no longer displays common law attributes. Mill's observation is important because it relates to protecting individuals' works from greedy behaviour ('men of money-bags'). It is interesting to note that individuals have accused corporate owners of popular media of displaying monopolistic and greedy tendencies.

Copyrights commence as personal rights. One of the most important rights of the owner of the copyright is the right to reproduce the created works (that is, copy the works). Consider the following passage from Slater (1939, p. 206):

> At common law there was no copyright in literary productions after publication, though there was before. The result was that if a person produced a work of imagination or reasoning, he could refrain another from publishing it, if by any chance that other happened to become acquainted with it, but if the author once gave it to the world he had no remedy against anyone who chose to pirate it.

In the modern context classically liberal mid-nineteenth-century common law copyright seems implausible. The modern day consumer might be forgiven for being quite liberal with popular media given the manner in which copyright has evolved. However, a radical politico-economic shift occurred, and these prima facie legal presumptions became the subject of a reverse onus during a period of great industrial transition in the mid-nineteenth century. This era witnessed a rapid consolidation of statute-based copyright laws that emphasized the creation of near perfect monopolies upon publication in conjunction with the birth of the modern corporation.

Unlike early-nineteenth-century legal conceptions of common law copyright, statute-enshrined copyright laws are codified and invariably prescriptive in that they prescribe how obligations are discharged and rights imposed through various legislative, judicial and executive instruments. Natural laws are not prescriptive (rules imposed by the government authority). These are new customs and traditions. That is, the old, liberal copyright customs that once reflected natural, personal rights have been subsumed under a broader modern copyright custom in which behaviour and conduct are imposed on

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individuals. In this modern universe, copyrights have been consolidated through international customs and conventions and imposed on natural citizens. Modern approaches are corporatist approaches, and largely reflect the wishes of the controlling elite rather than individuals. But they run contrary to international laws. In any politico-economic setting where prescriptive laws are imposed it is inevitable that tensions will arise. These issues may lie dormant or at least be successfully controlled over time, but when significant technological changes are introduced, the differences between old and new customs become clear. Digitalization has provided the most recent catalyst for challenges to prescriptive modes embedded in copyright legislation. Copyright obligations are absolute and exclusive (subject to exceptions such as obtaining a license and 'fair use'). Modern copyright laws are no longer natural rights, but virtual monopolistic rights. In *Jeffery v Boosey* (1854) it was held at 935–936:

> Weighing all the argument on both sides, and looking to the authorities up to the present time, the conclusion I have arrived at is, that copyright is altogether an artificial right, not naturally and necessarily arising out of the social rules that ought to prevail among mankind assembled in communities, but is a creature of the municipal law of each country, to be enjoyed for such time and under such regulations as the law of each State may direct, and has no existence by the common law of England. It would follow from this that copyright in this country depends altogether on the statutes which have been passed on this subject.

With the advent of emerging technologies in the fields of book and music publishing, copyright was one such proprietary right where a series of statutes were passed so that by 1842 the Copyright Act in Britain restrained those who chose to be liberal with literary works.

What should be acknowledged is that common law copyright (as opposed to codified copyright laws) and liberalism were related because of the emphasis placed on individual autonomy. As a private right, this principle still remains. Validation for this proposition can be found in *Roadshow Films Pty Ltd v iiNet Limited* (2010) (*iiNet*) where it was held (per Cowdury at para. 492) that:

> There is no legal obligation or duty on any person to protect the copyright of a third party. There is only a legal prohibition on doing an act composed in the copyright without the license of the owner or exclusive licensee of that copyright or authorizing another to do that copyright infringing act. Consequently, merely being indifferent or inactive in the knowledge that copyright infringement is occurring cannot possibly constitute authorisation.

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But as mentioned, by the mid-nineteenth century internationalization of agreed copyright principles through governance ensured copyright conformed to the process of codification. These purposes were originally reflected in the Berne Convention for the Protection of Literary and Artistic Works 1886. The consolidation, or rather politicization, of copyright in the latter part of that century largely reflects the general consensus in the Western world. Schwarzschild (2006, p. 218) correctly notes that:

> [i]n the twentieth century – the age of statutes – by contrast, a variety of doctrines and political forces challenged free market liberalism and denigrated it as retrograde, sometimes with great political success.

The rapid legal developments, which are the subject of detailed examination in subsequent chapters, are also consistent with innovative change experienced during the mid-point of the Industrial Revolution.

In Britain, not long after the start of the twentieth century, the Copyright Act (1911) unified the common law into a single coherent system in the form of a wide-ranging statute. By the early twentieth century, the developed nations continued the debate about the relevance of a robust international copyright governance framework and became signatories in a bid to universally unify copyright laws. The first of these was the Berne Convention for the Protection of Literary and Artistic Works 1886, and it was the Berne Convention (1908), and Rome Convention (1968) that included agenda items pertaining to recorded music, and the protection of the copyright in the recorded works. The 1956 Copyright Act (UK) 'attempted to keep pace with international and technological developments' (Edenborough, 1997, p. 11). In response to further international and technical developments, new legislation in the form of the Copyright, Designs and Patents Act (1988) was enacted. Throughout this almost 100-year period, Parliament constantly modified its copyright laws in a bid to keep abreast of new types of copyrights being created in order to ensure protection for the owners. As will be discussed in the following chapters, corporate citizens were the primary drivers in the bid to expand copyright and its administration.

Corporate copyright (corporate ownership of copyright) is fundamentally different to individual or beneficial copyright. Its objective is purely for commercial endeavour and thus should be described as an exclusive entrepreneurial copyright. Because of limitations in protection periods thereby limiting exclusivity whereby copyrights automatically revert into the public domain, it is only partially correct to describe corporate copyright as a quasi-monopoly.

It is argued, in terms of popular culture, that corporate copyright ownership displays true monopolistic behaviour because the impetus in copyright ownership is to preserve and protect copyright embedded in a particular product for as long as possible if it is deemed commercially viable.

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Corporations, not individuals (natural citizens), have become the main beneficiaries of modern copyright protection. Corporate citizens are devoid of natural rights possessed by individual citizens. Such rights as enshrined in corporation laws are artificial. Attali (1985, p. 52) remarks, '[c]opyright established a monopoly over reproduction, not protection for the composition or control over representations of it'. This observation is further elaborated by Whale (1970, p. 18):

> Copyright for some 150 years was quite simply the right to copy and, except for the implied right to publish, nothing else. It was accordingly not an author's right but a publisher's right, and indeed it was the booksellers (publishers) who created this right for themselves as a necessary protection for their business ... and although under the statute the author became entitled to hold copyright, the right protected was still essentially the publisher's right to copy.

Corporate influence over favourable conditions and legislative change was a core feature during industrialization. An interesting concurrent development in nineteenth-century Britain was that significant changes in a related legal arena also occurred. In 1825, the Bubble Act 1720 (England) was repealed thereby ending a 105-year ban on corporations. (This Act, curiously, was enacted shortly after the Statute of Anne (UK) was enacted in 1709. The Bubble Act was enacted after the Royal Exchange and London Assurance Corporation Act 1719 because the specific companies the Bubble Act related to were incorporated under the Corporation Act of 1719. The Acts are referred to concurrently because the Bubble Act was the result of a legislative response to the South Sea Bubble stock market crash.) Bakan (2005, p. 7) explains: 'in 1720, Parliament passed the Bubble Act which made it a criminal offense to create a company presuming to be a corporate body.' The main reason for the virtual carte blanche ban on associations of individuals possessing a common goal to pursue profit was that the British Parliament was 'fed up with the epidemic of corporate high jinks' (Bakan, 2004, p. 6).

The Companies Clauses Consolidation Act 1845 statutorily paved the way for a second chance for these corporate citizens (just three years after copyright laws were significantly changed). By 1929 the Companies Act in Britain was responsible for giving rise to the modern corporation (which was also the same time that copyright had become robustly consolidated and regulated through international custom and convention). By coincidence or design, modern copyright legislation and corporate rules commenced a congruent path to mutualism. The rise of corporate copyright consolidation will be discussed in the following chapters.

Given the above observation about entrepreneurial elements of modern day corporate copyright, it is important to recognize that copyright has

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evolved in three material stages: primary (basic), secondary (intermediate) and tertiary (advanced). The first two stages are concerned with individuals or groups of individuals directly, whilst the last stage represents the status quo of modern copyright (corporations as the relevant rights-holders assigning and licensing rights without individual interaction or consent). That is, the primary phase is closely associated with this natural state of ownership (where the original copyright owner retains control in his or her property). The next (secondary) stage and the final or late stage of copyright development are problematic and difficult to reconcile with notions of classic liberalism. In these later stages, natural copyright owners (namely creators) usually relinquish their rights in copyright as exploitable property by way of assignment – and in many cases perpetually. The difference in the second and the third stage is that in the latter, assignment is invariably to a large firm, whereas in the secondary stage, the transaction is between the natural owner of copyright and a minor player. The advanced stage creates the so-called entrepreneurial or corporate copyright in advanced capitalist society. The divergence of consumer and corporate attitudes stems from this final stage.

