Networked subjects: exploring the author, user and pirate through a relationalist lens.

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A thesis submitted in fulfillment of the requirement for the Degree of Doctor of Philosophy (PhD)

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The work presented in this thesis is to the best of my knowledge, original except as acknowledged in the text. I hereby declare that I have not submitted this material, in full or in part, for a degree at this or any other institution.

James Meese
2013
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<td>AFACT</td>
<td>Australian Federation Against Copyright Theft</td>
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<td>AFL</td>
<td>Australian Football League</td>
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<td>AFR</td>
<td>Australian Financial Review</td>
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<td>APRA</td>
<td>Australian Performing Rights Association</td>
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<td>ARIA</td>
<td>Australian Record Industry Association</td>
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<td>AUSFTA</td>
<td>Australian United States Free Trade Agreement</td>
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<td>AWG</td>
<td>Australian Writers Guild</td>
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<td>CD</td>
<td>Compact Disc</td>
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<td>CLRC</td>
<td>Copyright Law Review Committee</td>
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<td>DFAT</td>
<td>Australian Department of Foreign Affairs and Trade</td>
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<td>DRM</td>
<td>Digital Rights Management</td>
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<td>EFA</td>
<td>Electronic Frontiers Australia</td>
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<td>HD-DVD</td>
<td>High Definition-DVD</td>
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<td>IIA</td>
<td>Internet Industry Association of Australia</td>
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<td>IP</td>
<td>Intellectual Property</td>
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<td>ISP</td>
<td>Internet Service Provider</td>
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<td>Information Technology</td>
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<td>Media and Entertainment Arts Alliance</td>
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<td>SCAG</td>
<td>Standing Committee of Attorneys-General</td>
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<td>SC</td>
<td>Senior Counsel</td>
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<td>SLCLC</td>
<td>Senate Legal and Constitutional Legislation Committee</td>
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<td>TPM</td>
<td>Technological Protection Measures</td>
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<td>UGC</td>
<td>User Generated Content</td>
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<td>UK</td>
<td>United Kingdom</td>
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<td>US</td>
<td>United States</td>
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<td>VCR</td>
<td>Video Cassette Recorder</td>
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<td>WIPO</td>
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Abstract

In this thesis I investigate the cultural politics of law and subjectivity, with Australian copyright law as the site for analysis. Existing literature has sought to shed light on the historical figure of the author and recently scholars have started to map a clearer picture of the user and the pirate in law. However, there has been no attempt to consider these three central subjects of copyright law collectively and examine how they interact with each other. I focus on this previously unexamined space and analyse the interrelations between these three subjects through a modified relationalist lens. In so doing I identify and extend an emerging body of research that takes a relationalist approach to law.

This method offers a productive alternative to much of the existing research around intellectual property. Using a combination of discourse analysis and cultural theory, I challenge the liberal political philosophy underlying copyright law, which presumes a structural separation between self and society. I instead consider subjects of law as situated within a broader network of relations. This conceptual move allows the thesis to explore in detail how relationships between the subjects of the author, user and pirate come to be structured in law. I develop this analysis through three case studies: a study of the Copyright Amendment (Moral Rights) Act 2000, which explores the instability of the author through a relationalist lens; an examination of the Copyright Amendment Act 2006 that critiques the Australian government’s attempt to reify a separate user subject; and an analysis of recent High Court case Roadshow Films Pty Ltd & ors v iiNet, which considers the limitations of the pirate as a subject of copyright law.
Acknowledgments

This thesis would not have been possible without the guidance, patience and generosity of my supervisors Esther Milne, Jock Given and Ramon Lobato. I cannot thank them enough for the past four years. I particularly want to acknowledge Esther Milne, for her ongoing support over a number of years. As an educator, mentor and friend she has played a key role in my life and in the lives of a number of close friends, and her guidance has been invaluable.

I would also like to acknowledge the support of staff and fellow research students at the Swinburne Institute for Social Research. In particular, thanks are due to Lawson Fletcher, Jenny Kennedy, Christian McCrea, Aneta Podkalicka, Emily van der Nagel and Rowan Wilken for their support and encouragement during my candidature, as well as Grace Lee, Maria Han and Yee Man Louie, for their skillful administration.

As a disciplinary interloper from cultural studies, I have been overwhelmed with the level of assistance offered by scholars in the wider research community around intellectual property. I thank them all for their advice. I want to especially acknowledge Catherine Bond who read drafts of this thesis and offered invaluable guidance prior to submission.

I also wish to note the financial support of the Cultural Studies Association of Australasia, the Australian Research Council Centre of Excellence for Creative Industries and Innovation and Swinburne University’s Institute for Social Research and Faculty of Life and Social Sciences, which allowed me to attend a number of national and international conferences.

Finally, and most importantly, I thank my family and friends for their unconditional belief and support, especially my parents Christine Hennequin and Kevin Meese.
Material from this thesis has been previously published in other scholarly publications.

Sections of chapter four were published as Meese, J 2010, ‘Resistance or negotiation: An Australian perspective on copyright law’s cultural agenda’, *Computers and Composition*, vol. 27, no. 3.

Chapter six appears in a modified form as Meese, J forthcoming, “The pirate imaginary and the potential of the authorial pirate”. In Fredriksson, M and Arvanitakis, J (eds.), *Piracy: Leakages from Modernity*, Litwin Press, Los Angeles.
This thesis is dedicated to Maureen Meese, Therese Hennequin and Benjamin Hennequin.
Introduction

This thesis addresses ongoing debates around the viability of copyright law in the digital era. The decreasing cost of software editing tools and the use of the internet as a distributive mechanism has made it easier for people to edit and rework cultural artefacts, encouraging new creative cultures online that deploy legally questionable practices such as remixing and mash-ups (see Benkler 2006; Fitzgerald and O’Brien 2005, 2006; Jenkins 2006; Lessig 2008). The internet has also destabilised traditional methods of distribution and consumption, with the development of peer-to-peer networks and cyber lockers allowing people to infringe copyright more efficiently (see generally Bowrey and Rimmer 2002; Lessig 1999; 2002; Lobato 2012). The combination of widespread amateur creation, remixing and online piracy has led to a number of active debates around the very possibility of effective ownership in the digital sphere, what sort of activity constitutes the acceptable “use” of content and whether piracy can ever be justified.

My initial motivation for conducting this study stemmed from a realisation that in these debates and conversations, stakeholders and commentators regularly invoked particular subjects of copyright law when pressing their claims: the author, the pirate and the user. The author and pirate regularly appear in the statements of industry lobby groups, CEOs of major media corporations and certain actors as they rail against online pirates and the scourge of piracy. In these statements, the creative work of artists and their rights feature prominently and pirates are framed as illegal actors and a threat to future creative progress (see Billing 2010; Williams 2012). The pirate also appears in a number of spaces that seek to challenge the legal framework of copyright law. The title of popular torrent website The Pirate Bay invokes the pirate subject and numerous “pirate parties” have been founded across the globe (see Li 2009), bringing their concerns around law and technology into the political arena, attempting to reclaim the pirate as a productive cultural agent. The user also features as an important subject during these debates with interested members

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1 The Pirate Party of Australia stood for the Senate during the 2013 Australian Federal election, which occurred just before this thesis was submitted. The party did not manage to win any seats.
of the general public, academics and particular not-for-profit groups invoking the rights of copyright users when arguing for a more equitable and “balanced” copyright law (see generally Cohen 2005; Liu 2003; Patterson and Lindberg 1991; Tehranian 2011).

These subjects are regularly positioned as structurally and symbolically apart from one another. Grounded in particular assumptions about creativity and the general purpose of copyright law, in public discourse these assumptions:

[T]ake the form of stylized, oversimplified models of authors and users, and of the presumptively separate roles that each group plays within the copyright system (Cohen 2012, p.2).

As Julie Cohen suggests above, these general claims ignore the complexities of each subject position and presume a separation of subjects that does not necessarily occur in practice. In this thesis I show that the boundaries between each subject are often blurred and that these discursive attempts at separation in fact obscure vital questions about the current function and future development of copyright law today. The following questions outline the difficulty of locating individual subjects and the significant level of interaction and overlapping that occurs between each subject position.

The wider social and cultural background to this research outlined above already reveals a set of complex relations that exist between each subject position. Considering the substantial rates of piracy in Australia (see Ewing and Thomas 2012) can we still view pirates as marginal figures of consumption wholly separate from users and authors? How does the growing academic attention around amateur creativity impact on existing cultural understandings of authorship? Now that users are seen to retain a creative capacity, what is the subsequent impact on copyright law (see Benkler 2006; Bruns 2008a, 2008b; Jenkins 2006; Lessig 2008)? These questions stand as a point of departure for this thesis, which explores these complex processes of boundary setting in copyright law, with a specific focus on the Australian jurisdiction.
This thesis will analyse the interrelations between these three subjects through a relationalist lens. In so doing, I will extend an emerging body of research around relationality that challenges a long-standing presumption in the philosophy of copyright law: that there is a structural separation between self and society (Cohen 2007, 2012; see also Craig 2007, 2011; Craig, Turcotte and Coombe 2011; Shi 2010; Shi and Fitzgerald 2010). Using a modified relationalist approach that I will outline in the literature review and methods sections that follow, and drawing on a series of case studies, I will assess how each subject is shaped in relation to other subjects of copyright law. This research project will be guided by the following question: *How do these central subjects of copyright law interact with each other and what are the implications of these interrelations for copyright law?* By addressing this question this thesis will offer a substantial investigation into how public policy, digital media practices and existing legal frameworks collectively shape legal subjects and also offer a critical assessment of national public policy narratives around the digital economy, questioning some foundational philosophical assumptions about copyright law.

In conducting this type of analysis, this thesis stands apart from much of the existing academic literature and offers a number of contributions to knowledge. A significant body of literature has explored the subject of the author and attended to its contingent historical status in both culture and law (see Jaszi 1991, 1992; Rose 1993; Woodmansee 1984; also see Hesse 2002 for a historical overview). Scholars have also started to pay attention to the previously rarely explored subjects of the user (Cohen 2005, 2007, 2012; Gibson 2006; Liu 2003; Tehranian 2011) and the pirate (Johns 2009; Larkin 2004, 2008; Liang 2005a, 2005b; Lobato 2011; Loughlan 2006; Philip 2005; Sundaram 2010) and analyse their positions within copyright law. However, this work has tended to focus on one subject as their topic of study and critique how particular discourses have framed that subject. Occasionally, when analysing a less-dominant subject like the user (see Gibson 2006; Liu 2003) or the pirate (see Johns 2009), scholars will assess how copyright law’s tendency towards an authorial dominance has

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2 It is worth noting the pioneering work of Lyman Ray Patterson and Stanley Lindberg who outlined a radical reframing of copyright law in the early 1990s, suggesting that an ongoing fascination with the position and function of the author ignored the fact that at the heart of the matter copyright was a users’ law. This early work re-positioned copyright law as a law of users’ rights. However, despite the productive nature of this stance it took until the mid-2000s for substantial scholarship around the subjectivity of the user to be conducted. See Patterson, L & Lindberg, S 1991, *The Nature of Copyright: A Law of Users’ Rights*, University of Georgia Press, Athens.
impacted on a subject, but this analysis also maintains a binary opposition, outlining the relationship between the authorial subject and its opposite.

In contrast, I contend that it is not only possible to analyse these three central subjects of copyright law collectively but that it is incredibly productive to do so. By critically analysing and cultural and legal discourses that circulate around moments of legal reform and legal cases, this thesis identifies these three subjects as central to formal and informal conceptualisations of copyright law. Collectively approaching the pirate, author and user and analysing their interrelations provides greater clarity to the process of subjectivity in copyright law and allows us to understand how ongoing attempts to structurally separate a subject rest on the recognition of other subjects in law. Throughout the thesis, I argue that despite the current scholarly focus on one or two distinct subjects, in public discourse around copyright law these three subjects are rarely discussed separately from one another. The impact of this phenomenon is that these subject positions and agencies are always framed in relation to one another, a relationality which underlines the contingent nature of each subject. Rather than operating as stable subjects, each subject is defined through an unstable cultural and legal process of negotiation and contestation against each other, operating as a “subject-in-process” (Marshall 1994, p. 109). This approach outlines the generative power of law, the contingent nature of each subject and the importance of accounting for the collective process of subjectivity in copyright law.

Moreover, this thesis uniquely combines a cultural studies approach with an emerging body of scholarship that takes a relational approach to copyright law. In so doing, this study responds to recent theorists who have noted that there is a current lack of cultural approaches to copyright law within the existing literature (see Cohen 2007, 2012; Sunder 2012). The discipline of cultural studies has a long history of engagement with questions of power, governance and subjectivity and will provide an invaluable disciplinary framing for a project focused on subjectivity and law. Kathy Bowrey and Jane Anderson broadly support this approach, noting that post-modern expression - a vital part of the wider cultural studies project - brings with it a “heightened level of awareness
and engagement with issues of subjectivity and the authority of the speaker” (Bowrey and Anderson, 2009, p. 482). Combining this approach with the work of scholars who focus on relationality and law allows my thesis to take a nuanced approach to the question of subjectivity and offer a finely grained account of how these three subjects of copyright law interact with one other.

With these two significant contributions at the heart of my analysis, I present a narrative of subjectivity and copyright law in the Australian jurisdiction that takes a situated approach to the question of the subject in law. Through a combination of chapters that track the historical emergence of each subject and specific case studies that analyse how a subject is shaped in the Australian jurisdiction, I argue that scholars must move beyond the existing binaries of author and user (Cohen 2005, 2007, 2012; Gibson 2006; Liu 2003; Tehranian 2011) or author and pirate (Johns 2009; Philip 2005) that tend to populate current scholarship. Similarly, I contend that detailed accounts of how a subject like the author has emerged over time are still a vital resource for scholars today but are necessarily incomplete (see Jaszi 1991, 1992; Rose 1993; Woodmansee 1984; Woodmansee and Jaszi 1994). Instead, by paying attention to the formal and informal discourses that circulate around these subjects and attending to the ways in which each subject is positioned against one other, I show how the formal and informal processes of making and interpreting law directly contributes to the collective making of subjects. Continuing my introduction to the thesis, the following literature review will situate these contributions within the existing field of critical copyright studies and outline the relationalist approach at the heart of this analysis.

A time of transition: towards an interdisciplinary account of copyright law

Scholarship around intellectual property law has undergone something of a boom period in the last two decades. Jessica Litman (2006, p. 318) provides a material sense of just how much this area of scholarly research has changed, noting that while in the past, “a scholar could read essentially every copyright article, note, or comment published every year. That’s no longer possible”. Once
an esoteric academic arena - seen to be the province of specialists – a growing interdisciplinary body of researchers study intellectual property law today. Unsurprisingly, this gradual change in the audience of copyright scholarship has led to a concurrent theoretical shift. Today as a matter of course, legal scholars and cultural theorists critique normative legal claims, which traditionally passed by unchallenged in a field previously dominated by economics and law professors (see Weatherall 2011 for both an example and an overview of this discourse; also see Sunder 2012).

This emergent critical discourse developed slowly in the United States, with a significant amount of initial conceptual work conducted by Wendy Gordon (1982, 1992), Martha Woodmansee (1984), Rosemary Coombe (see generally 1989, 1990), Pamela Samuelson (1990), Peter Jaszi (1991, 1992), James Boyle (1991, 1992, 1996) and Jessica Litman (1996). These scholars were heavily involved in early debates around online regulation and the transition from an “offline” to digital existence. Importantly, many of these academics also articulated the public challenge to the Information Infrastructure Task Force (IITF) “White Paper” (1995); an expansionist interpretation of intellectual property law in the digital sphere, distributed by the Bill Clinton appointed IITF Intellectual Property Working Group (Samuleson 1996). Throughout these initial battles between legislators, industry representatives and legal academics, these scholars were fashioning an academic role that involved articulating a collective critical voice against normative visions of intellectual property and copyright law both publicly and within academia.

This voice was amplified with the publication of Lawrence Lessig’s book Code and Other Laws of Cyberspace (1999), now widely considered a foundational text of cyberlaw. Code was notable for its nuanced examination of the ways in which code can be used to establish and entrench material architectures of control.3 As a constitutional scholar Lawrence Lessig was interested in outlining the shift in how “real space” was regulated in comparison to cyberspace, where “the software and hardware (i.e., the “code” of cyberspace) that make cyberspace

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3 This specific concept, which raises interesting questions around agency and control, has also been productively developed through the lens of computer science and critical theory by Alexander Galloway. See his book Protocol (2004) for further context.
what it is also regulate cyberspace as it is” (1999, p.6). In his initial monograph, Lessig drew on a range of examples and he clearly viewed the emerging debates around copyright law and intellectual property and the impact of their subsequent regulation online as a perfect example of this dilemma. He further explored this problematic (2002, 2004, 2008) alongside a number of other scholars who offered interdisciplinary critiques of the normative basis for intellectual property law and the expansionist trend that they felt United States copyright law was taking (see generally Cohen 2012; Coombe 1998; Hilderbrand 2009; Litman 2001; McLeod 2005; Sunder 2012; Vaidhyanathan, 2003).

In Australia, the jurisdiction that this thesis focuses on, the study of intellectual property followed a similar path, moving from a specialist subject to a broad field of inquiry. As Catherine Bond (2010, p. 9) explains, Australia’s scholarly engagement with intellectual property and copyright law took a similar trajectory, only emerging over the “previous three decades”. Indeed “it was not until a few years after the enactment of the Copyright Act 1968 that specific textbooks on the topic of “copyright” began to emerge” (Bond 2010, p.9). The majority of articles about copyright in Australia prior to the 1968 Act were focused on constitutional issues and written by constitutional scholars (see generally Bond 2010). It wasn’t until the work of James Lahore (1973; 1977) and Sam Ricketson (see 1984) emerged that Australia could be said to have developed intellectual property as a specialist area of research. But despite these inauspicious beginnings, Australian scholarship has significantly advanced the broader interdisciplinary examination of both copyright law and intellectual property particularly in key topics of interest such as trade policy (Drahos 2001), user rights (De Zwart 2003; Fitzgerald and O’Brien 2005, 2006; Rimmer 2006, 2007), indigenous knowledge (Anderson 2004a; 2004b), public policy (Weatherall 2007; 2011), constitutional law (Bond 2010) and cyberlaw (Bowrey 2005).

It is important to note that the emergence of these critical approaches to intellectual property law have not just developed as part of a scholarly response

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4 See Bond (2010) for a complete listing of Australian scholarly articles on copyright law published prior to the emergence of the field as a discrete area of study.
4 Thanks to Catherine Bond for this information.
4 Catherine Bond (2010, p. 8) also notes that Griffith University, Brisbane was home to a public domain conference in 1998, well before the famous 2001 Duke University conference that brought together many of the key thinkers around copyright law see <http://www.acipa.edu.au/frame_conferences.html>
to problematic tendencies in law and public policy. They are also products of a significant disciplinary re-orientation in law. Legal scholars have begun to attend “to the cultural lives of law” (Sarat and Simon 2003, p. 13) and accept interdisciplinary accounts of law. Most notably the growth of critical legal studies (see Boyle 1991; Coombe 1989, 1990), the law and literature movement (see Dore 2006) and socio-legal studies (see Sarat and Kearns 1998; Sarat and Simon 2003) has allowed scholars to engage with and also deploy social theory when conducting legal analysis. This re-orientation has seen legal scholars acknowledge the ramifications of the cultural turn (see Jameson 1998) and move away from formalist interpretations of law to interrogate the notion of the legal subject and explore the question of ideology in law (see Boyle 1991).

This disciplinary re-orientation has presented a number of substantial challenges to normative understandings of copyright law. One of the most notable has come from a group of historicist scholars who draw on seminal critiques of the author in cultural theory (Foucault 1991; Barthes 1977) to re-assess the subject of the author in copyright law (see Jaszi 1991, 1992; Rose 1993, Woodmansee 1984; Woodmansee and Jaszi 1994). This research collectively reveals the historically contingent status of the author in copyright law and argues that a persistent ideology of Romanticism culturally supports this subject in law. Importantly, these scholars also challenge the formalist interpretations of the author in law by noting that the author has been an unstable subject at various times throughout its history. The most useful of these analyses in the context of this project is the work of Jaszi, who outlines the various metamorphoses that the act of “authorship” has gone through over the years and the impact that these changes have had on the subject of the author.

Jaszi (1991, p. 459) describes authorship as a “culturally, politically, economically, and socially constructed category rather than a real or natural one”, before going on to offer a historical survey of interesting moments in copyright law’s history. Noting how authorship and the subject of the author have changed over time, Jaszi argues that authorship became an increasingly loaded term throughout the nineteenth century as “individualistic notions of creativity, originality and inspiration were poured into it” (1991, p. 471).
However by the early twentieth century a decision in a notable case *Bleinstein v. Donaldson Lithographing Co.* “disassociated” authorship from the rarefied sphere of genius and linked it to “the meanest level of creative activity” (1991, p. 483). Jaszi (1991, p. 550) contends that these tendencies continue throughout the history of “authorship”, it has the ability to “appear, disappear, and reconstruct itself seemingly at will” and in concluding suggests that these oscillations will continue to be a feature of authorship in copyright law.

Jaszi offers an excellent example of how historicist scholars approach the author. These scholars note the predominance of the genius trope and the Romantic ideology in copyright law but also emphasise its constructed form and contingent status. This scholarship is important as it offers a useful (and arguably more contextual) alternative to formalist critiques of copyright law (see Saunders 1992) and also shows the impact of the cultural turn on copyright law, with ideology now a predominant focus of scholarship. However, what is of particular interest to my study is the notable absence of any other subject apart from the author in this analysis of authorship. Jaszi tracks the emergence and disappearance of authorship and identifies moments where particular imaginaries of the author come to the fore, but little is said about the user or the pirate. Various iterations of the author emerge over the centuries, but for Jaszi this is largely to do with broader cultural, political, economic and social forces and these changes have little connection to other subjects of copyright law.

This is a prevalent tendency amongst historicist scholarship. Despite their fascination with the origins and historical emergence of the author and the ideologies that sustain such a subject, these scholars carry their own particular ideology. For Jaszi, Rose and Woodmansee the author still stands as a dominant - albeit historically contingent - subject alone both in copyright law and in the socio-cultural history of the law. Pirates, users or readers may be mentioned briefly but generally feature as a background to the compelling narrative of the changing status of the author in law and culture. As these changes in the subject of the author are noted it is assumed there will be an impact on alternative conceptualisations of authorship (see Woodmansee 1984; Woodmansee and Jaszi 1994). Much of this scholarship rests on detailed historical research and
skillfully bolsters poststructuralist critiques of the author (Barthes 1967; Foucault 1991) and I am not suggesting that their conclusions are not well founded. Instead I am noting that there is simply more work to be done conceptually in extending this body of literature.

Therefore, I set out on an alternative theoretical path in this thesis and suggest that the successful deconstruction of the author sets the stage for scholars to now think relationally about the author. No longer do we need to limit our point of analysis to the reified author in law and instead our analytical lens can shift to embrace other subjects of copyright law alongside the author. As noted at the beginning of the thesis, social trends like the rise of amateur creativity online and the preponderance of online piracy pose significant questions about the definitional contours of copyright law. Deploying a relationalist model allows us to examine how subjects like the author; user and the pirate interact in and around law and examine the complex processes of boundary setting in law.

Recent scholarship in the field has already begun to identify this lacuna and a number of scholars have noted that the author cannot be understood separately from other subjects of copyright law. Moving beyond the author-centric model of the historicists to embrace a binary approach that accounts for authors and users, Johanna Gibson provides a nuanced account of how the author and user can impact one another. She outlines the hierarchy present in modern legal frameworks, and provides an explanation for how the dominance of the author is maintained in law:

> Users are somewhat diminished as coming after intellectual property and, to a certain extent, ‘created’ by intellectual property in so far as they arise as an audience of the knowledge products within the creative economy of intellectual property (Gibson 2006, p. 80).

For Gibson (2006, p. 116), the maintenance of a creative hierarchy in law through the “author-function” means that users are not granted any creative
agency and instead are left to operate as passive and anonymous subjects within the law.7

Julie Cohen (2005, also see 2007; 2012) continues this analysis of the user in a slightly more complex fashion. She too notes that throughout copyright law’s history the user has been an absent subject from copyright doctrine and argues that the failure to seriously consider the user has been a boon for rights holders. In addition to this critique, Cohen highlights a range of user “models” offered by contemporary copyright scholars as part of their analysis of copyright law:

- the economic user, who enters the market with a given set of tastes in search of the best deal; the “postmodern” user, who exercises limited and vaguely oppositional agency in a world in which all meaning is uncertain and all knowledge relative; and the romantic user, whose life is an endless cycle of sophisticated debates about current events, discerning quests for the most freedom-enhancing media technologies, and home production of high-quality music, movies, and open-source software (Cohen 2005, p. 348).

Cohen (2005, p. 349) views all three models as problematic because “none of them provide ... a convincing model of how real users behave”. Instead she calls for the acknowledgment of the situated user, a concept of a user that takes into account a range of factors - consumption, communication, self-development and creative play - and recognises the extent to which creativity relies upon imitation and play.

A number of important points emerge from Cohen’s analysis of the user. She clearly identifies a range of models of the user that have circulated in recent scholarly studies of copyright law (see Benkler 2006; Boyle 1996; Lessig 1999, 2002). This underlines the increasing attention paid to the user in copyright law and the need to account for more than just the author in law. Cohen’s criticism - that these concepts of the user are conceptually weak - is a valid one and her alternative concept of a situated user is much more productive. Like Gibson she accounts for the complex interactions between the author, the user and the interstitial position of creativity between these two subjects and her analysis.

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7 It is worth noting that a review of Gibson’s (2006) book observed that she did not spend a substantial amount of time attending to issues of subjectivity as this thesis attempts to do (Coombe 2008).
anticipates this thesis’ relational framework, which will be discussed shortly. However, for all Cohen’s investment in developing a substantial theory of the user her analysis stops short. The user is seen to be vital to the doctrine of copyright law but there is little attempt to either account for the pirate or justify the silence surrounding this subject.

Looking at analyses of the pirate subject, a similar theme emerges. A number of postcolonial scholars have usefully analysed this subject and provide an excellent rejoinder to libertarian and Western-centric accounts of piracy (see Liang 2005a, 2005b; Philip 2005; Sundaram 2010). These scholars question legal scholarship that valorises and reclaims forms of piracy such as peer-to-peer downloading while demonising forms piracy found more predominantly in Asian markets (e.g. mass-market copying and distribution of pirated material; see Lessig 2004 for an example). These critiques challenge the un-examined privilege embedded in such accounts of Asian piracy (see Liang 2005a; 2005b; Philip 2005) and also offer alternative philosophical and theological methodologies through which to understand copying (see Boon 2010). However, similar to the analyses of the user, these scholars tend to predicate their critique on a binary relationship between the author and pirate. Kavita Philip’s (2005) attempt to argue for the usefulness of a Foucauldian “pirate function” and to ask the question “what is a pirate?”, involves critical analysis of the subject itself and of the “author” as the presumed opposite subject in law, but the user is rarely sighted.

To summarise, the literature tends to analyse subjects either individually or in relation to only one other subject in law. In advancing my critique of the above literature, I do not seek to ignore the vital work conducted throughout these analyses, but rather suggest that these tendencies reveal a productive and necessary space available in which to conduct analytic work. I argue that a triangulated approach that can attend to three subjects would be more productive and adequately account for the interactions that occur between each subject in everyday engagements of copyright law. Through the following history of relationalist approaches to copyright law I will explain the benefits of this approach as well as the substantial conceptual shifts it demands, which
challenges some fundamental philosophical assumptions about copyright law and law’s relation to society.

Theorising relationality: Accounting for subjectivity and interrelation

A small group of scholars have recently begun to outline a relationalist approach to copyright law and I situate my thesis within this wider project. Carys Craig (2007, 2011; see also Craig, Turcotte and Coombe 2011) has been the strongest advocate for the benefits of a relationalist approach to copyright law in the existing literature. Her stance is “informed by feminist theory and capable of embracing the notion of the relational self/author and the principles of dialogism” (Craig 2007, p. 234) and opposed to the liberal notion of the self that she argues, contemporary copyright law represents. As Craig (2007, p. 235) explains, the author subject (which Craig terms the “author-owner”) relies on Enlightenment ideals of “individuation, detachment, segmentation, and abstraction” in order to be conceptualised as an individual in law. This stance forces production into “doctrinal categories” and sets up unhelpful binaries of “creation/reproduction, author/user and laborer/free-rider” (Craig 2007, p. 232), that, as I have already explained, are still maintained in the scholarly literature.