In relation to copyright as a natural, common law right, Justice Willes in *Millar v Taylor* (1769, p. 220) stated: 'It is certainly not agreeable to natural justice that a stranger should reap the beneficial pecuniary produce of another man's work.' In other words, a copyright owner has a right to profit from the proprietary right vested in a work. Gaining a pecuniary advantage through piracy would be akin to, say, trespassing onto property and fishing in a river on that property and where a license or royalties may be required. I do not cavil with this basic proposition. But whether consumers perceive downloading cultural products for personal consumption as harmful to corporate citizens is specifically open to debate.

It is suggested that when modern copyright developed, the notion of 'harm' did not extend to acts of media piracy against corporate ownership because corporations are artificial or unnatural constructs. Alternatively, recognition by individuals that illegal media consumption creates harm per se has remained unrecognized during the evolution of liberalism. The primary reasons for a perceived lack of recognition in the modern context are twofold:

- individuals appear not to recognize illegal consumption as harmful to corporate citizens when compared to obvious or literal acts constituting harm; and
- individuals in liberal society are naturally suspicious of dominant institutions, and regard the state, large corporations and their associate organizations as entities that actively interfere in *negative freedom*.

Any harm felt by corporations in terms of copyright infringement might be regarded as artificial or pseudo-harm when compared to individuals' general

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notions of harm (for example, physical harm or property harm against the person). Obviously, this is not to suggest copyright corporations are not legally entitled to damages for financial loss. It will be asserted that corporate harm, for example, losses allegedly sustained through piracy, might be perceived differently to losses caused to a composer in the eyes of consumers. In this regard, it is more difficult to conceptualize stealing an opportunity to make a profit as a loss of sorts and in a natural sense, compared to, say, the theft of a CD, which is easily measured in terms of harm.

The artificiality and unnatural state of corporations can be contrasted to the natural right of individuals and the natural rights vested in primary notions of copyright. In the corporate realm, the individual in the natural sense is lost and the effect of capital-raising by way of shares is a formidable instrument for large-scale investment. The corporation is not accountable to natural persons, but rather shareholders who possess corporate citizenship rather than natural rights. In this artificial universe, the bulk of incorporeal popular media copyrights are parked.

It is, therefore, not surprising that individuals find it difficult to contextualize how unauthorized use of invisible rights vested in artificial corporate entities might constitute harm. Copyright transcends basic notions and becomes complex by virtue of the manner in which it is dealt with through intricate intangible permutations and combinations exercised by corporations. Once copyright becomes assigned to and subsumed by corporations, compatibility between liberalism and modern copyright becomes less obvious.

Convergent corporate media industry

This typology is concerned with corporate governance in an era of globalization in late capitalism. Anticompetitive behaviour in an arena where a small group of majors control the playing field is evident. This form of aggressive corporate behaviour is completely natural for firms where the core of their existence solely rests on preservation and exploitation of primary copyrights.

The reasons for this assertion are based on the fact that naturally occurring copyright monopolies in popular media complement the manner in which products are organized. While it is difficult to define precisely the term 'natural monopoly', copyright industries are good examples. Like other monopolists, the owner of a copyright is able to use its monopoly position to theoretically charge higher prices and derive monopoly profits at the expense of consumers and economic efficiency.

Thus conditions typically associated with anticompetitive behaviour in popular media industries include:

- discriminatory pricing and artificial regional barriers (for example, regional viewing and gaming zones and subsequent resistance to parallel importation (e.g., music industry));

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- general hindrance to direct free market access for consumers; and
- restricted entry for new or independent participants (independent participants and other secondary or meso-level players).

Corporate consolidation of popular media has created a monopoly over content and delivery. In reality, competition governance and copyright governance are not very symbiotic or mutualistic in liberal democratic societies (and recent case law is analysed in following chapters to support this contention).

The concentration of market share should remain a concern for competition law and policy. This is because there seems to be an obvious connection between concentration and market power (Leavis, 1933; Schiller, 1969; Petersen and Annand, 2005). Market power, of course, can arise not just by acquisitions, but also through a range of contractual relationships between parties. A merger is, in a sense, just another contract. Sometimes it is difficult to know where to draw the line between contractual relationships and mergers. Popular media industries flourish in a variety of horizontally collaborative environments that incorporate remarkable elements of mutualism and cooperation. In these settings, dominant players create predictable economic exchanges and maintain consistent product information and commercial exchanges. These behaviours are mimicked by each corporate entity as competitors follow each other (film and music are typical of this type of behaviour). For example, consistencies in sales and marketing and broadcast media promotion through 'top-forty'-style chart systems work in the favour of the dominant few. This level of standardization has enabled unprecedented cooperation amongst the major players. This raises concerns about market coercion and undue influence (examples are provided in Chapter 3 to support this assertion).

The rationale for the implementation of anticompetition legislation is to protect society and promote economic efficiency (see generally, Burgess, 1989). In a situation where a dominant market player with substantial influence refuses to comply and this ultimately leads to a reduction in competition, this player could be deemed to be abusing its power. This conduct is detrimental to the retailer and the consumer.

Hausman (2008) argues fairness in the marketplace is best achieved when neither no individual firm (or group of firms) is exercising significant market power nor is the price above the competitive price.[8] Popular media industries have traditionally displayed these unattractive characteristics.

Where naturally occurring temporary monopolies (such as those found in copyright industries) are created, it is in the best public interest to ensure these industries do not abuse their position of control. The question about such behaviour on the part of corporate citizens is squarely concerned with societal benefits overriding private interests related to profitably and efficiency. This relates to the implementation of effective competition

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that enhances the welfare of individual citizens through the promotion of competition.

In the West, unfair monopolistic practices have been addressed by legislatures in a bid to control and minimize sharp or unfair trading practices. Recent notable cases before US, EU and Australian courts highlight the particular issues. The observation made here is that media piracy and anticompetition cases dovetail the respective arenas because of the internationalization of copyright governance. When investigating agencies conduct an assessment of potential exclusionary conduct or complaints of anticompetitive behaviour, tests including the effect of narrow competition for the public as a benefit and the detriment to smaller market participants are considered. Allegations usually centre on issues such as a substantial degree of power in a market, taking advantage of that power by preventing the entry of a person into that or any other market, and deterring competition. The consequential flow is obvious in that consumers suffer both in terms of product choice and pricing. The object of anticompetition legislation is to enhance the rights of consumers through the promotion of competition and fair trading (consumer protection and consumerism). But the success of such formal measures is open to conjecture.

Synonymous with the preservation of copyright control is copyright protection against piracy. Corporate governance ensures cohesive copyright maintenance. When disruptive events such as illegitimate consumption occur, corporations react in a predictable manner. As discussed in detail in Chapter 6, corporations reactively assess the cost of illegal consumption and implement several control measures in a bid to stem the flow of piracy. The preventative strategies generally include technological protection, legal action and education.

The law provides for penalties and subsequent retributive justice to ensure general deterrence in order to control recidivism. Yet why do consumers continue to defy the law in the West? One explanation might be that on a moral level, copyright interference, including computer fraud, hacking into financial data, tax evasion and other classes of 'white collar crime', is not viewed as negatively as, say, actual property interference (that is, of tangible or physical property). Copyright interference as a form of trespass to intellectual property is broadly illegal and deemed harmful according to law. This dichotomy of morality has not been adequately explored in the literature, and an account of these attitudes is not only desirable, but essential for any proper debate about global media piracy.

The conclusion reached is that regulation of monopolistic behaviour has not ensured quality of outcome for consumers in terms of consumer welfare (namely fair pricing and service). Consumers have reacted to this imbalance in various ways. Media piracy behaviour could be described as the alternative regulation of anticompetitive behaviour. As such, it is the subject of debate in that context.

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Technological convergence

The final typology is concerned with innovation and economic development. Technological change predetermines popular media consumption in the modern setting through digitalization and convergence. This is because, unlike analogue devices, popular media digitized products are broad spectrum, accessible and generally pervasive in terms of popular culture products because of their ease of use and consumption (see Flew, 2005). Digitalization is a simple but effective utilitarian form of communication and information exchange that empowers individuals who wish to derive affective pleasure from popular media products without interference from an intermediary. In terms of consumption, digitalization complicates matters whether or not these pleasures are to be derived in an unfettered mode.