As Craig explains, the problem with the liberal ideal of the autonomous self is that it “cannot accommodate - and so excludes or silences - those people whose experienced realities do not resonate with the individualized account of autonomy” (Craig 2007, p. 236). In terms of copyright law, the impact of this is seen through the dominance of the author-subject, the preponderance of the aforementioned binary approach to copyright law and a lack of doctrinal clarity surrounding the key concepts of copyright law (see Craig 2007; Cohen 2012). Craig (2007, p. 237) notes that feminist theory has usefully grappled with the issues presented by traditional legal liberalism and that by drawing on this theoretical history, one can critique copyright law’s existing construct of the self as well as offer “a new theoretical model” centred around the “relational self”. Drawing on this theoretical lineage allows Craig to set up a nuanced account of
selfhood and present a concept of the subject in law that is fully grounded in everyday practice.⁸

Feminist theorists have deployed the notion of relationality in order to move past the central impasse of challenging the liberal vision of the autonomous self (Frazer and Lacey 1993; Nedelsky 1993, 2001). The problem is that by critiquing this ahistorical abstract notion of selfhood, communitarian approaches to selfhood can too often foreclose the possibility of “genuine agency, autonomy and change” (Craig 2011, p. 42; see Coombe 1989 or Frazer and Lacey 1993 for a critique of this tendency). To manage these competing tensions, feminist theory has outlined a relational framework that re-imagines the notion of autonomy. For relational feminists, it is only through relationships that autonomy is made possible: one is not able to be fully autonomous without other people (see Leckey 2008; Nedelsky 2001). Acknowledging this concept of situated autonomy forces us to substantially reconfigure our given notions of law and its operation within society. No longer do autonomous individuals, wholly separate from society, possess legal rights. Instead legal rights are viewed as vehicles through which relationships are constructed between actors (Craig 2007). This conceptual shift does not deny the possibility of power within these relationships, but emphasises the relational and situated aspect of these commitments (see Leckey 2008).

Drawing on this philosophical history, Craig returns to the doctrine of copyright law and offers a new conceptualisation of the author-subject. For Craig, the author is best imagined as a relational author, one that “is always already situated within, and constituted by, the communities in which she exists, and the texts and discourses by which she is surrounded” (Craig 2011, p. 50). This is a useful theoretical shift that re-positions the author and their creative impulses as part of a broader “network of social relations” (Craig 2011, p. 51) rather than as an independent actor that creates works ex nihilo. Craig notes that this relational approach has direct implications for copyright law. No longer is the author’s right reducible to an “individual entitlement” (Craig 2011, p. 51) with the author-

⁸ Julie Cohen (2012) and Madhavi Sunder (2012) do not embrace relationality as a theoretical paradigm but their recent books both outline similar critiques of legal liberalism within scholarly discourses around intellectual property. Their work provides alternative solutions to the same problem, suggesting that there is more than one critical approach available through which to approach this issue.
subject separated from the wider public. Instead copyright law must be understood in relational terms, as a process by which particular relationships are structured, a framework that allocates “powers and responsibilities” (Craig 2011, p. 52) amongst various subjects.

Craig’s analysis is broad in its scope but she considers the major benefit of a relational approach to copyright law to be the challenge to traditional conceptualisations of creativity in law. Craig (2011, p. 55 - 56) argues that a relational model offers a way beyond the “simplifying dichotomies of liberal thought” and suggests that a relational model will allow us to develop a model of authorship and copyright law that values and encourages the “derivative, collaborative and communicative nature of creativity”. This attempt to re-define authorship stands at the heart of her relational model and legal scholars in Australia have usefully attempted to develop legal principles modelled on this framework (see Shi 2010; Shi and Fitzgerald 2010). However, I argue that the broader literature around relational feminism and indeed Craig’s own theoretical model offers a wider spectrum for intervention, beyond debates around authorship and creativity. By challenging such fundamental considerations of copyright law and the philosophical basis of subject formation in law, these critiques have a direct impact on how we conceive of the subject in law.

This thesis therefore extends these relational approaches to copyright law (Craig 2007, 2011; Shi 2010; Shi and Fitzgerald 2010) by shifting the analytic lens away from the author and questions of authorship and creativity to instead consider the situated nature of key subjects of copyright law and the ways in which these subjects interact with one another. As outlined above, the philosophical challenge of relational feminism directly intervenes in traditional liberal conceptualisations of the subject that exist in contemporary copyright law (see Craig 2007, 2011; Nedlesky 2001; Leckey 2008, also see Cohen 2012). The rejection of liberal atomism in favour of viewing legal frameworks as structures based on relationships does more than just reconfigure the “author-subject” (see Craig, 2007; 2011). Instead it also requires us to “focus on relationship[s]” (Nedelsky 1993, p.365) and conduct a substantive analysis of the nature of these relationships. If, as Susan Brison (1997, p.29) argues, the autonomous and
relational self are “interdependent, even constitutive of one another” then the relational (and concrete) legal and social processes through which key subjects of copyright law are constituted must be explored.

By placing feminist theory in conversation with the foundational philosophical claims that support judicial interpretations of copyright, Craig provides us with a useful theoretical framework through which to re-think copyright law itself. Furthermore, the feminist literature detailed above places significant import on the value of relationships in sustaining autonomy and the importance of considering selfhood and subjectivity in law through a relational model. Therefore, in answering Craig’s call to focus on relationships in copyright law, I take the next step and undertake an analysis of three subjects of copyright law: the author, the user and the pirate, and examine the relationships between them. I will look at the ways in which copyright law is structured through relationships between subjects, examine the impact of informal and formal legal cultures on these relationships and discuss the possibilities of change within the law through this relational model. Approaching all three subjects in tandem allows this thesis to productively assess the nature of their interrelations, shed light on the generative nature of these relationships and highlight the dual role of law and culture in shaping subjects of copyright law.

It is important to note that the relationships between these three subjects are complex and uneven. The author, user and pirate do not exist as part of a stable holy trinity but instead are situated and generated as part of a dynamic and ongoing process of interaction between law and culture. I will be examining all three subjects throughout the thesis but at some points one subject will emerge and another will disappear. At other moments, I will narrow my analytic lens to examine points of tension between two subjects such as the author and user or the user and pirate. This approach recognises the unstable and contingent nature of these subjects, allows the thesis to consider these relationships with a level of nuance and asks targeted questions about how these relationships are both shaped and framed in discourse and law: at what point do particular subjects emerge and others recede? When do the boundaries start to blur between subjects and when do they get shored up?
I will conduct this analysis by drawing on significant moments in Australian copyright law’s recent history, as well as by exploring the broader history of these three subject positions. In so doing, I look to outline how these subjects are constituted in relation to one another, and how this collective process of subject formation operates. My analysis pays particular attention to the “discursive construction of subjectivity” (Marshall 1994, p. 111) across a number of key sites of analysis such as courtrooms, in moments of policy reform and broader social and cultural narratives to examine how these relationships are constituted. Attending to legal discourse but also quotidian social and cultural engagements with law allows this thesis to acknowledge that subjects are “mediated by discourses” but that also subjects mediate themselves through discourses (Coombe 1989, p. 82). The project thus extends the broad relational approach to copyright law by offering an alternative vantage point upon which to consider the question of subjectivity in copyright law.

Research design and methodology

I will conduct this relationalist analysis of copyright law from the position of a broader cultural studies tradition that attends to questions of subjectivity and power in and around law. Austin Sarat and Jonathan Simon (2003, p.4; also see Coombe 2001) argue for the value of cultural analyses of law suggesting that “as the logics of governance in the late modern era turn from society to culture, legal scholarship itself should turn to culture and more fully embrace cultural analysis and cultural studies”. Importantly for this project, the field of cultural studies also has a long history of engaging with the “relational as opposed to essential quality of subjectivities” (Streeter 2010, p.10). This challenge to individualist approaches to selfhood presented by the cultural turn has been outlined earlier but it is worth repeating in the context of engaging with cultural studies as a broader discipline. As Thomas Streeter (2010, p. 12) argues, this very disciplinary history makes cultural studies a vital space from which to engage with “the dynamics of various constructions of selfhood in specific contexts”, the central goal of this thesis. The field of cultural studies provides this thesis with
the theoretical apparatus to understand the relationships between the author, user and pirate within specific legal cultures.

In order to conduct such an analysis, the thesis is organised around three case studies. Two of these focus on relatively recent moments of legal reform in Australia: the *Copyright Amendment (Moral Rights) Act 2000* and the *Copyright Amendment Act (2006)*. The final case study is of a recent Australian court case of international significance - *Roadshow Films Pty Ltd & Ors v iiNet Ltd* - which represents an alternative discursive space of law through which we can understand the collective process of subject formation and definition. Each study has been chosen as it highlights a “concrete field ... of struggle” (Coombe 1998, p. 28) over subjectivity in and around law. I focus on moments in Australian legal history when debates were centred on a particular subject-position - the author, the user or the pirate - providing a space to examine how the relationships between these subjects of copyright law are shaped. By focusing on one jurisdiction (Australia) I will be able to shed light on the ways in which law, the policy community, interest groups and the general public contribute to the discursive shaping of these three subject positions. These deliberate choices allow the thesis to focus on key points of reform and crisis, where the various agencies of the subjects are articulated in the public domain and debated in formal and informal spaces of law.

These case studies are substantially supported by primary and secondary archival research, drawing on grey literature and material from the public record such as government reports and transcripts of Senate hearings. While many of these documents - such as transcripts of recent Senate hearings or submissions to inquiries - are easily accessible online, many older Government documents and reports have had to be sourced from libraries across Australia, including the National Library of Australia. Independent reports, which played an important role in the broader policy processes that surrounded each case study, have also been sourced. In order to judge the public reaction to these moments of crisis and reform, an extensive survey of relevant newspaper articles and opinion pieces has been conducted. Using a combination of microfilm, Factiva and online websites I have been able collate articles published in major newspapers across
Australia, focusing on the fortnight surrounding each important judgment, public announcement or legislative enactment in order to get a sense of the buildup and reaction to each event. Mapping these public spaces of argument and debate was a vital process, in being able to understand the cultural and legal context in which these cases studies took place. This broad swathe of government documentation, news articles and independent analysis allows the thesis to clearly map out these moments of crisis and reform and outline specific discursive spaces within the Australia community, which directly contribute to the broader processes of subject formation.

The case studies found in chapter two and four occurred before contemporary web 2.0 practices such as commenting on blog posts became mainstream practice, and social media was still in its infancy. Changes to the online media ecology since that time meant that the case study in chapter six is able to draw on an array of online sources in order to provide a clearer picture of the cultural conversation occurring around the trial. In addition to the strategies detailed above, materials for analysis were also drawn from selected independent online news sources - particularly from the technology industry - that followed the trial closely, and the comments below online articles also functioned as a source of data. Twitter was also an important cultural agent during the trial - the case received its own hashtag (#iiTrial) - and so relevant tweets were also studied to gauge the public reaction of interested parties.

The collection of Twitter data was relatively simple with a search of the hashtag on Twitter and the keyword “iiNet” revealing tweets relevant to the trial. Bruns and Burgess (2011) note a series of recent changes to Twitter’s management and sharing of its data with non-commercial institutions that are worthwhile to reflect on:

Changes made late in 2010 ... mean that even for the purposes of publicly funded, non-commercial research, it is no longer possible to gain access to the full ‘firehose’ of all tweets, or even of a substantial subset of this full feed; indeed, tracking the ongoing public activities of more than a maximum of 5,000 identified Twitter users is now only possible by working with Twitter’s licenced
third-party API provider Gnip, at commercial access costs which are likely to be well beyond the funding available to the vast majority of research institutions.

However, they suggest that “a more immediately achievable direction for Twitter research focusing on news and current events is to track the Twitter community’s use of keywords and/or hashtags”. This stance informs my methodological approach towards the collection of Twitter data, and so only tweets with the #iiTrial hashtag appended will be considered for analysis.

I will use discourse analysis in order to examine the above material. This analytic approach has a long history within the discipline of cultural studies, which considers language to be the building block of culture and the process by which subjectivity is shaped. For cultural studies scholars, language is recruited in order “to enact specific social activities and social identities” (Gee 2004, p. 1) and thus seen as the central space in which subjects are shaped and re-shaped over time. This method of analysis therefore directly links in with the broader aims of my project and also distinguishes my approach from cognate disciplines. In conducting this analysis I am not claiming legal expertise or offering a formal history of Australian copyright law. Instead I engage with both the law and historical documents through discourse analysis in order to interpret and analyse these texts and identify particular cultural narratives and discourses around law.

The final step of outlining my general methodological approach is to briefly explain how I will approach key terms within my thesis. I begin this process by noting the difficult position of “the subject” in the existing legal literature (see Abrams 2001; Balkin 1993; Boyle 1991; Coombe 1989; Singer 1988). I address the question of the subject by extending the insights of Robert Leckey (2008) who has also deployed relational theory in order to engage with subjectivity in law. Like Leckey, I am concerned with how subjectivities are produced through a “multiplicity of discursive fields” (Cossman 1994, p. 16) and focus on courts, legislatures and legal scholarship as spaces where subjects are produced (see Leckey 2008; also see Abrams 2001).
I draw a wider analytic net in locating these discursive spaces. Leckey (2008, p.6) rightly notes Jack Balkin’s (1993, p. 108) claim that the jurisprudence of the subject is a “cultural jurisprudence, for it is culture that creates legal subjects as subjects” but Leckey only turns to legal scholarship “in order to get a sense of legal culture” (Leckey 2008, p.6). It is laudable that Leckey extends his site of analysis in order to encompass scholarly discourse; a vital space of discursive production but such an approach still limits the cultural production of subjects to a particularly specialised field of lawyers, judges, legal scholars and students. This stance suggests that one only gains influence over the creation of legal subjects through a deep knowledge of law and that there is only a particular set of conversations about law that carry cultural influence.

I consider such an approach, which is also present to a degree in cultural studies of law (see Gaines 1991), to be excessively limiting. I draw on Bowrey (1996) and Coombe (1998) in order to highlight the importance of considering informal legal understanding in analyses of law. Bowrey argues that the social life of law is a valuable site of inquiry. Legal culture is not just what is written and decided about law in these concretes spaces, but also involves citizens’ interpretations of and engagements with law in everyday life:

Most of us gain our understanding of the law informally, we grasp it in our day to day experience and interactions in the world. To most, thinking about copyright does not start at the Act of such and such a time and place. Rather copyright is the set of legal notions we rely upon to bound our activity and to suggest the possibilities of behavior.

This stance opens up a site of analysis beyond that of institutional settings to take into account broader social engagements with law and its role in the legal process.

Coombe (1998) has a similar view and develops it through a broader critique of existing cultural studies (see Gaines 1991; Lury 1993) and historicist analyses (Jaszi 1991, 1992; Rose 1988, 1993; Woodmansee 1984) of law. She notes the problematic tendency of cultural studies scholars to approach law “as if [it] had a unified, canonical presence and spoke in a singular unambiguous voice”
(Coombe 1998, p. 30). Setting out an alternative methodological approach, Coombe (1998, p. 30 - 31) argues that cultural studies scholars should move away from “isolated decisions, statues, or treatises ... to attend to the social life of the law’s textuality and the legal life of cultural forms”. Therefore, in this thesis I also examine informal spaces of legal culture, as mentioned, and focus on particular sites of public interaction such as letters to the editor, opinion pieces and social media platforms. I consider these spaces equally important when analysing the discursive process of subject production and indeed, the broader institutional processes of legal reform.

This approach also informs my use of the term publics throughout the thesis. In each case study I will highlight a range of publics who have a strong influence on law and the discourse around law during particular moments of crisis and rupture. I deploy public sphere theory (see Fraser 1990; Habermas 1991; Warner 2002) with the goal of using it as a useful theoretical tool that allows the dynamic between formal and informal spaces of law to be examined in greater detail. This theoretical approach helps to map the separate spaces of debate that occur during the process of legal reform, trials and judgment, as well as to examine how these contestations lead to the production of new and altered subjectivities in copyright law.