It is important to re-emphasize that popular media technologies – which are analysed in detail in Chapter 3 – have traditionally been controlled by a few dominant corporations throughout the twentieth century (see Longhurst, 1995; Negus, 1992). These industries constitute nothing more than a highly concentrated, horizontally integrated organization (see generally Canterbury and Marvasti, 2001).

Mandel (1975) identifies concentrated control by transglobal corporations as a fundamental tenet of late capitalism. Indeed, those who control the media industry are traditionally obsessed with discoveries, namely in the fields of electronics, communications, entertainment, and the further acquisition in these fields. It is argued that carte blanche control is the ultimate aim of corporate owners in the popular media industry. The rationale for having vested interests in a variety of related industries is obvious. Vertical integration allows for complete control and maintenance of the product from start to finish – a flow of production from raw materials (including intellectual property) to sales (Peterson and Berger, 1990, p. 143).

Globalization and technology also complement the rise of the corporation and the advent of innovation and consolidation of intellectual property, and together these elements form the core of advanced capitalist production and development. In *Late Capitalism*, Mandel's goal is 'to provide an explanation of the capitalist mode of production in the twentieth century' (Mandel, 1975, p. 9). Mandel was particularly interested in how capitalism had reconstructed itself as consumer capitalism. Consumer capitalism is concerned with the accelerated use of technology as fixed capital, and the implications of the emergence of technology and intellectual property. A study of popular media should therefore include an examination of the interaction between technology, commodification, the creation of surplus value through copyright acquisition and the subsequent control of tangible and intangible products in capitalist society. In the Foucauldian sense, the imperative by corporate citizens to subsume popular media represents *power* (corporate control of popular media), *knowledge* (technological determination)

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and *truth* (legal owners of copyright in popular media asserting their rights through formalist conceptions of copyright governance).

For Adorno, popular culture became consolidated through recorded formats that inevitably changed the way in which musical and artistic expression was perceived. By recording moments, records permanently created fragments of time. By inventing various formats, companies ensured that these products were capable of being recreated and thus repeated identically at any given time (and in any given space). Adorno (1990, p. 60) stressed that records themselves were not an expression of art, but as they were part of a 'breakthrough', records were able to 'transform the most recent sound of old feelings into an archaic text of knowledge to come'. In other words (ibid., p. 61):

> Ultimately the phonograph records are not artworks but the black seals on the missives that are rushing towards us from all sides in the traffic with technology; missives whose formulations capture the sounds of creation, the first and last sounds, judgment upon life and messages about that which may come thereafter.

Frith (1983, pp. 44–45) has stressed the importance of Adorno's contribution to the sociology of popular media:

> Adorno's is the most systematic and most searing analysis of mass culture and the most challenging for anyone claiming even a scrap of value for the products that come churning out of the music industry. His argument … is that modern capital is burdened by the problem of overproduction. Markets can only be stimulated by creating needs … needs which are the result of capital rather than human logic and therefore, inevitably, false. The culture industry is the central agency in contemporary capitalism for the production and satisfaction of false needs.

As principal controllers of finished products, corporate players are directly responsible for influencing the mass cultural landscape. In short, these multinationals set the entertainment standard and have standardized the norm for consumers. As Burnett (1995, p. 43) writes:

> The vertical and horizontal integration of the music, film and television production, publishing industries, and alignment of technology development and ownership that is coupled to production and distribution control, has never been more closely linked to the power centres of media and electronics industries in America, Europe and Japan.

Not surprisingly, the major players have become powerful primarily by a process of consolidation through mergers and acquisitions (including corporate raiding), and by controlling innovative change or development

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through joint-venture research and technological development (see especially Negus, 1992; Brown, 1997; Longhurst, 1995). In essence, media corporations are the epitome of what Mandel (1975, pp. 310–311, 342) described as 'late capitalism' – an aggressive and pressurized advanced form of capitalism premised on increasing levels of market internationalization, or, in other words, globalization in conjunction with the acquisition of intellectual property rights (IPRs). Andrews (1997, p. 143) succinctly describes Mandel's thesis as follows:

> It explains the emergence of technology and intellectual property … as the most valuable forms of capital. In this accelerating process old distinctions between fixed capital and circulating capital disappear. This leads to further specialization in labour to develop and manage technology and intellectual property.

The behaviour of the majors in film and television – especially in the last 50 years – fits the above description. Indeed since 1910, the core interrelated entertainment industries within popular music have witnessed a series of acquisitions. The industry has continued to be dominated by a few corporations from either side of the Atlantic (Negus, 1992, p. 3). During this period eight companies regularly accounted for between 83 and 85 per cent of the revenue in recorded media (see especially Chappel and Garafalo, 1977). Over the course of the past 100 years, the popular media industry has come to be characterized by three major factors:

- heavy concentration,
- organizational integration, and
- acceptance of specific technology.

Generally, these factors accurately reflect the state of play throughout the twentieth century. Within this broad corporate environment, technology in popular media was subsumed and thereby controlled.

Historically, the subsumption of innovative advancement by popular media corporations has provided for controlled synergistic developments between product creation and delivery. The same observation cannot be made for the period commencing this millennium. The most intriguing aspect of technology for the purposes of this discussion is its capacity to change and become double-edged in a relatively short space of time. Frith (1986, p. 286) is correct in maintaining that electronic advancement undermines the idea of fixed objects on which copyright, the essential legal safeguard of art as property, rests. Reference here is made to ('pirate-friendly') inventions for legitimate replication. Once the domain of industry professionals and elite consumers, in less than 40 years reasonably high and ultimately very good quality replicating technologies have become universally

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accessible to consumers. In this environment the challenges to the status quo are evident, and it is perfectly understandable why media industries are so obsessed about curtailing the carte blanche free use of their property in the twenty-first century. In this climate, individuals freely utilize external discoveries to consume popular media products and do so without the need for popular corporate media direction. In the current world of digitalization where quality is not an issue, the evolution of enabling technologies has not only created a legal crisis for industries delivering entertainment, communications and new technologies, but a moral dilemma for consumers. These issues are not new, but in this era the cause for concern is at its greatest.

By way of illustration, the Internet is like no other media protocol/device in that it connects individuals' computers worldwide by using access connection tools and an ISP. Communication devices (mainly computers) are able to access the Internet in remote locations or public places (where Wi-Fi services are available, and by 'leeching' from neighbours and those in close proximity). It is a virtual tool, but codependent on actual interconnected devices. Digital data is sent and received as 'packets' from one address to another. Modems and related signal and carrier devices enable people to subscribe to ISPs (telcos) for Internet plans where the user is afforded fast access and download rates for a relatively small fee.

In this environment, P2P developments thrive. BitTorrent was described in the *iiNet* case as a scheme for a highly efficient and decentralized means of distributing data across the Internet. As a form of software for accessing popular media it is exceptional in that it can be used for legal and illegal means concurrently. For the purpose of copyright infringement, P2P is an almost universal, ad hoc and free form of digitalized consumption because a successful download of any media involves several computers working online, communicating with one another.

Several users may be using computer protocols to swarm around one title, participating in simultaneous uploads and downloads of specific items or parts of a packet of data so that a complete file is made, shared and otherwise redistributed. Computers might be working in peer groups across the World Wide Web sharing in the production of a complete file. Each 'bit' makes a unique part. For example, clusters of persons in Australia may contribute 33 per cent of the bits to a movie, another person or persons in Bolivia may have another 33 per cent, whilst another in Canada might have yet another 33 per cent. Finally a person in, say, Denmark may have the remaining 1 per cent. Together, these uploaders have created a complete file as seeders and peers.

The material contained in the file is the subject of copyright control and restrictions. However the tools utilized may not be, and the proprietors and services providers are invariably pursued by copyright owners. BitTorrent's omnipotence as a legal and legitimate form of multimedia software is unprecedented. In the past ten years consumers have been able to

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progress from downloading P2P small files (equivalent to individual songs à la Napster) to downloading larger files (for example, albums with artwork) with the use of BitTorrent. Highly individuated behaviour in social forums has become a show case arena for the owners of the economic capital in popular culture.

This heightened state of corporate concern stems from the combined effect of burning, ripping and file-swapping – protocols, add-ons, application and devices generally standard in all computer hardware. Downloading and uploading means the loss of control of a lucrative mode of centralized cultural control. Innovation has provided a radically new mode of entertainment. The Internet is a way of communicative life. It intimates a true era of digitalization and convergence, and it is difficult to imagine how education and policing can subsume this paradigm shift.

In practical terms, copying perfect or near perfect recordings is a very standard task. It is suggested this behaviour might also be construed as socially acceptable behaviour despite the industry's strict prosecutorial stance. As mentioned above, P2P is heavily used for both legitimate and illegitimate means. As a form of software/protocol for accessing popular media it is extraordinarily fluid, and by virtue of its enabling properties it also possesses the positive aspects of individual behaviour in a civilized liberal society, namely:

- self-determination (freedom of choice) through the Internet (without corporate or government coercion); and
- self-reliance (the emergence of a type of social Darwinism) and the capacity for individuals to evolve naturally, free from organizational influence and interference in new or different settings (see Heywood, 2003, pp. 55–56).

These processes are inherently private and self-regulating.

It is argued that freedom from interference in the exchange of information is a natural desire for citizens in liberal societies. Famous literary works, in particular those of Shakespeare, provide interesting examples of liberal values throughout history.[9] Schwarzschild (2006, p. 217) identifies the relationship between individuality and voluntary exchange: 'They ensure a degree of moral independence from other people; they are also an indispensible counterweight to government power and the force of social conformity.' Not all innovation in popular media has been subsumed by corporations. Consumers' attitudes towards emerging digital technologies reflect nineteenth-century ideals in the form of a more liberal approach by individuals towards media piracy.

If it is acknowledged that any freedom expressed by individuals in the twenty-first century in relation to advancement (especially replicating tools and P2P software) is more consistent with classic liberal attitudes, then it is difficult to accept natural citizens have become morally derelict in their duty

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towards corporate citizens. Independently evolving developments epitomize emancipatory concepts as espoused by early liberal thinkers, such J. S. Mill, who argued for individual independence and autonomy when there 'were growing pressures to conform which inhibited individual spontaneity and cultural diversity. Without the space for individual experimentation with life the human potential would be thwarted and society would stagnate' (Eccleshall, 2003, p. 35). When conditions allow for liberal expression, problems between the individual and authoritative control are created. The issues between individuality and opportunism, corporate control, government regulation and legal instruments are briefly discussed below and are the themes for the chapters to follow.

Tensions between liberalism, realism, copyright control and technological change

The *iiNet* case is unusual in that it demonstrates the capacity for challenges to a strict and formal application of statutory copyright legislation when assessing technological impact on copyright. The differences between innovative change and (copyright) statutory interpretation are summarized at the outset of the case (per Cowdury J at para. 19):

> The result of this proceeding will disappoint the applicants. The evidence establishes that copyright infringement of the applicants' films is occurring on a large scale, and I infer that such infringements are occurring worldwide. However, such fact does not necessitate or compel, and can never necessitate or compel, a finding of authorisation, merely because it is felt that 'something must be done' to stop the infringements. An ISP such as iiNet provides a legitimate communication facility which is neither intended nor designed to infringe copyright. It is only by means of the application of the BitTorrent system that copyright infringements are enabled, although it must be recognized that the BitTorrent system can be used for legitimate purposes as well. iiNet is not responsible if an iiNet user chooses to make use of that system to bring about copyright infringement.

Fragile tension has probably always existed in finished copyrighted products due to the process involved in blending incorporeal chattels within actual objects. The heavily protected copyrights possess no intrinsic worth to the consumer, but the products give affective pleasure to the individual. As individualism and personal autonomy are deeply embedded in classical liberal thought, emerging digitalization has called legal and technological divisions into question.

Convergence in popular media has fused the boundaries between a legal understanding of exclusive copyrights as private rights and a common

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understanding of public rights. This has led to a misguided perception by consumers about access rights in popular media. It is argued that individuals rank their own rights, including the right to choose without influence or control, higher than the holders of the exclusive copyrights. If so, then the effect of statutory interpretation of copyright is being affected. Convergence in popular media has affected copyright governance frameworks because it potentially undermines the stability of copyright laws and challenges corporate control. It is argued that such change is capable of destabilizing popular media industries as a consequence of individualistic, self-determining behaviour. This development creates omnipotent opportunities in liberal society. The most unprecedented private-to-public tool capable of destabilizing the balance of power is the Internet – something regulated by laws *other* than copyright legislation.

It was affirmed in the *iiNet* case there is no compulsion (under liberalism) on any person to protect the copyright of another. It was held that: 'The law only recognizes a prohibition on the doing of copyright acts without the license of the copyright owner or exclusive licensee, or the authorisation of those acts … it is impossible to conclude that *iiNet* has authorized copyright infringement' (per Cowdury J at para. 20).

Liberalism is the very political ideology that underpins US, UK, Australian and other significant English-speaking common law copyright jurisdictions including Canada and New Zealand.[10] Drahos (1998, p. 2) correctly observes that 'property in expression (copyright) conflicts with freedom of expression'. Herein lies the point of contention between the right to unconditionally utilize information via convergence in popular media and the right to preserve proprietary interests.

Prior to the mid-1800s, copyright was regarded as a creature of the common law and not statute. Modern common law copyright regimes are now completely codified. Common law, English-speaking nations (especially the US and UK) are extremely influential in terms of media commodification and consumption. They are therefore of particular interest because several notable cases concerned with legal and illegal consumption have been heard in those jurisdictions. But more notably, liberalism as an important political ideology evolved alongside copyright laws in these two important common law jurisdictions.

Yet the purpose of copyright in the modern sense, however, is not to preserve a natural state of freedom. Rather it is a mode of complex intangible property and its purpose is to protect an environment that to a large extent has allowed a consolidation of property into the hands of a few powerful players who are cultural and copyright gatekeepers.

It is important to acknowledge this because a fundamental shift has meant the Internet is now probably the major cultural gatekeeping forum. Nonetheless, it is trite law to state that copyright protection exists in

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cyberspace. The issues remain unresolved, and Lyman (1995, pp. 33–35) correctly summarizes the ongoing dilemmas:

> [N]et-culture – if that isn't an oxymoron – has become hostile to the concept of intellectual property … [and] although the Internet has become more sociologically diverse, it still reflects the academic view that knowledge is properly governed by a gift culture in which each of us gives away what we know for free, and takes what we know for free.

The political and legal reality seems to be that on any objective assessment of media piracy, digitalization and convergence are occurring on multidimensional level.

Illegal consumption combined with unresolved neighbouring laws issues are material to these developments. In Chapter 8 the impact made on copyright governance by the advent of personal websites and social networking sites such as YouTube, Facebook and Myspace is discussed. It is quite clear the Internet has become the new forum – a new marketplace where money is not necessarily exchanged. Instead, exchanges are represented by a populist-created commons movement. In simple terms, the act of purchasing a song in the form of a CD single at the local shopping mall for $5 or even by mail order is now lost in a milieu of exchange – legal downloads, illegal torrent uploads and downloads, and streaming. This low-level regulatory environment has made it difficult to successfully monitor, review and implement protection against piracy.

Methods: why empirical and doctrinal literature should be examined concurrently

The approach adopted for the theoretical insight relevant to this study combines case law, legislation and literature. Research into the political economy of popular media does not usually take into account doctrinal developments. However, the information contained in the cases extends beyond the law. Decisions, submissions and related legal extrinsic materials also provide a fertile source of empirical data. These are often ignored in popular media studies, which is curious in itself given the inextricable link between copyright and popular media products. This book remedies any deficiencies in the existing literature by including significant legal, politico-economic and cultural developments. A concurrent application of primary and secondary sources is not only preferable when examining the tangible and intangible dimension of popular media products, but essential. By providing an examination of doctrinal and statutory developments in the subsequent chapters, the methodological framework for interpreting, understanding and characterizing digitalization and convergence becomes firmly grounded in both

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legal and empirical reality. Given the litigious nature of the film, music and gaming industries, the law provides the best source of contemporary primary evidence in the form of forensic data and judicial reasoning. It is highly desirable to cross-reference the data and literature with statutory change vis-à-vis significant court decisions. A *substantive* position rather than a formal discursive approach is adopted in relation to the legal concerns raised in the case law and literature. Emphasis is placed on recent cases and recent legislative change where the central consideration has been the management of digital rights in an age of broad-spectrum file-sharing and -swapping.

Building on existing literature with empirical insights and primary legal data, this study enables a more robust examination of the state of disorganization in popular media. Reliance is also placed on quantitative data provided by various powerful industry associations. In many respects, the case law provides a form of triangulation in a bid to overcome subjectivity and bias on the part of industry representatives.

Legal insights are also useful because in terms of the formal separation of powers in a democratic liberal society, the judiciary (as opposed to the executive and legislature) is the most independent arm of responsible government (both in terms of formal and informal governance structures). Consideration of judicial reasoning based on forensic evidence helps to assess positive theory about popular media and media piracy and corporate behaviour, the empirical reality of consumer behaviour and corporate control in popular culture, and the normative dimension of copyright governance in terms of digitalization and convergence.

The methodology adopted asks questions that ultimately assist in conceptualizing a framework for the purpose of developing a new perspective that enables a multidisciplinary approach. And despite some excellent debates in the literature and case law relating to media piracy, the consequences of the measures and strategies adopted by the ruling corporate elite have not been critically analysed.