The work of queer theorist Michael Warner provides a useful entry point to conceptualising publics and their value as a conceptual frame. He notes that in order for a public to function it needs to be organised and separate from formal bodies of the state and law. The purpose of a public is to “appear as the public” (Warner 2002, p. 51), “to stand in for the public, to frame their address as the universal discussion of the people” and “transpose themselves to the level of the generality of the state” (Warner 2002, p. 84). The public that interests Warner is text based and one that comes into being in relation to texts and their discourses. For Warner, through the circulations of texts (which we can consider to be legislation, opinion pieces or judgements) a public discourse that carries a particular form of agency comes in to being (see Warner 2002).
However, in this thesis I deploy Warner’s term public in a broader sense. For the purposes of this thesis I suggest that material engagement between citizens can also form a public. Through my research, I have found particular spaces of dialogue to be especially vital in the establishment of publics around copyright law. The dialogic engagement in spaces such as the 1979 National Symposium and in various Senate inquiries stand as vital spaces for this project where particular publics are generated and should not be dismissed out of hand. Therefore, in this thesis I consider both text and dialogue to be mutually generative in the creation of publics and my broader analysis will follow from this foundational stance.

Chapter Outline

Following this introduction, the thesis is broken up in to three parts, with each part focusing on a particular subject of copyright law. The first chapter of each section will provide a chronological and theoretical history of a subject and then the subsequent case-study chapter will provide a clear evidential base for the arguments established in the theoretical section. In this way a broad theoretical approach will be married with nuanced specificity, allowing this thesis to both contextualise each subject and map the relationships and interrelations between all three subjects.

In chapter one, “Towards a Relational Author”, I will explore the changing status of the author throughout history and provide a detailed critique of current scholarship around the author. Starting in the pre-modern era, I chart the changing social and cultural role of the author and explain how the authorial subject became entrenched in a legal framework. Throughout this analysis I argue that that a relational approach to copyright law provides a more accurate picture of how the author operates. Linking seminal poststructuralist re-interpretations of the author (Barthes 1967, Foucault 1991) to recent relationalist approaches, I call for more attention to be paid to the “system of dependencies” (Foucault 1991, p. 119) that supports the author. In closing I outline how a

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9 Robert Asen (2009, p. 269) argues that Warner presents a ‘false choice’ between ‘dialogue and circulation’ by refusing to allow dialogue the possibility of generating a public. Asen argues that this stance elides the importance of dialogue by solely privileging the text.
relational approach allows scholars to acknowledge the author’s dominance in copyright law, while also revealing how this dominance is maintained through an on-going process of cultural and legal legitimisation, one that operates in relation to other subjects.

Chapter two, “Case Study: Copyright Amendment (Moral Rights) Act 2000” continues this examination of the author through a case study of the introduction of a moral rights regime into Australian law. Moral rights are a series of personal rights separate to the economic rights of copyright law and connect an author’s personal identity to their body of work and were enacted into statutory law following a drawn out reform process. Through an analysis of archival research and the public record, I offer an example of the messy process of legal boundary setting and codification, with a particular focus on the Copyright Amendment (Moral Rights) Act 2000. This chapter underlines the importance of acknowledging these collective processes of subjectification, explores the contested status of the author and outlines how the relationships between author and user and author and pirate were redefined throughout this period. This legal reform substantially redefines the author, but I suggest that the user and pirate are also re-shaped alongside it.

In the second section of the thesis, I turn to the subject of the user and my analysis begins in chapter three, “The User: The Cultural Paradox of Creation”. I begin by outlining the historical emergence of the user as a subject, first focusing on its legal conceptualisations before discussing particular cultural moments where the user has emerged. I then shift focus to the creative user and drawing on a range of historical examples, from Sony v. Betamax to recent scholarly trends in media and cultural studies, I outline the contours of this recent redefinition of the user subject. I argue that the creative user is a paradigmatic example of particular tensions in what has been described as copyright law’s philosophy of possessive individualism (see Cohen 2012; Craig 2011). Examining the creative user, I underline the importance of informal interpretations of copyright law, which helped to sustain this subject, as well as explain how this subject operates in a contested space between the user and author. In closing, I suggest that the status of the creative user underlines the contradictions inherent
in copyright law’s philosophical foundations and suggest that a relational approach could be a productive way to rethink the tensions that exist between these two subjects.

The case study in chapter four, “Case Study: Copyright Amendment Act (2006)” continues the examination of the user. I analyse the Copyright Amendment Act (2006) reform process, which I argue is the first time in Australian copyright law that the user emerged as a clear discursive figure in particular legal cultures. Using primary archival research, I outline how the philosophy of liberal political theory undergirding copyright law attempted to dominate these discussions, with key Government figures positioning the user as separate from the author and the pirate. Through a detailed examination of user practices around this time and arguments made by a number of publics, I contend that this reform process reveals the impossibility of maintaining the separation between subjects. Drawing on relational theory, I argue that as subjects are defined against each other a range of practices and discourses continually challenge these definitions, underlining the procedural (Marshall 1994) and quotidian nature of this collective subject definition. I suggest that these processes reveal substantive weaknesses in the political philosophy that currently supports copyright law.

Chapter five, “The Historical Pirate: Early Modern England and Enlightenment France”, marks the beginning of section three, where I offer an alternative way to think through the subject of the pirate. I conduct an analysis of early modern England and Enlightenment print culture and follow the pirate’s trajectory during these periods, returning to the Stationers’ Company, only this time viewing its history from the perspective of piracy. Through this analysis I reveal how the pirate buttresses the identity of the nascent author figure and contributes to emergent consumption practices and market formations. I argue that this alternative approach re-positions the pirate subject and emphasises its centrality to copyright law. The pirate’s role in defining the author provides another example of relational processes of subject formation and again highlights the difficulty of establishing clear definitions of a subject in copyright law. I suggest that once the subject of the pirate is treated as a valid and formative object of study, and not merely background noise on the way to the
construction of the author, not only does the primacy of the author wane, but this historical appreciation of the pirate provides us with tools to re-assess various discourses that circulate around the pirate today.

Chapter six, “Case study: Roadshow Films Pty Ltd & Ors v iiNet Ltd”, continues the examination of the pirate and its function within and around the dominant structures of copyright law. I draw on the evidence of the court as well as the public reaction to the case in order to look at the contemporary framings of the pirate in Australia. After assessing these various discourses around the pirate, I outline the complex interrelations between the pirate and the user, the changed relationship between the author and the pirate, and examine the cultural work that must be constantly undertaken in spaces of both culture and law in order to maintain a clear separation between these various subjects. I also contend that the dynamics of law explored in this chapter, show law to be a living actor rather than a reified institutional structure, wholly imbricated in contingent formal and informal cultures of legal understanding.

The concluding chapter will re-iterate the key findings of the thesis and suggest that studies of copyright law could make further use of relationality as it can more accurately account for the messy and ongoing process of subject formation. I suggest that a relationalist approach productively destabilises the strict subject-delineations that currently define its legal framework and in doing so, will contribute to the wider scholarly project of both understanding and critiquing copyright law in the digital age.
Part I

Authorised subjects
Chapter One

TOWARDS A RELATIONAL AUTHOR

Any investigation into the various subject positions of copyright law cannot avoid tackling the subject of the author. In the three centuries since the invention of copyright law, a comprehensive theory of authorship has developed alongside this legal framework, and in the latter half of the twentieth century technological changes and theoretical developments have begun to challenge foundational assumptions about the creation, cultivation and ownership of knowledge that reside in the framework of the law (see Barthes 1977; Boyle 1996; Coombe 1998; Foucault 1991). Indeed for most of copyright law’s history, the author has operated as a form of legal shorthand for these activities and retained a privileged position within the structure of the law itself. Law clearly delineates the privileges due to an author and an extensive body of case law has helped to continually refine and expand both the definitional contours of the author and the rights attaching to authorship (see Bowrey 2005; Litman 2001; Rimmer 2007).

The dominance of the author is an oft-discussed cultural and legal phenomenon. An influential field of scholarship has examined the history behind this subject’s dominance (Craig 2002; Jaszi 1991; 1992; Rose 1998; 1993; 2003; Woodmansee 1984) and a significant strand of critical legal scholarship around copyright law bemoans the expansion of copyright law and the ever-increasing extension of authorial rights at the expense of the wider public (Boyle 1996; Craig 2002; Litman 2001; Lessig 1999; 2002; 2004; 2008; Samuelson 1996, Vaidhyanathan 2003). This critical stance has its own antipodean arm, with a number of

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10 A detailed history of case law that speaks to this expansion is beyond the scope of this thesis, particularly as significant amount of scholarship has already outlined exactly how authorial rights have expanded over the years. The authors cited in-text offer a convincing analysis of how authorial rights have expanded over the years and the policymaking processes and cultural assumptions that have helped to sustain this trajectory. I would also point to the United States’ Copyright Term Extension Act 1998 (US), Digital Millennium Copyright Act 1998 (US) and Australia’s US Free Trade Agreement Implementation Act 2004 (Cth) as key pieces of legislation that have sustained this trend.

11 The broad contours of this critical stance have been productively challenged by a number of scholars. Eva Hemmungs Wirten (2006, p. 287) suggests that attempts by ‘free culture’ activists (see Lessig 2004) to do away with the author are flawed as they end up merely smuggling ‘him in through the back door…as hacker, programmer, DJ, whatever…’. Hemmungs Wirten (2006) also critiques the gendered approach to creativity that dominates these accounts. Jane Ginsburg (1997; 2013) is a long-standing critic of
scholars challenging an array of Australian legal reforms over the past decade, which have substantially expanded the rights attaching to authorship (Bond et al. 2007; O’Brien and Fitzgerald 2006; Rimmer 2006; 2007; Weatherall 2007).

The additional rights granted in Australian law, such as the reform to extend the copyright term to 70 years beyond death, may potentially benefit corporate actors rather than individual authors (Rimmer 2006). However at a philosophical level these rights are largely justified by emphasising the rights of the author, with little consideration granted to the role of users (see Rimmer 2006).

This chapter does not seek to directly intervene in this well-worn debate, I simply present it as a contextual background for my own specific intervention. I offer an alternative approach to the author by arguing that a relationalist perspective offers a more accurate way of accounting for the subject of the author. This analysis will present a brief history of the author that explains its emergence, while also drawing on relationalist theory in order to underline the author’s contingent nature and constituent instability as a subject-position. My examination of the author will begin in the ancient world; exploring how earlier societies understood the processes of creativity and knowledge production (Alford 1995; Hesse 2002; Masterson 1940; Yu 2006) before moving on to the early years of copyright law’s history where the author emerged in law. Following an assessment of how various scholars have interpreted this particular historical moment, I will turn to the work of Michel Foucault (1991) and Roland Barthes (1977). I argue that these texts offer some beginning conceptual threads through which to consider relationality, before turning to the ramifications of Craig’s (2007; 2011) own conceptualisation of a relational author. Although this chapter embarks on a rough chronological route, it does not seek to provide a historical narrative, but instead looks to highlight key cultural shifts in our understanding of authorship and outline its concomitant function as a legal and cultural subject.

Pre-modern concepts of creation

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this strand of scholarship. She suggests that copyright law is flexible enough to be sympathetic to various re-conceptualisations of authorship and that there is no need for a radical re-assessment of copyright law’s current trajectory.
When assessing the author it is important to remember that the subject is always situated in a particular historical and cultural context. It is worthwhile revisiting the pre-modern world if only to underline just how historically contingent the current dominant legal and cultural framing of authorship is. In a wide-ranging article that charts the history of intellectual property, Carla Hesse (2002; see also Masterson 1940) provides an excellent counterpoint. She notes that for the major civilisations of the pre-modern world, there is a “striking absence of any notion of human ownership of ideas or their expressions” (Hesse 2002, p. 27). Instead, knowledge was seen as something stemming from divine providence, and the scribe or intellectual was viewed merely as a cipher, with the faithful transmission of God’s knowledge to future generations seen as its own reward, a concept that was present to varying degrees across the pre-modern world.

In Ancient China, a scholar’s ability to “render or interpret the wisdom of the ancients, and ultimately God, more fully and faithfully than his fellows was highly prized” (Hesse 2002, p. 26) and such intellectual work was repaid through reputational esteem throughout the generations. Income for scholars was also raised through the support of various patrons. Commerce and writing for profit was looked upon disdainfully, and direct copying was praised as it led to a broader societal goal: moral improvement of the author and their community. As Peter Yu (2006, p. 28) explains:

[T]he Chinese believed that copying was an important living process through which people acquired understanding to guide their behavior, to improve themselves through self-cultivation, and to transmit knowledge to the posterity [sic].

Furthermore, although the book or manuscript produced was a clear form of property, which could be exchanged, authors had no property right to their written words or particular forms of expression. “Chinese characters were thought to have come from nature” (Hesse 2002, p. 27) and so the Chinese

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12 Carla Hesse discusses Ancient Greek, Chinese, Islamic, Jewish and Christian civilizations and it is important to recognize that this does not stand as an exhaustive analysis of systems of knowledge production in the pre-modern world. However, historians of print and legal scholars have tended to focus on these civilizations at the expense of others (see Alford 1995; Drogin 1983; Hesse 2002; Yu 2006 for example).
believed that words should be made freely available to all, refusing any property claim that could potentially limit their usage.\textsuperscript{13}

Similarly Islamic, Jewish and Christian civilisations had a cultural understanding of knowledge that presumed the intervention of the divine was involved in the generation of new knowledge, and had no concept of an individual author that retained property in his or her work. Islamic society believed that all knowledge came from God, and oral recitation was prized over the written word, with books maintaining a lesser social status. Like Chinese scholars and scribes, Islamic authors held no ownership over the ideas expressed within their books, as ideas were seen to be intangible and not a legitimate form of property. The Judeo-Christian tradition had a similar relationship to knowledge, which rested on the words of Jesus who told his disciples “Freely ye have received, freely give” (Matthew 10:8). This passage translated in medieval times as “Knowledge is a gift from God, consequently it cannot be sold”. As Hesse (2002, p. 28) goes on to note, as “[s]elling something that belongs to God constituted the sin of simony”, professionals were told not to charge fees for services, and relied on gifts instead.

This biblical framing of the Judeo-Christian tradition of knowledge production is supported by Salathiel Masterson (1940, p. 623; also see Yu 2006), who explains that after the fall of Rome, “the task of the production and preservation of literature was in the hands of the scribes of the Roman Church”. Monks would labour “for the glory of God and the service of the Church” (Masterson 1940, p. 623 - 624), rather than for any material reward. Although “most manuscripts were highly prized”, this was largely due to the fact that the text itself as an object represented “expensive materials and laborious hours”. Yu (2006, p. 7, quoting Drogin, 1983) outlines the material limitations of knowledge production:

When Bishop Leofric took over the Exeter Cathedral in 1050, he found only five books in its library. Despite immediately establishing a scriptorium of skilled

workers, his crew managed to produce only sixty-six books in the twenty-two years before the bishop’s death in 1072.