Outline of chapters

In addition to introducing the themes, and setting the scene, Chapter 1 also examines the governance of copyright, and the creation of a globalized and consolidated popular media industry.

Chapter 2 addresses international copyright governance and the manner in which the popular media industries are controlled and supervised. The modern copyright industry framework in popular media comprises various vertically and horizontally integrated local and international institutions. Copyright is a social-interest-based concept created to enable, promote and otherwise encourage innovation for the greater public good and benefit. Its development reflects significant economic changes in the West, which also shape prevailing socio-economic rules and public policy.

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Copyright was transformed into an entrepreneurial proprietary right by companies for the purpose of perpetual commercial exploitation. This transformation occurred at the time significant replicating advancements were made. Accordingly, lobbying was required to assist in alerting Parliament to the need to create a framework that has by and large facilitated the creation of the current status quo (Barnett, 2004, p. 10). In short, the development of modern copyright regimes was a reaction to the prevailing politico-economic changes.

Chapter 2 examines how copyright in popular media became politicized, That is, it became politicized in the sense the laws were created to primarily protect and preserve corporate interests in the West. It is asserted that the current international legislative and regulatory framework overwhelmingly supports and protects the interests of only the most powerful actors. The implications for the organizational framework for copyright are obvious to the extent that copyright has become politicized by moving from an individual rights-based concept to an internationalized and statutorily codified process for the preservation of power in the hands of a limited number of multinational corporations. This can be described as the transition to corporatized copyright control in advanced stages of capitalism.

The chapter also provides a case study on pressures imposed by Western nations in the face of flagrant piracy. The literature is dominated by reports of the excesses of piratical conduct in nations less developed politically and economically (and legally). The conclusion is that in this modern copyright setting several legal and illegal factors affect global copyright governance through emerging digital communications, namely the Internet. The chapter builds on the unusual idea that individuals' natural rights and corporate copyright owners' rights in popular media industries are incompatible. It supports the proposition made in Chapter 1 that copyright is a policy or instrument of social control.

Chapter 3 analyses the corporate control of popular culture and the manner in which products are organized. The governance of competition policy in popular media intersects with traditional or established activities including trade, commerce, corporate regulation, administration of associations and organizations, and copyright. The chapter argues that centralized corporate control of copyright law in popular media constitutes obvious anticompetitive behaviour because the concept of copyright promoting innovation has been usurped by the desire of corporate citizens to control intangible property to the extent that it remains in their exclusive possession. If such objectives are deemed anticompetitive then such conduct is not in the best social interest.

The chapter also charts the rise corporate of media citizenship through transglobal capitalism in the light of competition policy, regulation and its governance framework. The consolidation of standardized technologies (tangible products in the form of industry-endorsed formats) and copyrights

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(intangible property) is identified. The creation of an exclusive copyright club comprising a dominant few is also identified. The chapter determines the point at which corporations subsumed copyright and effectively became copyright industry controllers.

Competition policy in popular media industries is a dynamic concept driven by a desire to regulate copyright and influence modes of delivery. This is also historically relevant because popular media is correctly particularized as an arena traditionally concentrated in power both in terms of copyright ownership and technological control. This was certainly the state of play until the end of the twentieth century. Accordingly, the nature of anticompetitive behaviour in popular media industries is identified and the effectiveness of competition policy is assessed in the light of potential market power abuse.

Chapter 3 argues that because popular media industries exhibit natural monopoly characteristics they are in conflict with concepts of social interest. It re-emphasizes that the phenomenon of the globalization of popular media products should not be viewed as merely a global consolidation of popular culture per se, but rather as exclusive international and domestic appropriation of copyrights contained in finished products (commodification). In other words, when popular media corporations merge and become more centralized, the impact is twofold: cultural control of the commodities and capacity to exploit these commodities in the future (the intellectual property component).

The concentration of market share has long been a concern of competition law and policy. This is because there is an obvious connection between concentration and market power. Market power, of course, can arise not just by acquisitions, but also through a range of contractual relationships between parties.

Competitor collaboration in popular media is also identified. In recent years the main reason for an interest in competition governance in popular media industries is that one of the more dynamic features of popular media controllers is the capacity to enter into various semi-permanent or arm's length commercial arrangements (joint ventures, mutual benefit agreements and other more fluid arrangements). Due to the exclusive nature of copyright, the potential for naturally occurring monopolies to flourish in media industries exists. This is because the exclusive ownership and proprietorship embedded in the products is controlled by the owners of the means of production. That is, traditionally the technologies used to mine these rights have also remained the property of the dominant few. Combined, these elements form the essential ingredients for the existence of natural monopolies.

The chapter develops the argument that the music, film and games industries (in that order) are extremely centralized and represent some of the most anticompetitive forms of commercial enterprise in advanced capitalist

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societies. Misconceptions about popular media industries are also identified in this chapter. The assumption that media firms always, or usually, behave in an economically rational manner (especially when exposed to media piracy) is questioned. The conclusion sets the scene for the next Part where an analysis of the challenges to centralized control is presented.

The chapters in Part II make a case for the creation of a new structure in governance arrangements to enable socio-economic rather than economic regulation. Part II also assesses challenges to the dominant position of the major corporations in popular media. Chapters 4, 5, 6 and 7 highlight the interconnected problems facing the major actors. They consider connected, but unresolved rights issues, and the illegal threats facing popular media industries. Chapter 4 draws on the legal principles established in Chapter 2 and provides a concurrent examination of legislative developments and relevant case law. These developments highlight the complexities in the changes currently being experienced in neighbouring legal arenas. These changes have clearly impinged on the structure of copyright industries in a world of digitalization. This legislative impact is referred to as an external or horizontally integrated legal challenge.

Neighbouring laws in digital arenas refer to the statutorily and jurisdictionally separate and distinct set of technology-driven statutes that have been enacted without the necessary direct consideration of the copyright regime and its myriad exclusions and limitations. In light of this legal convergence, reconciliatory digitalization initiatives, namely law harmonization protocols between copyright telecommunications industry frameworks, are examined in order to assess the impact.

It is trite to assert that primary infringements of copyright become prevalent once copyright owners make products available online to the public, or once members of the public make products, primarily ones that infringe copyright, available online (P2P). Illegal consumption of copyrighted products is a hazard, as is the risk of illegal use of copyrighted products. Concern should not just be about copyright infringement per se, but rather about individuals participating in all forms of copyrighted products.

Chapter 4 analyses the disorganizational and reorganizational effects currently being experienced in popular media industries that are materially reliant on the maintenance and preservation of copyright on the one hand, but have become increasingly reliant on emerging but externally dominant technologies located in the telecommunications arena. The commercial value of the copyright industries is being diluted in the digitalized world by these concurrent developments. In the digitalized world, copyright industries appear to be experiencing disjointed, but incrementally negative effects capable of diluting or diminishing the commercial value of copyright industries. The obvious negative effects include piracy, but residual effects in the form of consumer interest in other popular forms of entertainment such as social networking must also be viewed as destabilizing because they

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distract consumers from traditional modes of commodification. The chapter stresses the need to recognize that the commercial value attributed to copyright by the major players is being hollowed out by various interconnected factors, including competing legal interests, changing business models and especially through individuals' changing attitudes.

Chapter 4's analysis is limited to copyright legislation in the West, and the respective digital agendas and telecommunications laws in those jurisdictions. Reference will also be made to international obligations and specific jurisdictions where relevant. The laws will be scrutinized in light of the most significant recent cases. These cases demonstrate popular attitudes and beliefs in liberal society. Common themes in these decisions raise concerns about how consumers' overall attitudes towards copyright have been shaped by emerging technologies.

In the light of emerging technologies, several significant cases over the last decade have attempted to deal with the problem of digital media piracy (by way of example, and most notably, *A&M Records, Inc. v Napster, Inc.* (*Napster*) (US, 2000), *Universal Music Australia Pty Limited v Sharman License Holdings Ltd* (*Kazaa*) (Australia, 2005), *Cooper v Universal Music Australia Pty Ltd* (*Cooper*) (Australia, 2005), *Neij, Svartholm, Sunde, Lundstrom* (*The Pirate Bay*) (Sweden, 2009) and, most recently, *iiNet* (Australia, 2011); these examples are purely for introductory purposes, several other important cases are addressed in following chapters). In addition, there is liability-limiting legislation. So-called telco acts, for example, consider the implications of Digital Millennium Copyright Act 1998 (US), the Telecommunications Act 1996 (US) or Telecommunications Act 1997 (Australia), limit obligations, liabilities and remedies available against ISPs (pursuant to 'safe harbour' provisions). What becomes clear is the existence of unresolved matters between copyright and telco/ISP legislation through convergence.

The cases analysed suggest copyright and telecommunications industries do not make good neighbours in legislative arenas. The long-established popular media industries continue to elevate their concerns to the highest level on the political calendar thus rendering digital harmonization problematic. The issues explicated in the case law are technically complex and highly contestable, and the case law demonstrates divergent views.

Obviously in some cases the findings are less vexing (for example, the *Kazaa* case or the recent settlement in *Arista Records LLC v Lime Group LLC* (2010) (*LimeWire*)). It is argued that contrary to the misguided view held by industry representatives, applying identical legal principles to very different factual circumstances is not possible. Indeed contrary to the views expressed by copyright industries, digitalization is not simply about copyright. Whether media piracy debates should focus solely on the narrow issue of copyright infringement as opposed to forming a component of a broader topic concerned with emerging consumption patterns requires greater consideration in the literature. That is, whilst consumption in the general

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economic sense requires the elements of a financial transaction, individuals engaged in these transactions are also capable of participating in discrete forms of infinite communication and transmission. These consumption patterns are unique when one reflects on other goods and services in the marketplace (for example, the purchase of finite items such as food or urban utilities).

This leads to the legislative dilemma that was exposed in the *iiNet* case. Major international motion picture studios initiated proceedings against the ISP based on the undisputed fact that a number of *iiNet* customers were downloading films. Yet while it was found that certain iiNet users infringed copyright, the ISP was not found to have authorized BitTorrent downloads of films. But it was very plain from the evidence that iiNet, as an ISP, possessed the relevant technical capacity to stop illegal downloads. Why then is it so difficult for telco and copyright industries to form workable memoranda of understanding? It is argued that the legal jurisdictions in which these industries reside are at cross-purposes and not capable of being reconciled in this current climate. One practical illustration is the spurious aspersion cast on ISPs by Hollywood that large ISP customer download plans attract more illegal activity. This correlation might be apparent from the view of a dominant few, but it does not account for large volumes of legitimate Internet traffic in the form of social networking. Online game sites, for example, require a very large amount of data, and YouTube demands extensive usage.

The conclusion is that these externalities have challenged the rigid control once exercised by copyright controllers because conditions in the digital environment are not necessarily determined by developments in copyright governance. Take the example of safe harbour provisions that operate as a defence. They provide a defence to actions against copyright infringement brought against an ISP (for example, the Digital Millennium Copyright Act and the respective mirror laws throughout the West). Due diligence is one way an ISP will discharge its obligations in relation to actions against copyright infringement brought against it. Prima facie certainty against impunity has been provided to carriers and ISPs over the last ten years. To date (2012), ISPs have largely relied on good faith and reasonable and best endeavours principles to minimize liability. Yet whilst the safe harbour defence was raised by iiNet, the Court did not need to discuss it because infringement had not been established. The *iiNet* case is one of the recent authorities examining issues of remoteness in terms of causation and a general lack of interconnectedness between copyright owners, ISPs and consumers in the world of digitalization. The case demonstrates how an ISP might protect itself from legal action without even relying on statutory defences. The defendant was able to argue successfully that through telecommunications industry best practices and other semi-regulated compliance initiatives, such as codes of good conduct, it had met its legal requirements to both the aggrieved parties. The dilemmas for copyright owners remain unresolved because, at best,

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if third-party (customers) infringement is proved to have occurred, but due diligence has been performed, then the ISP is deemed to have taken reasonable and practicable steps and cannot be accused of failure to prevent piracy or other forms of illegal behaviour. At worst, if a court rules infringement did not occur and that an ISP was a 'mere conduit', then a defendant may have a complete defence. The remedies are therefore limited given the robustness of the defence provisions. Good neighbour fences appear to have been erected by competing industries, or rather externalities have encroached upon the uneven playing field once exclusively enjoyed by corporate popular media industries as copyright owners.

Chapter 5 is concerned with recent developments in innovation and format change in an era of digitalization. It provides a historic account of liberal attitudes to illegal access via new technologies.

The chapter also presents significant developments in media consumption. Its main focus is the rise of digitalization and, in particular, universal accessibility to replicating devices. It provides a historical examination to demonstrate the fact that illegal consumption is not a new phenomenon. Three centuries of copyright development in common law nations has provided a fertile source of technology-versus-copyright-style cases. By analysing the case law and literature specifically concerned with innovation, the chapter attempts to situate the debate about the rise of centralized corporate control of popular media through technological consolidation.

By way of background, the first section of Chapter 5 briefly charts the evolution of popular media products, including the transition from analogue to digital reproduction. This is significant because while media piracy has existed for over three centuries, near perfect replication is a relatively new development. The section describes popular media devices (including their replicating potential) and revisits the argument that the system of copyright control that emerged in the mid-nineteenth century was designed for corporations as the financial controllers of popular media, and whose priorities rested with copyright as an entrepreneurial right. From book pressing to universally popular audio file format extension known simply as MP3 (motion picture experts group – 1 audio layer 3), to a raft of other subsequently developed audio and visual file formats with high-quality compression rates, a direct correlation has always existed between developing technologies and the desire to consume products in new formats, legally or otherwise.

The inextricable relationship between popular media's corporate control of intangible property and tangible products is examined in the light of technologies directly and indirectly related to popular copyright industries. It is argued these technologies are double edged in the sense they have positive and negative effects. The next section of Chapter 5 identifies several concerns. External developments in the form of MP3 or BitTorrent are clearly capable of facilitating pirated media. But internal technologies directly manufactured by different arms of copyright industries are also specifically

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capable of facilitating pirated media (for example, Sony's replicating and storage media and devices (blank CDs and PlayStation)) enable illegal activity as freely as other non-industry standards (namely MP3).

The second form of innovation is usually unrelated to any media industry developments, lacks governance and appears to evolve organically (without any apparent economic incentive in some cases) – but is nevertheless unequivocally empowering. These are so-called freeware products (BitTorrent and other P2P). The definition of copyright is rigidly connected to the concept of mechanical reproduction (and subsequent manufacture). Historically, the rationale for the implementation of copyright was to protect economic interests in intellectual property. Modern copyright law developed to complement advances in the mechanical reproduction of works. Accordingly, Chapter 5 maps the significant reactions by corporate citizens when copyrights are threatened.

Chapter 5 examines the tension between innovation and copyright law. This tension is a double-edged sword because it enables optimal exploitation of copyright in a commodified form. However it also emancipates individuals who illegally use copyrighted products. One conclusion is that while copyright law is an instrument of social control, the problems it faces are technologically determined. Since the advent of digitalization the quality of illegal products has been remarkable given the capacity to replicate perfect or near perfect copies.

Internet-based P2P file-sharing networks also differ significantly from physical digital media because of the social networking dimension. P2P sharing is more problematic. It follows that omnipresent digitalization channels have empowered consumers because they are free to consume popular media products independently and in any manner and form. That is, where consumers were once limited to a small range of prescribed hard formats, exploration into new forms has created several discrete avenues.

What becomes apparent from the case law is the *reactionary*, not the *anticipatory*, approach adopted by corporate citizens. To claim, as some corporate citizens do, that users of perfectly legitimate social networking and file-sharing tools are somehow complicit in acts of copyright infringement is blatantly unfair. Yet corporate citizens continue to initiate proceedings against innovators of new technologies, which is incongruous with the fundamental tenets of economic liberalism and, in legal terms, would border on the vexatious. Several cases demonstrate the fact the controllers of popular media are exceptionally litigious towards parties (natural or artificial) that pose a threat to the status quo through their use of emerging technologies.

An analysis of case law shows that, for substantive and procedural evidentiary reasons, it is becoming increasingly futile for corporate copyright industries to resist change. The fact that it was revealed in the *iiNet* case that iiNet (the third largest ISP in Australia) received allegations of infringement involving in excess of 5,000 Internet Protocol (IP) addresses over

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a seven-week period indicates that media piracy is more than an illegal act. It is a popular social act. The popular nature of media piracy is also expressed on the forums of BitTorrent sites where downloaders and uploaders brazenly exchange opinions on the quality of the illegally sourced items. In other words, the infringement notices suggest groups of like-minded individuals are exchanging information as if they were in some form of book club for piracy. (And it leads one to wonder just how many complaints are received by the largest telcos in Australia (Telstra and Optus)). Given the scope of the problem, it would be no more than a daydream to suggest that successful legal action against an inordinate number of downloaders and uploaders is in the best public interest. Civil, quasi-criminal and criminal copyright infringement cases are costly given the complexities of intellectual property. While corporate citizens continue to feel aggrieved, governments would hardly justify the significant expense that would be incurred in terms of court resources.

Drawing on the problems revealed in Chapter 4, it is argued that ISPs have made available online (pursuant to copyright legislation) copyrighted material capable of being manipulated by humans through computers. The act of making something available en masse is an unprecedented development, and it is argued that the sequence of actions to download a file and leave popular media available to, say, BitTorrent users in a P2P environment is beyond copyright industries' control for various interlocking reasons.