Such a slow production line meant that knowledge was a limited commodity, and due to such difficulties in reproduction, the copying of vital knowledge was highly prized in medieval communities (Yu 2006; 6 - 8).  

The absence of modern notions of authorship across Medieval Europe was partly due to the significant role that religious belief played in these processes of manuscript production. Michael Clanchy (1982, p. 172) explains that when copying texts and producing manuscripts, monks viewed such work as a “sacred charge for posterity”, writing “their books as an act of worship” and comparing the process to a divine act of cultivation. Further evidence of the divine was present in the illumination practices of the monks who embellished individual letters throughout the text with an array of colours and borders. Clanchy explains that as medieval monks regularly worked on scripture - the sacra pagina - these practices came to the fore as the monks, “[u]nlike hireling scriveners and slave writers of the ancient world ... enfolded the divine words in the interlace of their designs” (Clanchy 1982, p. 176).

This brief history of textual production in the pre-modern world presents an economy around authorship that functioned through gift giving and reputational esteem and where the divine provenance of knowledge was seen to be as natural as contemporary justifications of authorship and intellectual ownership are today (see Hesse 2002; Masterson 1940; Yu 2006). These approaches to authorship were not just technologically contingent but also culturally and economically supported. That is, particular understandings of authorship did not automatically change once improved technology such as the printing press was introduced into society. Instead, changes were reliant on cultural as well as technological developments, and some long-standing conceptualisations of

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14 Yu (2006) clearly outlines the social importance of copying over encouraging further creative acts by individuals. Copying was a cultural necessity, used as a method of knowledge preservation and as a way of educating the community:

In the early Middle Ages, the Church played a very important role in protecting ancient works and monks were heavily involved in the preservation of literature inherited from earlier writers (Putnam in Yu 2006, 6 – 7).

Copying helped increase the knowledge base. In the early Middle Ages, obtaining knowledge from books was not easy... Even after the manuscript was secured, it required several people and many months of labor to copy, proofread, decorate, and bind the book (Yu 2006, p. 8).
authorship proved to be more resilient than others. For example, despite inventing movable type, the Chinese maintained aspects of their pre-modern understanding of creation well into the twentieth century (Alford 1995). However, Europe took a substantially different path and following the introduction of the printing press in the mid-1400s a concept of the author slowly emerged.

From God to the garret: The emergence of the author

The advent of the printing press allowed communities wider access to written materials but provided rulers with a regulatory headache (see Patterson, 1968). A new, and increasingly valuable, printing economy was slowly growing in cities across Europe and with printing beginning to gradually displace scribal economies, rulers and monarchs wanted to benefit from these new economic ventures. However they needed to contend with an emergent circle of printers (otherwise known as stationers) who had the capacity to produce texts at a faster rate than previously imagined and were not necessarily tied to the Church or the State. Thus the protection of local printers against outside competition and the need to control the dissemination of heretical and seditious thoughts were at the forefront of regulators’ minds during the fifteenth and sixteenth centuries (Yu 2006).

The answer to these problems was a system of privileges, first deployed within the Venetian Republic and soon found in common use across Europe (see Woodmansee 1984). The book privilege provided “the publisher with the exclusive right to print a work … releasing him from the competition of other publishers”, and afforded each printer the chance to recoup the initial investments on printing (Borghi in Deazely et al. 2010, p. 140). These privileges functioned as a form of economic protection for printers. However, they also allowed authorities to engage in significant pre-publication censorship and retain a certain amount of control over the printing industry. This system meant that entrepreneurial printers had to agree to some sort of regulatory oversight of their wares in order to be sure of a return on investment. Over the course of the
fifteenth century a range of different models of privileges were in operation in both city-states and nations and explaining them in detail is beyond the scope of this thesis. Importantly for the concerns of this chapter, in all of these nascent legal frameworks, the author was absent.

Privileges functioned as a form of censorship and were also used to organise and manage an emerging trade. Unlike copyright law, privileges were not deployed to protect the original contributions of the author and a concept of authorial rights did not automatically emerge alongside the printing press. As Laurent Pfister (in Deazley et al. 2010) explains, in France, authors could obtain rights in their works through the privilege system in the sixteenth century but the system itself was indifferent to the status of the petitioner. The author retained no special status due to having written a work and it was in fact possible for works to be published with a privilege but without the author’s consent. Such examples make it abundantly clear that “the privilege system was not established with the principal aim of protecting and securing the interests of the author” (Pfister in Deazley et al. 2010, p. 122).

So how did the author emerge as a legal and cultural construct and become a key subject in the operation of copyright law? It is worthwhile turning to developments in England and Scotland across the seventeenth and eighteenth century to answer this question. A number of seminal legal battles centred on the emerging subject of the author occur in these countries, and a substantial amount of research has provided a useful social and historical lens through which to understand this “birth” of the author (see Bowrey 1994; Feather 1988, 1992 Kaplan 1967; Patterson 1968; Rose 1988, 1993; Saunders 1992). Due to this central role in the development of copyright law, the British Isles has been a common location from which to explore the role of the author in early copyright law.

England and Australia’s shared common law heritage also means that an examination of how the author emerged as a statutory legal subject in the British

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Isles provides a useful historical context for analyses of Australian law reform conducted in the following case studies.

England had a nascent system of knowledge regulation maintained by a guild of London based printers, the Stationers’ Company. They had been operating since the early 1400s but their regulatory power expanded dramatically after King Philip and Queen Mary granted the Stationers’ Company a “virtual monopoly” on printing and publishing from 1557 onwards through the Stationers’ Charter (Feather 1992, p. 459; also see Ochoa and Rose 2002).16 The Stationers’ Company already had a functional system of internal regulation similar to many other trade groups. These groups generally developed a set of ordinances, which were “drafted by members of the trade themselves, subject to approval, and which generally conformed to a common type” (Patterson 1968, p. 31).

What the Stationers’ Charter of 1557 sought to do was to strengthen this internal regulation and put it in the service of the monarchy as an “instrument … of press control” (Patterson 1968, p.37). As briefly noted above, monarchies across Europe had a vested interest in the censorship of the press as well as the fostering of a sustainable print market and Elizabethan monarchs were no exception. In order to facilitate effective censorship of the press, Queen Mary I and King Philip of Spain granted the Stationers’ Company a wider set of powers in comparison to other trade guilds and organisations, providing them with the aforementioned near-monopoly on printing, and “powers of national regulation” (Patterson 1968, p.32). Whereas the powers of other trade bodies were geographically limited, following 1557 no one could print a book in England unless they were a member of the Stationers’ Company or directly “licensed by the Crown” (Blagden 1960b, p. 40). These restrictions also “effectively restricted printing to London and the suburbs” as the only other bodies licensed under royal Letters Patent were the two universities Oxford and Cambridge, neither of whom owned a press (Greg 1956, p. 3).

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16 The early history of the Stationers’ Company will be explored in chapter five. In addition to the history provided in this thesis, the scholarship of Cyprian Blagden (see 1960a, and also 1955; 1958; 1960b) explores the early years of the Stationers’ Company in great detail. Other scholarship that also traverses similar ground include the histories of Sir Walter Wilson Greg (1956) and John Feather (1988).
The Charter is particularly important because it strengthened a protean notion of copyright protection developing within the Stationers’ Company. This form of regulation was not directly concerned with the author, and copyright was instead viewed as a publisher’s right, seen as “a right to be protected in the receiving of profits from publication, without the fear of piracy” (Patterson 1968, p. 44). The system functioned through a method of registration. A guild member presented a manuscript - licensed by the proper authorities and censors - to the Stationers’ Company wardens for endorsement. The member would then submit the copy for entry into the register of Stationers, situated in London (Patterson 1968; also see Feather 1988). Following registration, the member owned the right to publish that book in perpetuity. Members could also sell or bequeath the right to other stationers. This economy was not open to the public, and so rights to publish popular books were extremely valuable and tightly controlled by their owners like any other investment. Monarchical support for this regulatory system, which supported a bourgeoning print economy, was a key reason why the Stationers’ Company were willing to acquiesce to a Charter that structurally implicated them in a censorship regime (Patterson 1968).

To briefly turn to matters of royal succession, Mary died soon after incorporating this censorship regime and Elizabeth I, who succeeded her and ruled for the rest of the sixteenth century, largely supported the Stationers’ monarchy (Patterson 1968). However the two monarchs that followed Elizabeth - James I and Charles I - “had strongly held views about the status and powers of monarchs” and both attempted to strengthen the role of the church and Crown in the censorship of the press (Feather 1988, p.41). In terms of the structural organisation of the printing trade, this power was controversially deployed in the increased granting of monopolies to individual authors by James I. As Feather (1988, p. 41) explains “from 1603 to 1640 there were more than seventy grants of this kind, enough to threaten to undermine the trade’s internal mechanisms for the protection of rights in copies”. This willingness to directly challenge the internal workings of the Stationers’ Company and grant monopolies in the face of a rising anti-

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17 It is important to note that these processes of registration involved the granting of two separate licenses, a practice in operation as early as the 1560s. The censor’s ‘license was a generalized permission for the book to be printed, while [the Company’s license] granted the specific and unique right to do so to a named person’ (Feather 1988, p. 39).
monopoly sentiment of parliament underlined the changed political context in which the Stationers had to operate.

The use of the royal prerogative to grant monopolies is also interesting for this study of the author for a number of reasons. Firstly, this change in approach by the monarchy meant that an increasing number of authors became rights holders and now held a monetary interest in their work. No longer directly bound to the monopolistic practices of the Stationers’ Company and having to deal with publishers and printers, authors were starting to gain a sense of financial and professional independence. This can be seen most clearly in a pamphlet from poet George Whiter - owner of a royal patent - that attacked the “monopolistic attitudes” of the Stationers’ Company (Feather 1988, p. 42).

Secondly, these conflicting debates between authors and publishers were never really resolved and a number of political upheavals across the following decades weakened the Stationers’ Company substantially. They would never again have the relative security of a near century long monopoly on printing again.

Their monopoly was initially placed under threat in the period following a series of civil wars between the monarchy and parliamentarians, wars which Charles I - James’ successor - eventually lost. England was declared a commonwealth and this ongoing political discontent and structural change led to the collapse of the licensing system and a raft of unlicensed printing followed, a process that will be described in more detail in chapter five (also see Blagden 1958; Feather 1988). Once the monarchy was restored, control was returned to the Stationers’ Company through the Licensing Act of 1662, providing them with a general monopoly over printing and again integrating the printing industry within a censorship regime (Sherman and Bently 1999).

But the regulatory power of the Stationers’ Company was eroded again when Parliament failed to renew the Licensing Act in 1695. The House of Commons argued that the act was inefficient and subject to favoritism and abuse (see

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18 An Act for Preventing Abuses in Printing Seditious, Treasonable, and Unlicensed Books and Pamphlets, and for Regulating of Printing and Printing Presses (the Licensing Act), 1662, 13 & 14 Car.II, c.33
19 Under the terms of the act printing was restricted to London and the two universities Oxford and Cambridge. The number of master printers was limited to twenty and appointed by the Archbishop of Canterbury and the Bishop of London and manuscripts had be registered by the Stationers’ Company and submitted to pre-publication censorship (see generally Astbury, 1978; Griffin, 1999).
Sirluck 1960; Kaplan 1967), and was also concerned by the rise of an anti-monopoly sentiment amongst the learned public, who resented the control that a small cartel of publishers retained over a number of important texts and the imposition of pre-publication licensing and censorship (Rose 2003). The free press of England, which dramatically expanded at the turn of the eighteenth century, was also beginning to be seriously valued by younger members of Parliament, who were developing a “taste for uncensored news and information” (Deazley 2004, p. 13). With prominent figures like John Locke and Daniel Defoe arguing for freer presses and “an increased emphasis on post-publication accountability and prosecution” (Deazley 2004, p. 26), it was unlikely that a bill that simply echoed the 1662 Licensing Act would be passed in the near future.

These developments worried the Stationers’ Company suddenly left without any property in their works, or control over the printing industry and they were losing “position and prestige” (Feather 1988, p. 49). They attempted to restore their old monopoly by linking themselves with pro-censorship forces, but by the early eighteenth century they realised that they needed to take an alternative approach. The decade following the 1695 lapse of the Licensing Act saw thirteen proposed bills on press regulation fail - largely due to each bill becoming increasingly reactive and proposed on the back of one or two “individually contentious publications” (Deazley 2004, p. 29) - and the Stationers’ Company eventually heeded the winds of change. They gave up their dream of maintaining a monopoly on the printing industry, and acknowledged they might have to concede some ground to anti-monopolists in exchange for the viability of the industry as a whole. Deazley (2004, p. 33) notes the discursive shift in the Stationers’ claims, with the Stationers no longer highlighting “their precarious livelihood and the numerous stationers’ widows facing utter ruin”. Instead, “the deserving nature of the author’s work and the public utility in legislating in such a manner was foremost in their reasoning”. Thus printers swung the other way, framing their cause around supporting authors’ rights and education rather than the need for censorship and worries about their own financial wellbeing. In so doing, the printers helped to enact the first copyright law: the Statute of Anne.20

20 Both Ronan Deazley (2004) and Siva Vaidhyanathan (2003) critique scholars who claim that the Statute of Anne is the first copyright law. Deazley in particular is anxious to point out the poor drafting and lack of coherence in the text, which meant that the following century saw a series of court cases conducted in order to ascertain the exact forms of protection granted to authors under
The Statute of Anne was the first body of law that legally recognised authors as owners of their works, and provided a term of protection of fourteen years, renewable for another fourteen years and also further “reinforced the Stationers’ exclusive rights to previously published works for a non-renewable twenty-one year term” (Vaidhyanathan 2003, p. 40). It is important to note that the actual passing of legislation did not immediately change practices of ownership or distribution in early modern England, despite this Statute representing a significant shift away from monarchical regulation and hinting at our modern configuration of copyright law. Scholars (Bowrey 1994; Deazley 2004; Kaplan 1967; Patterson 1968; Rose 1993; Saunders 1992) of the period largely agree, arguing that although the Statute grants the author some cursory rights in their work, the bill was largely concerned with regulation of trade and the maintenance of the printing industry. But a stronger legal concept of an author would emerge soon enough, partially due to the Stationers’ rationale for supporting authors’ rights in the first place.

The Stationers were only happy to enact the Statute of Anne as they assumed that the statutory acknowledgement of authorial rights would have little to no impact on the operation of trade. They argued that authors retained a perpetual common law right of property in their work, but because authors needed to sell their works to printers in order to get published, this common law right was immediately transferred to them. The Stationers viewed the statutory right, which was also transferred through contract, as a supplement to the common law right, thus rendering the Statute useless in practice (see Bowrey 1994). This impasse between the views of the printing industry - now expanding following the dismantling of the monopoly of the Stationers’ Company - and a growing class of authors, who suddenly were in reach of statutory rights that protected their work, led to a series of major legal cases, which sought to answer one key
question: did authors, and through them booksellers, have a perpetual common law copy-right in their works or were their rights confined to the statutory period provided under the Statute of Anne? (Sherman and Bently 1999). It took the courts of England over half a decade to answer this question, and through this process the author in law began to emerge.

The emergence of the authorial claim

The rhetoric of the Stationers made it clear that despite the difficulties of the past half-century, they were hoping to maintain their monopoly position through other means and continue to reap the financial rewards of printing. They advocated on behalf of authors - arguing that they were rights holding individuals deserving of legal protection - only to immediately dispossess authors of these same rights. The problem with this strategy was that that the Statute was a significantly different regulatory device to earlier forms of print regulation. The Stationers’ claims about the common law right of the author were only based on a presumption about how the new law would operate. As the following history shows, once the statutory right was tested in the courts it was authors rather than the Stationers, who began to emerge as the central beneficiaries of this new legal arrangement.

The landmark case of Millar v Taylor was the first time that these questions about the Statute were formally resolved in the courts of common law, and it centred on a poem called “The Seasons”. As Salathiel Masterson notes (1940 p. 631), the poet James Thomson had published the poem “for his own use and benefit as proprietor at several times during the period from 1727 to 1729”. He then sold the work to Andrew Millar, who registered the work at Stationers’ Hall and published it regularly until 1763 “when Robert Taylor put forth an edition without his license or consent”. The term limit of the Statute of Anne had expired, so Millar’s claim, brought to the King’s Bench in 1766, “proceeded upon the theory of a perpetual property at common law in the author and his assigns”.

In 1769, Lord Mansfield, Chief Justice of the court of the King’s Bench, found in favour of Millar. Mansfield was no doubt influenced by the cogent arguments of
famed legal scholar William Blackstone who in representing Millar, drew on the works of John Locke in order to fashion a viable case for the extension of the common law right (see Bowrey 1994; also see Blackstone, 1766). It was no surprise then that Mansfield drew extensively from Locke’s natural theory of labour and property developed from Two Treatises on Government in order to shape his judgment. He decided that “it is just, that an author should reap the pecuniary profits of his own ingenuity and labour” (Millar v Taylor (1769) 4 Burr. 2303),²² echoing Locke’s (1690 [2013]) claim that:

The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyed to it something that is his own, and thereby makes it his Property.

This judgment was not a legal acknowledgement of Locke’s theories as a foundation for some sort of author’s right, but rather an acknowledgement of Blackstone’s selective interpretation of them (Bowrey 1994). Blackstone avoided the more radical parts of Locke’s broader philosophical outlook to make his claim more appealing. Therefore the early history of copyright law was not imbued with a broader Lockean philosophical framework but rather a particular interpretation of it (Bowrey 1994; see also Anderson 2003; Drahos 1996).²³

The decision was soon challenged and in 1774 “The Seasons” formed part of yet another landmark copyright case, Donaldson v Beckett.²⁴ By this stage, copyright of “The Seasons” had been transferred to Thomas Beckett and a group of London booksellers and printers, who argued that Scottish bookseller Alexander Donaldson, whose successful business was based around reprinting cheap editions of classics like “The Seasons”, was a pirate (see Rose 1988). The

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²² A copy of the judgment is available at copyrighthistory.org. At the time of writing the permanent link was: http://copy.law.cam.ac.uk/record/uk_1769

²³ This point which rests on a detailed comparative analysis of William Blackstone’s legal argumentation and John Locke’s political thought conducted by Kathy Bowrey (1994) is an important one to make. It is a common tendency for scholars to suggest that a ‘Lockean’ theory of copyright law resides within copyright law (see Hughes 1988; Craig 2002). However as Bowrey’s analysis makes clear, it is debatable to what extent Locke’s general thought can be discerned within law, as opposed to Blackstone’s interpretation of Locke. As a counterpoint, Carys Craig (2002) provides an alternative approach, directly locating Lockean thought in contemporary frameworks of copyright law. As part of this project she offers a critique of the general Lockean approach to copyright law.

²⁴ A copy of the judgment is available at copyrighthistory.org. At time of writing the permanent link was: http://copy.law.cam.ac.uk/record/uk_1774
The case tackled one of the great legal questions of the day, and it essentially revisited the questions raised in *Millar v Taylor*, seeking to establish whether copyright law was a limited statutory right or a perpetual common law right. The case was heard in the House of Lords, and the judicial standing of the House meant that a decision would mark the end of “one of the most important periods in the history of intellectual property” (Bently and Sherman 1999, p. 15) and directly impact the foundations of the publishing industry. The case “attracted great public attention” and was “perhaps the only time [where] so many issues were discussed at such length and in such detail” (Bently and Sherman 1999, p. 14 - 15).

The House of Lords functioned as a court of appeal for important matters. Twelve common-law judges - the judges of the courts of King’s Bench, Common Pleas, and the Exchequer - would be present “to hear the arguments of counsel and advise the house” but the case was to be decided by a “general vote of the peers, lawyers and laymen alike” (Rose 1988, p. 67). Three initial questions were posed to the judges in order to advise the house prior to the vote:

First, did the author have a common-law right to control the first publication of his work? Second, did the author's right, if it existed, survive publication? Third, if the right survived publication, was it taken away by the statute (Rose 1988, p. 67)?

The judges found that an author retained the common-law right and that it survived publication, however a six to five vote (with Lord Mansfield abstaining) decided that the statute took away the common law right.

Following these clarifying questions the House of Lords was presented with one basic question: “[S]hould the Chancery decree restraining Donaldson from publishing Thomson’s poems be reversed?” There were a number of theoretical points of law converging on this decision, such as the difference between a literary and mechanical invention and the form of a literary composition, but as Rose (1988 p. 68) notes the Lords were not only unable but also unwilling to approach these debates. Instead, they were “concerned with the prospect of a perpetual monopoly” - monopolies standing as one of the pressing political
issues of the last few decades - and so deliberation continued along these lines. Following a fervent debate amongst the Lords, it was agreed to reverse the Chancery decree and end the possibility of any further claims of perpetual copyright.

This decision had a number of immediate material ramifications. It legitimised reprinting businesses like Donaldson’s, which provided affordable classics to a burgeoning reading public (Rose 1988) and significantly reshaped the publishing industry. The case also carried a dramatic long-term impact. No longer was the author seen to have natural rights to their property but were instead only granted rights limited by statutory law. The Lords’ decision only represented the birth pangs of the authorial subject, and there were still many questions left to be answered. For example, as Bowrey (1994 p. 24) notes, there was no effort made to decide the exact scope of what an author owned “nor [an] endorsement of criteria by which the limits to reproductive property could be discerned”. Notwithstanding these qualifications, the decision represented a significant shift in the debate and the author began to operate in a similar fashion to our modern understanding: as a subject limited by statutory law.

Interpreting narratives of authorial emergence

The abridged eighteenth century cases presented above serve as a commonly agreed point of interest for historians of copyright law, and others concerned with tracking the emergence of the author. The significance of these cases is regularly contested, with various scholars debating their influence on both our modern understanding of the authorial subject, and the final conceptual shape of the author in law. In the following section I outline the key debates in order to explore the theoretical interpretations of the above history as well as point to other factors that may be at play in the author’s emergence as a subject in law.

Three strands of scholarship stand out as both useful and significant analyses of the eighteenth century. Historicist copyright scholars Mark Rose (1988, 1993; 2003); Martha Woodmansee (1984) and Peter Jaszi (1991, 1992) have published a range of historical analyses of the period, which attempt to explain the social
construction of the author across Europe as well as the growing influence of
genius and Romantic notions of the author in copyright law. A group of scholars
have critiqued the above work, with David Saunders and Ian Hunter (1991, p.
480; also see Saunders, 1992) challenging this attempt to unify “the patchwork
of historical phenomena” in order to locate the emergence of an authorial
consciousness. Finally, the scholarship of Kathy Bowrey (1994; 1996) and Lionel
Bently and Brad Sherman (1999) manage to critically appraise both sides of the
debate and in doing so provides a productive frame though which to understand
the emergence of the authorial subject.

Martha Woodmansee (1984) was one of the first scholars to attempt to locate the
birth of the legal and cultural author. She views the modern idea of the author as
“a relatively recent invention” (1984, p. 426) that signifies a dramatic shift in
Western culture’s understanding of creativity and explains how eighteenth
century German theorists downplayed (or even discarded) the notion of
craftsmanship that was previously seen to be central to writing and creation,
favouring instead the “element of inspiration”. Woodmansee argues that
craftsmen went on to internalise “the source of that inspiration” and with
inspiration seeming to emerge from the very body of the creator, this led to the
view that the “inspired work was made peculiarly and distinctively the product –
and property – of the writer” (1984, p. 427). Drawing on detailed historical
research, Woodmansee’s project begins to establish the social, cultural and
political conditions that contributed to the emergence of the genius author.
Rather than viewing the genius author as a subject that emerged naturally from
law, Woodmansee provides a complex history of eighteenth century debates
around creativity that explains how a writer craftsman turns into a genius
author.

The project of identifying the genius author is also the focus of Jaszi (1991;
1992). He explores how the protean concept of authorship occasionally deployed
in the early eighteenth century, slowly became an ideology by the early
nineteenth century, with notions of “creativity, originality and inspiration ... poured into it” (Jaszi 1991, p. 471). Outlining a number of cases from Anglo-
American copyright history, Jaszi follows the emergence and subsequent
reification of authorship and then develops this history by assessing the state of
the Romantic ideology in the present day. He argues that despite developments
in copyright doctrine, there is a persistent strain of Romantic individualism. This
can be clearly seen in copyright’s recursive insistence on forcing all writing into
the Procrustean doctrinal model shaped by the individualistic Romantic concept
of authorship (Jaszi in Woodmansee and Jaszi 1994). For Jaszi, despite the
increasing abstraction of copyright law and the influx of “economic interests”
(1991, p. 504) that could potentially move copyright doctrine away from the ideal
of the individual creator, the Romantic individual is still present in law and
retains significant cultural power.

The work of Rose - discussed previously in this chapter - focuses extensively on
the development of copyright in England and Scotland and in a similar fashion
to Jaszi and Woodmansee seeks to underline the historical contingency of the
authorial subject. Through his research on “the battle of literary property”, a
battle briefly sketched out above, Rose (1993, p. 6) notes that in an array of texts
- parliamentary records, pamphlets and legal reports - “aesthetic and legal
questions are often indistinguishable” underlining the complex position that the
author held during this period. Drawing on this historical evidence, Rose also
argues for the instability of the authorial subject, claiming that by “refusing to
affirm perpetual copyright” Donaldson v Beckett represented clear recognition
of the “radical instability of the concept of the autonomous author”. Like
Woodmansee and Jaszi, Rose is interested in how the author-figure in law
emerged through broader social, cultural and economic forces and he also
acknowledges that such a process can only underscore the contingent nature of
such a figure.

Despite the extensive historical research conducted by these scholars, their
narrative of authorial emergence is often criticised for being too simplistic and
conflating a range of significantly different social and cultural trends. Ian Hunter
and David Saunders25 have advanced the strongest critiques against the

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25 In both this work and David Saunders’ book Authorship and Copyright there is an ongoing attempt at criticising the tendency of
copyright historians to deploy ‘post-structuralist’ analyses. The argument is strident in its tone, challenges a set of interpretive
orthodoxies and has been critiqued extensively (see Coombe, 1994; Bowrey, 1996). Coombe criticises Saunders’ (1992)
characterisation of poststructuralism (see for example Coombe, 1994: 416) and in so doing usefully reveals the flaws in Saunders’
historicist projects embarked on by the above scholars. They argue that these histories are “teleological” in their approach and assume that “at some deeper level than the actual law the writer has economic rights that flow from his or her aesthetic personality” (Saunders and Hunter 1991, p. 494). Instead they contend that “the rights and liabilities, the statuses, the ethical and aesthetic capacities in which individuals might serve - do not converge in the authorial subject” (Saunders and Hunter 1991, p. 483). This critique is a useful one and cautions scholars against assuming that the emergence of the author is the only possible result of this particular historical period. It also serves as a warning not to automatically link the legal agencies granted to the author to the cultures of authorship emerging around this time (also see Bowrey 1994; 1996).

It is possible to acknowledge this divide identified by Saunders and Hunter and still recognise that these two lenses through which to understand the author are not hermetically sealed off from one another. Lionel Bently and Brad Sherman provide a useful approach that manages to balance these differing visions of the author in a more productive fashion. They recognise the findings of the aforementioned historicist scholars, noting that “there can be little doubt that over the course of the eighteenth century the individual-as-creator took on a more prominent role in law than had hitherto been the case” (Bently and Sherman 1999, p. 36). But this acknowledgement is balanced with a cautionary reminder that throughout the eighteenth and nineteenth century, commentators and scholars were:

Conscious of the interpersonal nature of creation, of the debt and connection which existed between authors, of the fact that creators existed within networks of communication, and that they drew upon and at the same time contributed to the traditions they inhabited ... (Bently and Sherman 1999, p. 37-38).

reasoning. But despite these critiques, Saunders and Hunter’s critique still stands as an interesting attempt to develop a counter-narrative of this historical period.

26The scholarly efforts of Jaszi (1991; 1992), Rose (1988) and Woodmansee (1984) can be largely considered historicist approaches to law Despite their suspicion of the term’s usefulness, Saunders and Hunter (1991, p. 480) provide a workable definition of historicism as it relates to the sort of critical position the above scholars engage in – namely contending that a range of factors:

Protestantism, printing and the book trade, philosophical realism, the decline of patronage and the rise of a literary profession, copyright law-coalesced to produce the prototype of the modern expressive author. This stance is supported by Guyora Binder (2012, p. 289) in her ‘Law and Literature’ entry for Contemporary Literary and Cultural Theory: The John Hopkins Guide.
Thus while Bently and Sherman (1999, p. 38) welcome the recognition of the Romantic legacy in copyright law, they warn against over-emphasising “the role played by the individual-as-creator in the law” or the extent to which Romanticism solved complex debates occurring in law during this period.

These two contrasting scholarly positions lead us to something of an impasse when trying to understand the position of the author during this period. Historicist scholars (Jaszi, 1991; 1992; Rose, 1988, 1993; 2003; Woodmansee, 1984) easily identify the rise of the author, highlight the individualisation of creativity and suggest that this strain of Romanticism is still present in law today. Conversely, Saunders and Hunter present an entirely different interpretation, one that suggests a much more complex range of factors and questions any attempt to provide an all-encompassing narrative that explains the emergence of the author. Bently and Sherman attempt a possible resolution. Generous in their interpretations they balance the concerns of both sides acknowledging the individual-as-creator as a vital cultural force, while also cautioning against a privileging of an ideal of the Romantic author. However, too much can be made of the need to qualify the persistence of Romanticism in law. Kathy Bowrey (1996) provides an alternative approach that appreciates the dynamic interplay between law and culture and allows us to understand this period more clearly.