The conclusion is that, historically, new technologies for legitimate and illegitimate consumption have always coexisted. Furthermore, despite aggressive attempts by artificial citizens to stunt the advancement of technologies in direct competition with their own internal technologies, the case law supports the proposition that external enabling devices are perfectly reconcilable with conceptions of liberalism, but some incompatibility exists with corporate copyright models. The cases explicate the fact that ongoing incompatibility continues to exist with corporate copyright models. At worst, digitalization promotes illegal consumption and, at best (through P2P file-sharing), it offers external models where popular media copyright holders have no option other than to license their products to third parties on less favourable terms (for example, Apple iTunes stores). In either scenario, soft formats are beyond the control of corporate popular media industries.

Adopting a legal realism perspective, Chapters 6 and 7 substantively examine the illegitimate attacks on the organization of copyright, namely acts of piracy. 'Organization' means the interrelationships between emerging technologies and copyright law in the core popular media industries affected by media piracy.

How effectively have corporate entities in popular entertainment media pursued copyright protection and management in the light of attacks on the position of the dominant status quo? Chapter 6 provides a detailed assessment of the corporate and political response to illegal consumption.

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It addresses the legal and politico-economic approach to piracy by analysing the success of the current regulatory regime, prosecutorial policies and civil and criminal legal action. It considers the response by the major stakeholders, namely the corporations.

Chapter 6 provides an empirically grounded assessment of the methods implemented by popular media corporations in the war against illegal consumption. It evaluates the overall success of the anti-piracy policies implemented by these copyright industry stakeholders. It examines first-, second- and third-line strategies (technological, legal and educational measures). These strategies are deployed concurrently, cumulatively and conjunctively in the sense they attempt to reduce illegal activity through campaigns designed to create formalized consumer awareness, modify behaviours and ensure that consumers comply with the law. The first is described as primary in the sense that research and development departments have been established by copyright owners to help make piracy technically challenging. The second quite simply relates to legal sanctions whilst the third is used to consciously appeal to individuals to refrain from consuming products illegally. These measures are described as corrective processes, and will be discussed in Chapter 6. The aggregate rate of the norms displayed by many consumers shows a lag in the actual success of these stages. If anything, these strategies have been the subject of ridicule and contempt by citizens in liberal democratized societies. The guiding question is: what is the overall effectiveness of these preventative steps?

The chapter is concerned with the multidimensional corporate response to media piracy. It is posited that legal sanctions and copyright preservation remain core strategic business positions and solutions adopted by the major actors. It maps out legislative, procedural and substantive difficulties. Significant legal obstacles in copyright enforcement are identified, including why the state does not deem copyright infringement a high priority in the overall public safety enforcement framework. The level of enforcement adopted by investigating agencies specifically devoted to copyright regulation is comparably minimal when one considers the resources devoted to tangible offences against property and persons in the form of policing, taxation, border security, and customs. This is reflected in the low rates of court activity involving copyright breaches. The nature of penalties in successful cases is also considered.

The impracticalities of pursuing individual pirates are examined. Substantive litigation is aimed at ISPs and software design pioneers (as in the *Napster*, *Kazaa* and *UMG Recordings, Inc. v. MP3.com, Inc* (2000) (*MP3.com*) cases), but the *iiNet* case demonstrates that emerging technologies cannot necessarily be limited by legal action.

Despite these general observations, the current environment in which anti-piracy policies are implemented is of particular interest and concern because the literature shows that the key actors have traditionally adopted

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both *reactive* and *anticipatory* policies in order to ebb the flow of illegal consumption. This tends to suggest these policies have produced mixed results despite the fact the industry is combating the damage to copyright property more strenuously than it ever has before.

Chapter 6 also attempts to reconcile the doctrinal developments raised in previous chapters by focusing on both the general and specific deterrent values (if any) of the more well-known cases. Accordingly, emphasis is placed on the capacity of statutory regimes to control P2P behaviour (especially BitTorrent file-swapping practices). These decisions demonstrate an inherent weakness in the ability of copyright legislation and legal action to restrict the capacity of individuals to consume products illegally.

Notwithstanding the limited number of cases that are or have been before courts and copyright tribunals, the legal-political response by the major players has been to take the stance that unauthorized use is more than illegal – it is criminal or quasi-criminal and therefore punishable according to law. Criminal behaviour relating to financial loss is also gauged by societal norms and values that are largely shaped and influenced by powerful groups in society. For example, copyright infractions are generally deemed by corporate copyright industries as an opportunity loss because of the potential for interference with the primary commercial imperative that is associated with copyright exploitation. While traditional, formal conceptions of justice define illegal behaviours as crimes, substantive conceptions adopting critical legal perspectives broaden the scope facilitating norms, values and even morals. Media piracy for non-financial gain should not be ranked equally with piracy for commercial gain in the form of racketeers or site administrators in any criminological sense. Chapter 6 assesses the moral dimensions of illegal consumption in the light of the literature concerned with deviance and anti-social behaviour in Western society.

It is contended that many citizens in liberal democratic societies (and probably elsewhere) do not equate downloading a movie or CD without paying in the same light as walking into a store and stealing a DVD or CD from the store shelf. Downloading is embedded in notions of soft or quasi-immoral conduct whereas stealing is immoral behaviour. Furthermore, the movie downloader who occasionally consumes a show must clearly be distinguished from the commercial operator who procures the media and passes it on for favourable consideration. Commercial operators might be described as robbers, but not individual consumers, as uploaders and downloaders, because of the aggravated nature of the activity. That is, profit obtained through illegal means is akin to proceeds of crime, but performing illegal activity for personal consumption or even swapping for some altruistic reason (for example, expressing fondness for an artist's work by disseminating an illegally recorded concert on YouTube) must be viewed as morally distinct – notwithstanding both acts are illegal. Legal realism allows for an examination of these activities.

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What is important to note is that rarely are end-users found to have committed aggravating offences. Although, legislatures deem copyright infringement to be a serious matter, judiciaries do not place the same weight or value on acts that would objectively create the elements of a serious offence. When one thinks of subjectivity involved in elementizing fault in terms of *mens rea*, one thinks of malice in relation to actual criminal offences against property and persons. These ordinarily include stealing objects, destruction of property or reckless acts of violence. The perpetrator and victim are objectively easy to identify. In all these scenarios, a person cannot be said to be lawfully excused from his or actions in any objective sense. File-swapping cases demonstrate, however, that consumers engaging in illegal activity as uploaders and downloaders are inextricably linked across various sites offering conduit services, and to the ISPs acting as the primary enablers of information exchange. Proving the elements of any copyright offence is problematic because inbuilt into this complex communicative process are several discrete avenues for all the respective parties in distancing one another from liability. Strict liability or even absolute liability actions are rendered meaningless if the aggrieved parties cannot even establish causation. Even if courts did, there is little empirical evidence to support the proposition that offenders (infringers) are strenuously pursued by prosecutors in Western society.

The current literature and case law suggests combating media piracy can, at best, be described as incrementally disjointed. Chapter 6 contributes to the debate by analysing the effects of piracy prevention. Any analysis in the academic literature that extends the dimension of technology and law might be construed as relatively underdeveloped as recent contributions do not provide a wide and comprehensive range of substantive normative works relating to the measure of actual success of current piracy protection strategies. Chapter 6 attempts to remedy some of these deficiencies.

Copyright laws are generally flouted by both consumers and pirates in a synergistic process, both in the West and emerging economies. Chapters 1 to 6 focus on consumption patterns from within Western nations. Chapter 7 considers the relationship between Western consumers and emerging economies in the light of moral and altruistic considerations. The chapter also analyses the inherent structural weaknesses that preclude a substantive governance framework in emerging/developing nations and lead to a façade of regulation – an appearance that something is being done. The West repose to piracy is a thinly disguised threat that trade sanctions and embargoes will be imposed if universal (Western) notions of copyright fail to be imposed. It is argued that any objective blameworthiness on the part of emerging nations should be viewed, at least in part, as due to Western influences.

Chapters 2 to 6 highlight the strong emphasis in the literature on media piracy as a one-dimensional issue based purely on legal transgression. An examination of the statistical data proffered by the industries' associations

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confirms this. But there has been no comprehensive consideration of why consumers find illegal consumption so desirable. One explanation is obvious, and this is reflected in the play-for-free attitude. But this simple observation does not explain individual uploaders' motives as altruistic consumers who risk legal action. Acts of bravado and rebellion have been identified to some extent in the literature and cases, but those without malice or political motivation are largely ignored in the literature. For example, what possible benefit may an uploader who subscribes to a cable service have in uploading a TV show for the benefit of viewers who are not subscribers? By way of analogy, these particular acts are reminiscent of free-love movements – and are consistent with liberalism. The anarchical dimension of illegal consumption therefore requires examination.