Bowrey (1996; also see Coombe 1994) explains that it is impossible to separate the author as a legal subject and cultural construct as Saunders attempts to do. She notes that as Saunders confines his study of the authorial figure to legislation he fails to appreciate the broader cultural contexts and informal and quotidian engagements with law that influence its construction. She also acknowledges Saunders’ concern with the work of historicists and agrees that it would be wrong to assume - as historicists have a tendency of doing - that law “simply and passively reflects broader cultural forces”. But law does not stand apart from culture. As Bowrey (1996, p. 9) explains, interpretations of judges who “generate and regenerate the legitimacy of the set of values that “copyright” stands for”, the generative power of courts and the informal interpretations of citizens all have an impact on our collective understanding of copyright law. All
of these acts reveal an ongoing dynamic exchange between “law on the books” and the various cultures of law that continually shape copyright law, and suggest that the author is continually shaped throughout these cultural processes rather than simply instantiated within the legislative text.

Returning then to the arguments of the aforementioned historicist scholars, I suggest it is possible to extend them with this nuanced approach sketched out by Bowrey (1996), allowing us to understand the author in a more productive fashion. Rather than considering the author as a subject defined solely by law, we can instead view the author as a subject held in dynamic tension between the legal text and these varying cultures of law. This perspective allows us to balance the concerns of Saunders and Hunter (1991) with the aforementioned historicists (Jaszi 1991, 1992; Rose 1988, 1993; 2003; Woodmansee 1984) and come to a clearer picture of the author. The author in law is not placed solely in thrall to cultural forces but this approach accepts that Romanticism and individualism is a persistent feature of copyright law, and still deployed today through cases, judgments and informal interpretations of law that generate and regenerate cultural notions around the legitimacy of particular forms of creation.

Balancing these scholarly interpretations avoids any attempt to provide a simple narrative of authorial emergence during the early modern period. Instead of separating cultures of authorship from the legal concept of the author, the subject’s cultural and legal histories interrelate and influence each other in a cyclical and dynamic process. Recognising this dynamism allows us to view the author as an unstable subject that has relied on various cultural forces in order to continually maintain its legitimacy over time but also acknowledges the importance of law and its material impact on the codification of subjects. Turning to Barthes’ (1977) and Foucault’s (1991) seminal analyses of the author in copyright law I will begin the process of outlining an alternative framework through which to understand the complexities of the author subject.

Foucault and Barthes: Locating the prehistory of relationality

The recursive and continual feedback loop of culture and law outlined above highlights the contingent and the unstable status of the author. Historicist
scholars argue that the author is a limiting subject-position that fails to take into account other creative practices. This dominance of the author is identifiable today but I contend that this dominance does not mean that one must engage in an author-centric process of analysis. The author may be dominant but it is also unstable, reliant on a number of always changing relationships with other subjects in law and constantly re-figured through the lenses of both culture and law. I suggest that a relationalist approach to copyright law provides a clearer way to think through this re-conceptualisation of the author. I will now consider the work of poststructuralist critics Barthes (1977) and Foucault (1991) and highlight salient points of their critiques of the author, which anticipate a relationalist approach to copyright law.

Barthes’ “The Death of the Author” and Foucault’s “What is an Author” are seminal critiques of the author, and these two essays have been quoted at length by scholars who have sought to understand the cultural and legal position of the author. In each of these pieces the author is fundamentally challenged as a category and an analytic shift that carries with it a number of ramifications, which have been examined in the literature (see Coombe 1994; Saunders 1992; Woodmansee and Jaszi 1994). For the purposes of this thesis however, the works of Barthes and Foucault stand as useful tools through which to understand relationality, the situated nature of the author (see Craig 2007, 2011) and how relationships between subjects of copyright law might operate and change. By deconstructing the singular referent point of the author, both of these theorists offer a space through which one can think beyond the author and engage with other subjects that are equally important to our collective comprehension of the author and copyright law in general.

Barthes’ (1977, p. 143) manifesto “The Death of the Author” writes an obituary for the modernist and Romantic figure of the author, while attempting to map the ramifications of an authorless future for both literature and society. He begins his analysis by noting that the ideal of the author is in fact a modern invention, which bears no relation to the act of writing, which can only ever

27 Indeed, their influence on existing theoretical approaches is so strong that it almost appeared to be a convention for scholars to respectfully acknowledge or quote from Foucault’s piece in the late-1980s and early-1990s (Bowrey 1996).
destroy the point of origin. Barthes outlines how social upheavals such as the birth of rationalism and the reformation lead to the discovery of the “prestige of the individual”. Subsequently, an excessive amount of interest was placed on the persona and indeed the person of the author. This incessant focus, which he views a form of literary “positivism”, places the author as the source and indeed the end point of interpretation, “as if it were always in the end, through the more or less transparent allegory of the fiction, the voice of a single person”.

Barthes rightly notes that his attempt to disempower the authorial figure, has a long pre-history traversing along surrealist and Brechtian lines (Barthes 1977, p. 144-145), however his success is in being able to outline the implications of this act, explaining that “[t]he removal of the Author ... utterly transforms the modern text”:

> We know now that a text is not a line of words releasing a single ‘theological’ meaning (the ‘message’ of the Author-God) but a multi-dimensional space in which a variety of writings, none of them original, blend and clash. The text is a tissue of quotations drawn from the innumerable centres of culture (p. 146).

This theoretical demand raises deeply problematic questions around originality and creativity that Barthes does not seek to answer. Instead, by announcing the passing of this much-vaunted figure of literature, he is able to open up a space for “the birth of the reader”.

Barthes notes that much like law, viable subjects of literature such as the reader are often hidden away in the shadow cast by the author. In approaching Barthes one does not have to take the authorial death literally, but can instead read it as an acknowledgment of the significant relationships, subjects and ongoing cultural work that occurs in the background in order to sustain the authorial subject. Barthes usefully highlights the often hidden reliances that the author depends upon in order to claim its status. For Barthes, the author relies on readers and existing cultural forms and both the work and the authorial identity operate in relation to these factors in an unstable fashion, constantly having to assert and re-assert itself as separate from these sources upon which it is dependent.
Foucault’s analysis moves one-step further and directly examines these various trajectories. He seeks to assess the impact of the authorial death and uses Barthes’ theoretical claim as a departure point, from which to examine the author as subject and explore the processes that occur behind the authorial subject:

It is not enough, however, to repeat the empty affirmation that the author has disappeared. For the same reason, it is not enough to keep repeating that God and man have died a common death. Instead, we must locate the space left empty by the author’s disappearance, follow the distribution of gaps and breaches, and watch for the openings this disappearance uncovers (Foucault 1991, p. 105).

Foucault begins by deploying the term author-function as a conceptual device in order to convincingly outline the various cultural and legal limits placed around the authorial subject and the way it operates as a “limitation of the cancerous and dangerous proliferation of significations” (Foucault 1991, p. 118).

This notion of limitation is particularly interesting as it challenges the tendency to link the authorial role with the generative capacity of creativity. Foucault (1991, p. 118) notes that our traditional understandings of the author view the subject as the “genial creator of a work in which he deposits, with infinite wealth and generosity, an inexhaustible world of significations”. Conversely, Foucault (1991, p. 119) argues that the classificatory function of the author’s name always marks “off the edges of the text, revealing, or at least characterizing, its mode of being”. He notes the ideological weight behind such a figure, explaining that the author is a “…certain functional principle by which, in our culture, one limits, excludes, and chooses; in short, by which one impedes the free circulation, the free manipulation, the free composition, decomposition, and recomposition of fiction”. It would be tempting to leave the analysis there and decry the “limiting” nature of the dominant authorial figure, which still resides in the philosophy of copyright law and limits re-imaginings of authorship (see Jaszi, 1991; 1992). But importantly Foucault opens up a space to examine the relational connections of authorship, and in fact suggests that the very contingency of authorship implies
a reliance on a number of actors, existing in a series of relationships yet to be fully explored.

Foucault suggests a re-examination of “the privileges of the subject”, and posits a productive method of analysis: to “grasp the subject’s points of insertion, modes of functioning, and system of dependencies’ [my emphasis]. In establishing this critical distance, he (1991, p. 119 - 120) moves beyond the revolutionary cry of Barthes, and instead provides the reader with productive a new set of questions about this subject known as the author:

What are the modes of existence of this discourse? Where has it been used, how can it circulate, and who can appropriate it for himself? What are the places in it where there is room for possible subjects? Who can assume these various subject functions?

By asking these questions Foucault underlines the specificity of the authorial subject and also suggests that there are broader systems, processes and relationships in place, which allow particular discourses of authorship to exist, circulate and flow.

Deploying the theoretical framework outlined in the introduction, I therefore suggest that a relationalist approach to copyright law can productively account for these systems, processes and relationships and help us to think beyond the subject position of the author. It accounts for a law that is not teleological and also attends to the complex interactions between culture and law and to the leakages between these two fields. It also acknowledges the contradictory natures of an authorial subject that is contingent and unstable but also a dominant cultural and legal force. Finally and most importantly, such an approach acknowledges the author’s ongoing engagement with other subjects of copyright law and its need to establish points of difference, a process which –as both Barthes (1977) and Foucault (1991) explain - have been too regularly hidden by the legal and cultural artifices of authorship.

Understanding the relational author
So far I have provided a history of the authorial subject in law, a history that outlines the function of the author prior to the emergence of copyright, maps the various conflicts that led to the enactment of the Statute of Anne and details the emergence of the authorial claim. A critical analysis of the existing literature exploring this emergence found that scholars have generally placed an excessive focus on one of either cultural or legal interpretations of the author. I have suggested that viewing law and culture collectively as a space of dynamic interrelation (see Sarat and Kearns 1998) allows us to develop a clearer picture of the contingent and unstable author as well as how the author’s relationships with other subjects are constituted. The next step is to directly engage with the theoretical framework of relationality that was developed in the introduction to this thesis. This framework accounts for the contradictory position of the author outlined earlier, as a dominant subject, who is also dependent on a range of subjugated processes and relationships with subjects and in turn questions the tendency to approach the author as a singular object of critique.

Jane Gaines (1991) offers an initial analysis that allows for a nuanced understanding of the way the subject position of the author can simultaneously appear to be entirely whole, autonomous and dominant, while also weak and dependent. She begins by acknowledging the progress made by the critical legal studies tradition, and appreciates their attempt to read “juridical discourse as ideology” (Gaines 1991, p. 15). Gaines goes on to critique the field and speak broadly about the idea of the subject in law. She notes that in approaching the subject, scholars need to not merely be interested in the subject within the text, but also have to engage with a material subject. Outlining the ramifications of this demand, she shows how a subject like the author can appear to be both “connected yet disconnected” (Gaines 1991, p. 17). When developing a legal-subject, an institution must “set ... up structural positions that anticipate hypothetical subjects” with a cultural life “predicated on singularity and self-sufficiency” (Gaines 1991, p. 31-32). Indeed, returning to our study of the author, the multitude of legal and cultural discourses that coalesce around the authorial subject might appear to further reify this apparently singular, disconnected
subject. But as Gaines goes on to remind us, a legal subject is always implicated in its own culture (Gaines 1991).

Gaines (1991, p. 32) explains that when a number of discourses - both legal and cultural - converge on the one subject such as the author, they can either act in harmony or contradict one another. At first glance the author looks like the end result of a “monolithic” process, but once its material position is accounted for an interrelation of subject positions emerges. She highlights the work of Paul Smith (1988, p. 32), who explains the process of interrelation as a “continual” and “constant” overlapping of subjectivities. The use of these terms, as well as Gaines’ own critique provides a solid foundation from which to explore the possibility of a relational author. This critical account emphasises the necessity of a relational approach to copyright law, because while law constantly searches for separation, as an initial point of departure we must understand that the author can never be wholly separated from other subjects of copyright.

Craig also examines this tension between the structurally separate subject and the subject that is constituted by and situated within a cultural and social context. For Craig (2007, p. 261) copyright law has difficulty reconciling “The idea of authorship as both originating within oneself and being derived from the social and cultural context within which the author creates”. Situating her project as part of a broader feminist project of re-examining selfhood - a project that informs this thesis - she argues that the vision of a wholly separate and individual subject can never be realised. The author is “always-already situated within, and constituted by, the communities in which she exists” (Craig 2007, p. 261). For Craig, the author and her works can never exist in isolation.

However, Craig also takes an important step towards reconciling tensions between the apparently competing ideals of a reified author and a socially situated one. She explains that by recognising that subjectivity is constituted but also contested through discourses, we can still affirm the agency of an individual author, while also recognising its contingency. Craig re-orientates notions of originality and authorship, by suggesting that we move from notions of originality that rely on the independence of author and instead engage with a
participatory model of creation. Viewing the author through this model then re-positions the subject as one that interacts “with the meanings and texts and discourses that are already out there ... and adding to them something of ourselves and our (socially-constituted) subjectivity” (Craig 2007, p. 246). Craig’s relationalist approach recognises the socially-situated position of each author, as outlined throughout this chapter, and underlines its dependence on existing cultural artifacts and previous authors as it generates meaning, while not denying an independent agency to each creator.

In this thesis I suggest a modified version of this relationalist framework as the most appropriate way to understand the author, as well as subjectivity in copyright law more generally. This involves extending Craig’s work by accounting for multiple subjects of copyright law and in turn exploring how they are situated in relation to one another. Accepting such an approach means that one can account for the paradoxical nature of the authorial subject as a separate yet connected figure and also attend to the complex processes of boundary setting in law, a process that sees various subject positions contest and interrelate as their agencies are continually questioned and debated. It also allows us to critique contemporary scholarly analyses of the author. Rather than treating the author as the sole dominant subject in law (Jaszi 1991, 1992; Rose 1993; Woodmansee 1984), I highlight the various negotiations and contestations that occur between subjects and examine how the dynamics of culture and law can define and re-define the relationships that exist between the author, user and the pirate.

This approach carries a number of benefits. At a conceptual level it continues the ongoing scholarly project of destabilising the contemporary “liberal and neo-liberal assumptions” that copyright law makes of authorship (see Craig 2007, p. 208; Cohen 2007, 2012), while also challenging scholars’ excessive focus on the author (Craig 2007; Rose 1993). Attending to three subjects of copyright law also presents a much more complex process of subject formation, than existing narratives which focus on engagements between the author and user (Gibson 2006) or author and pirate (Johns 2009). Finally, this approach moves beyond philosophical concerns to develop this relationalist approach through a series of
case studies. I focus on moments where the author, user or pirate is held up for critique and its agencies debated and explore how both law and culture collectively engage in the process of “meaning-making” around legal subjects (see Coombe 1998).