Part III focuses on cultural convergence matters, such as the mode of consumption and its effects on copyright policy. Chapter 8 introduces a parallel theme to the debate by suggesting consumer discontent is also inextricably linked to modern illegitimate consumption. It explores whether there is any causal nexus between P2P file-sharing (and other modes of file exchange) and a genuine lack of consumer discontent vis-á-vis the manner in which popular media is offered by the major players. Has the Internet (and allied software products) emancipated consumers to the point that they no longer accept at face value the monetary value placed on cultural products owned by major firms? In other words, does this independent behaviour constitute some form of protest?

Chapter 8 revisits the political and legal themes raised in Chapter 1 by arguing that consumers empowered by change have undermined the concentrated corporate status quo in the sense that consumption patterns have significantly decentralized in the past decade. And despite some initial denial on the part of corporate controllers that external technology could seriously challenge the dominant position, the fact the dominant popular media industries have entered into external joint ventures with allied and unallied industries suggests that consumers are not responding to the traditional entrenched business model. There are significant socio-economic reasons for the denial that the concentrated status quo was capable of being disturbed, including consumer discontent about how popular media markets products for consumption, as well as more 'interesting' or exciting modes of cultural exchange competing with popular media. In addition to pricing and perceived value for money, issues also relate to choice, range and mode of delivery of commodified popular culture. How these issues are juxtaposed in terms of social networking developments are discussed in Chapter 8.

As stated in Chapters 3 and 5, corporate citizens act as powerful gatekeepers in relation to popular culture. But as new technologies have evolved independently of any entertainment media industry involvement, consumers have become less influenced or controlled by these major companies in terms of how products should be consumed. Similarly, consumers have

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become less interested in the traditional products and prefer to surf the 'net for entertainment. The Internet has enabled consumers to listen, watch and play entertainment media without the need to access main industry channels.

Social networking provides the best case study about these challenges. Change or, rather, a shift in power from centralized to decentralized modes of control has created a *revolution* of sorts. This development suggests some form of biopolitical struggle, in the Foucauldian sense. The conflict is concerned with the struggle for legitimacy of copyright and not the illegitimate consumption of copyright. The integrity and superiority of major players is questioned by consumers who appear to resist this norm of discipline (Foucault, 1991b, p. 223). That is, through innovation, consumers have questioned the following corporate-driven norms:

- the monetary value of media products,
- the format of products, and
- the manner in which products are disseminated.

Consumers utilizing external or alternative technologies through social networking in the pursuit of entertainment have called into question established norms in traditional modes of media consumption. This has caused a reflexive reaction in popular media. The cause-and-effect relationships established through file-sharing have encouraged consumers to use social networking as an alternative source of entertainment. This behaviour is also described as viral consumption patterns where value, format, and manner of dissemination are subordinated by a sense of immediacy. For example, corporate channels dictate the commodification processes from the input to the output end for the creation of a finished product, say a live film clip taken from a concert. Yet the same subject matter is instantly uploaded for social networking purposes by a devout fan who was at the concert (presumably for a fee). It is irrelevant when (or in many cases, if) the infringing material is taken down by, say, YouTube – the product has been consumed in what might be described as in a transreflexive fashion between consumers acting as virtual automatons. However, social networking has exacerbated the issues of copyright infringement. The combined effects of convergent consumption patterns reflect a sense of biopolitical power which leads to a disconnect between law and compliance on the one hand, and moral behaviour on the other hand. In other words, does indifference towards copyright necessarily constitute recklessness?

In Foucauldian terms, the rise of corporate popular media as a genealogy of power – the power of corporate control through copyright to normalize individuals. In other words, the genealogy of technology and copyright historically represents corporate knowledge in terms of what is right and what is wrong. Traditional business models remain the primary focus of copyright

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industries notwithstanding the fact that hybrid business models have (reluctantly) been considered and implemented by the major players. But in any event, newer corporatized models have also been significantly challenged because neighbouring laws developments and consumer behaviour (including divergent attitudes to traditional consumption and delinquent conduct) have penetrated the heart of copyright industries. Whilst it makes no economic sense to fall behind the IT revolution, the desire to preserve a lucrative monopoly makes perfect sense. The music industry in particular is a good case study about such falling behind and eventual reaction.

Of significant consequence is that consumers have not become increasingly benign or malevolent, but rather ambivalent in relation to copyright and subsequent infringement. This attitude is consistent with the fundamental tenets of liberalism and basic liberal values in advanced capitalist society. The most compelling case study to support this proposition in the past decade is the music industry and the rise of the MP3 format as the dominant mode of product delivery. This decade of disorganization has also been significantly experienced in film and gaming industries.

Chapter 8 also acknowledges the impact of other forms of entertainment (namely social media) on the historical significance of popular media products in the West in terms of traditional modes of commodification and consumption. The fact that live-music and cinema attendance and pricing appear to be unaffected by innovative change suggests that traditionally commodified popular media products are at risk of being less influential as modes of popular culture. That is, from an affective perspective, physical attendance at a concert can never be replaced. Yet popular culture in a commodified form is now consumed in convergent ways. Flexible approaches to popular media reflect attitudes that are firmly embedded in liberalism and shape the current modes of consumer behaviour. Recent developments such as corporate social networking where corporations have established Facebook and Twitter sites suggest radical changes in the majors' business models. The corporations are 'tweeting', 'twittering' and otherwise following the followers in a bid to gain a following. The level of self-reflexivity on the part of corporate citizens in a world of digitalization is remarkable.

The increasing play-for-free attitude in the context of private use must not be ignored. Chapter 8 concludes that the Internet has created a market environment that encourages forms of socio-economic reciprocity on an unprecedented scale. This is an extension of social media network behaviour free from control or intervention. Consumers freely exchange views, opinions, ideas and material (popular culture) without intervention or control from cultural gatekeepers. For example, a CD or TV show may have been legitimately purchased, but is uploaded so that others may benefit from the experience. The behaviour is mutualistic in the sense that the uploader may rely on reciprocity at some later time. The perception that consumers are providing a community good through media exchange has not been identified in the

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literature. Digitalization of popular media transcends traditional ownership boundaries that were clear in the pre-digital era.

It is also asserted that consumers have not only become suspicious of those who control copyright industries, but they are also generally discontented with those who act as cultural gatekeepers. This observation leads to the conclusion that if the value of copyrighted goods is reduced, then there will probably be a reduction in the rate of illegal consumption; but if the value is significantly diminished, then this is hardly a positive outcome for corporate controllers of popular media products.

Chapter 9 asks whether emerging technologies are difficult to reconcile with modern copyright laws. One conclusion is that popular media corporations must now compete in a decentralized entertainment arena. This means direct interaction with software, telecommunications and other allied external industries. Where once copyright governance existed in an unfettered, one-dimensional environment, it now must conform to a combined machinery of copyright and telecommunications governance. Modern day popular media industries are underpinned by copyright at the substructural level, but at the superstructural level the playing field has been altered substantially. Digital rights management and protection were problematic until recently. These developments have caused irreconcilable shifts in the balance of power between the various stakeholders at the superstructual (horizontal) level.

Chapter 9 remarks about a growing sense of futility and perpetual frustration by industry controllers, fittingly, given the competing or incompatible paradigms concerning consumer attitudes and perceptions. Governance, in the light of convergence, and approaches about the best way forward for copyright remain unresolved. On the matter of copyright preservation, the doctrinal evidence and empirical data suggest prima facie illegal consumption is too complex and multidimensional for copyright to provide any meaningful protection.

The chapter argues that there appears to be less room for copyright recognition where specific new technologies have assisted in emancipating those who previously could not consume popular media. The general impact these new technologies have had on copyright controllers is evident simply by a cursory Internet search. Currently, several discrete opportunities to engage in discreet consumption exist for media consumers. These must be viewed as *negative* and debilitating for the owners of copyright because of the loss in control, but *positive* for those who believe in the democratization (or rather, emancipation) of popular media consumption. The significance is that consumers have become disorientated in a state of market disorganization while the major owners of copyright continue to experience reorganizational effects.

The old business models based on monopoly power have been directly affected to the extent that rapid decentralization is causing dilution of

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copyright to a 'commons content' sphere. The products, services and participants all appear to be experiencing reorganizational effects.

Corporate strategies have not taken into consideration the democratizing effects of new technologies. The Internet might be deemed the catalyst capable of reorganizing delivery of popular media. Should this approach proliferate, it is argued that the traditional industry will become less concentrated as the parameters concerning copyright control must also change. In this environment, large-scale acquisition of future entrepreneurial copyrights would diminish, creating a decentralized convergent pluralist popular media industry as opposed to the current situation where the dominant few maintain the status quo.

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