Conclusion

In closing, the main points of this chapter’s argument can be summarised as follows. Firstly, the author is more usefully understood as a subject that needs to constantly maintain its dominance through an ongoing process of cultural and legal legitimisation, a process that recognises the generative power of culture and law. Secondly, this legitimisation is regularly conducted in relation to other subjects of copyright law, which means that the author maintains a relationship in some way with these other subjects. Finally, this process is not a fait accompli but an unstable process, meaning that not only the dominance of the author is always under question but that there is always the possibility for reform and change.

These three over-arching points represent a fine but important conceptual shift in contemporary analyses of the author, which I have developed through my reading of the existing literature. The author has always operated as a contingent subject-position in thrall to historical, societal and cultural forces that have significantly impacted on how it has been understood. A relational theory of authorship provides a more accurate picture of how the author operates. It clearly outlines the radically contingent nature of the author’s dominant status in law and offers the possibility of balancing the various paradoxes that reside within the contemporary authorial subject. I will develop this account of the author in the next chapter, further developing my broader relational analysis of copyright law while shedding further light on the position of the author today.

The following case study of the introduction of a moral rights regime into Australian law takes the first step towards examining this relationality, while also assessing how the position of the author has altered in Australian copyright law during the last decade. Through analysing these legislative and policy
debates, I will explain how the author is able to maintain its dominant subject position in law in the face of inherent categorical instability, by looking at how various interested parties strategise in order to be able to claim the mantle of author. This analysis will reveal persistent cultures of copyright law that are present during these moments of rupture and will also detail how the author is figured through and in relation to other subjects of copyright law. This discussion of the author will then set the stage for subsequent chapters, which assess the interactions between the authorial subject and two alternate subjects of copyright law: the pirate and the user.
Chapter Two

CASE STUDY: COPYRIGHT AMENDMENT (MORAL RIGHTS) ACT 2000

This chapter will consider a concrete example of authorial contingency in the form of a case study of recent legal reform. My case study examines the period from 1979 to 2000, which saw Australia move from a studied indifference to moral rights, to eventually enacting moral rights into statutory law. As moral rights evolves from being a much-questioned continental legal framework to eventually being enacted in Australia, various publics present numerous framings of the author seeking to gain moral rights protection for the vested interests they represent. By exploring how this advocacy works, I outline how relationships between subjects of copyright law change and the role of particular legal cultures in instigating that change. As argued in the previous chapter and demonstrated in this case study, when claiming the authorial mantle, interested publics have to define their activities and explain why their creative practice deserves to be considered authorial. Through an examination of these actions we will see that the author is not an autonomous subject, but is instead imbricated in a number of complex relationships with other subjects of copyright law.

The chapter will proceed by briefly explaining what moral rights are, before outlining the broad theoretical framework and pre-history of moral rights, sketching the historical development of the legal doctrine in Europe. An examination of Australia’s own legislative journey towards moral rights will then follow, drawing on archival research and the historical record in order to highlight particular moments of this legislative journey, which saw an extensive debate about the rights and functions of the authorial subject and who had the right to be called an author. The chapter will conclude with an assessment of how the introduction of moral rights has worked in practice. This analysis of the authorial subject at a time of categorical instability and significant technological change will help to outline the ways in which culture and law can construct
particular spaces of power, alter relationships between subjects and grant and delimit specific agencies and also expose the contested and unstable nature of that construction. The story of moral rights in Australia sheds significant light on the politically and culturally complex process of codifying legal subjects and how particular legal cultures discursively frame their own concept of an author.

What are moral rights?

The general scope of copyright law addresses both public and economic aspects of creativity. The philosophy supporting copyright law argues that there is a need for some sort of economic motivation for creators in order to stimulate further creativity in the future (see Hughes 1988). However, creation may be as much a personal act as a public one. The concept of moral rights emerged as a way of recognising this personal act in law, operating as a legal framework that looks to protect the connection between an author’s personal identity and their body of work. The scope of moral rights varies according to jurisdiction, as I will soon explain, but broadly speaking the rights are centred on issues to do with authorial identity, attribution and the reputational issues that can stem from making a creative work public.

Moral rights exist as a unique set of rights within copyright law and are able to function wholly independently from the general economic interest in a work. Unlike the copyright itself, the moral right in a work is not transferrable, and remains with an author even if the copyright in a work is assigned elsewhere. This allows creators to claim a series of specific moral rights in a work at all times, namely:

The right of integrity, under which the artist can prevent alterations in his [sic] work, the right of attribution or paternity, under which the artist can insist that his work be distributed or displayed only if his name is connected with it; the right of disclosure, under which the artist can refuse to expose his work to the public before he feels it satisfactory; and the right of retraction or withdrawal, under which the artist can withdraw his work even after it has left his hands (Hansmann and Santilli 1997, p. 95 - 96).
Europe has consistently seen moral rights as part of the broader framework of copyright law, but common law countries have only started the process of legislating for moral rights in the last few decades, which means that not all of these rights have been subsequently enacted in law in these jurisdictions.

Australia introduced moral rights in 2000 following an extensive period of debate and a lengthy reform process that involved a number of Government reviews. Australia had committed to introducing moral rights at the Rome Conference of the Berne Union in 1928, but it wasn’t until arts lobby groups, artists, authors and academics put pressure on the federal government that steps towards reform were taken. Despite this convoluted history, the current Australian legislation manages to strike a balance between an established European tradition of moral rights, and the more recent legislative reforms introduced by common law countries (see Adeney 2001a). Protection for moral rights is all inclusive, and as long as “works” are original and copyright protected, then the moral rights of attribution28 and integrity of authorship29 - the only two rights that Australia protects - are applicable to both authors and performers. However, despite the inclusive granting of rights, the rights themselves are specifically delimited. The right of integrity of authorship is designed for “maximum specificity and maximum closure” (Adeney 2001a, p. 299), and the right of attribution of authorship is also “limited” in comparison to other jurisdictions, only providing for a right to identification and a right against false attribution of authorship (Adeney 2001a, p. 302 - 304).

Integrity of authorship can be infringed by subjecting the work to derogatory treatment, the authorisation of such subjection or through certain dealings with the work as derogatorily treated. Infringement of attribution can occur by carrying out listed attributable acts without attribution or by carrying out an act of false attribution (Adeney 2001a). These laws are not subject to fair dealing defences instead the only defence is “reasonableness”, which considers a “non-exhaustive” list of nine factors the court must take into account when assessing the reasonableness of any defendants’ actions. This includes examining the

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28 See Copyright Act 1968 (Cth) s193 – 195AHC
29 See Copyright Act 1968 (Cth) s195AI – 195ALB
nature, the purpose, the manner and the context of the infringement, as well as any existing industry practices, any difficulty or expense that would have been incurred in order to identify the author. There is an onus on the defendant to prove “reasonableness” (Adeney 2001a, p. 310 - 312). An author’s right of integrity in authorship in a cinematographic film continues until the author dies, in any other work the right of integrity continues until copyright ceases to subsist in the work. Similarly, any other moral rights in the work lapse once copyright ceases to subsist in the work.

It is worth noting a handful of interesting features of Australia’s moral rights statutory framework. Moral rights do not apply to broadcasts, sound recordings or published editions, with these activities deemed to be not sufficiently creative to warrant protection (see Sainsbury 2003). A range of potentially creative contributors to copyrighted works also are not granted moral rights. For example, screenwriters, principal producers and principal directors of a film are granted moral rights whereas actors and cinematographers are not, an issue that will be discussed later in this chapter. Furthermore of the four categories of moral rights protection - the right of publication, the right of withdrawal, the right of attribution and the right of integrity - Australia has only recognised the right of attribution and integrity (Sainsbury 2005). These features underline the specificity of Australia’s moral rights framework as well as point to the difficult decisions, which needed to be made around who can be deemed creative and the level of creative input an individual needed to make before they could claim a moral interest in a work.

This brief outline of Australia’s moral rights legislation shows that these rights operate within particular legal traditions and reflect particular social, cultural, economic and political choices. Hence to understand moral rights in Australia it is necessary to consider how this legal concept has developed internationally, and the specificities of the historical divide between the continental and common law traditions of copyright law. The following section begins this process with a discussion of the varying philosophical approaches to moral rights and explains

30 See generally Part IX, Division 6 of Copyright Act 1968 (Cth)
31 See Copyright Act 1968 (Cth) s195AM
the emergence of an international agreement around moral rights and
Australia’s central role in this process.

A brief history of moral rights in common law countries

Central to the history of moral rights is the long-standing international
bifurcation in copyright law between common law understandings of copyright,
which are purely economic in scope, and the continental civil law tradition,
which provides equally for both economic and personal rights. Indeed, apart
from Canada, which introduced moral rights provisions into its domestic
legislation in 1931 (Adeney 2001b), most common law countries did not enact
moral rights until well into the twentieth century, viewing these rights as entirely
unworkable within the common law tradition (see Banks 2004). Despite the
historical tendency to view moral rights as an inherent part of the continental
legal tradition, as Cyrill Rigamonti (2007) notes, the emergence of an abstract
philosophy of moral rights was a late-nineteenth century phenomenon. Prior to
this time, as Rigamonti (2007, p. 78) goes on to explain, there were
“commonalities” between the common law and civil law approaches to moral
rights.

Questions around an author’s “right” to attribution or integrity have been raised
since the enactment of the Statute of Anne in 1710 (a statute previously
discussed in chapter one). For example, an early English case Millar v Taylor in
1769, while in no way a direct enunciation of a moral rights regime, clearly shows
a concern for an author’s rights of attribution, disclosure and integrity
(Rigamonti 2006; Rose 1993). However, jurisdictions across Europe approached
these rights through a patchwork of individual laws and judicial decisions, rather
than in the form of a consistent, legally enforceable doctrine. This was largely
due to the publishing landscape of the time, which saw “the core moral rights of
attribution and integrity completely embedded in the context of the contractual
relationship between publishers and authors” (Rigamonti 2007, p. 79).
Therefore, these rights were seen to be firmly rooted in the common law of
contracts, and did not require a separate theory of their own. A similar approach
to these questions across common law and civil law countries prevailed and the
overarching notion of a doctrine of moral rights was not part of the legal consciousness of the time (Rigamonti 2007).

There was an eventual shift towards the codification of moral rights in the latter half of the nineteenth century. However, this wasn’t a smooth process, and resulted in “a period of fluidity, when the nature of the interests concerned was disputed and the means of protecting them not fully resolved” (Adeney 2001b, p. 209). Rigamonti splits this “period of fluidity” into two chronological stages. The first stage occurred during the last quarter of the nineteenth century, when these “various decisional rules” were aggregated into a “coherent theory, and eventually into a right called *droit moral* (moral right) in France and *personlichkeitsrecht* (right of personality) in Germany” (Rigamonti 2007, p. 92). The second stage took place in the early twentieth century, when “select elements” of these two approaches were “further developed into the modern theory of moral rights” with these rights conceptualised “as copyright-based rights of authors in their works” (Rigamonti 2007, p. 93).

During this two-stage period, legal thought underwent a significant conceptual shift in relation to moral rights. Andre Morillot (1872) published an article that featured first technical use of the French term *droit moral* in 1872. Morillot articulated particular “extra-patrimonial” or “moral” rights of the author, which engage with the authors “sphere of personhood” (such as “the right of authors to make decisions about the publication of their works”) as opposed to purely economic rights. Despite this attempt to sketch out a theoretical space around copyright law, Morilliot saw no reason to continue enforcement of personal rights following first publication. His approach therefore differed little in practice from the common law right of first publication (Rigamonti 2007). Thanks to further work by Morilliot, Francois Geny, and an array of French courts and legal commentators (see Logeais 2001; Rigamonti 2007), by the early 20th century, France had established a dualist conception of copyright law. This framework established two separate spheres of rights emerging from authorship: economic rights, which were alienable, and *droit moral*, rights which were personal to the author, inalienable and “completely separate and apart” from the operation of copyright law itself (Rigamonti 2007, p. 105).
The trend towards legal recognition of an author’s moral rights occurred across Europe, with the recognition of the right of personality in Italy and Germany emerging around the same time (Rigamonti 2007). However, while rights of attribution, integrity and disclosure were now part of a rigorous conceptual framework, which acknowledged the fact that “the author’s personhood ... expressed in the work deserved respect” (Rigamonti 2007, p. 104), as Adeney (2001b) previously noted, this shift did not immediately lead to a coherent legal expression of the moral rights doctrine in practice. Even though Germany’s legal theoreticians were at the forefront of establishing these new rights, their legal system only offered “some protection” when passing statutes in the early twentieth century, whereas France “would not legislate for the droit moral until 1957” (Adeney 2001b, p. 211). However, this conceptual revolution had a direct legislative impact across numerous European countries, which enacted extensive statutory regimes for moral rights during the early twentieth century - Romania in 1923, Italy in 1925 and Poland in 1926 (Adeney 2001b).

The Italian Copyright Act of 1925\(^\text{32}\) is noteworthy, as it was the first country to deliberately base its legislation on the German monism\(^\text{33}\) of their 1901 and 1907 Acts, effectively re-integrating moral rights back into copyright law, a trend that other countries would follow at a much later date (Rigamonti 2007). No longer were moral rights seen as the rights of authors in their personhood (their right of personality), but rather in their work. Instead of functioning through an entirely different legal basis (right of personality versus copyright), moral rights would now represent an expression of a different legal nature within copyright law (personal versus patrimonial). However, perhaps more importantly, the 1925 act served as a model for Article 6bis of the Berne Convention (Rigamonti 2007), an Article that effectively set the stage for the internationalisation of moral rights.

\(^{32}\) Legge diritto d’autore 1925

\(^{33}\) Dualism and monism represent two different approaches to moral rights. The monist tradition can be considered the standard contemporary approach to moral rights today and is largely represented by the European tradition. Moral rights are considered to be a concern of copyright law and the bond between an author and their work needs to be recognized. Therefore it is incumbent on copyright law to recognize both the economic and moral elements interests within copyright law. Conversely, the dualist perspective considers the broader issues surrounding moral rights to be separate concerns from copyright law and organise these issues under a general right of personality. Found most recently in Switzerland, these rights do not need to be premised on a copyrightable work and are technically not limited to authors but instead fall under general private laws (Rigamonti 2007).
and their subsequent introduction into common law jurisdictions such as Australia.

The issue of international obligations in respect to moral rights was first raised at the Rome Conference of the Berne Union, which ran from 7 May to 2 June 1928 at the Palazzo Corsini (Atkinson 2007). Strangely enough, moral rights were not included in the conference’s original agenda, but instead formed part of a pre-conference strategy to raise Italy’s international visibility. Eduardo Piola Caselli, one of the architects of the Italian Copyright Act of 1925 and Italy’s representative at the conference, convinced his colleagues that Italy’s international reputation would be enhanced if their domestic moral rights law were adopted internationally. This led the Italian delegation to add a last-minute moral rights proposal to the agenda (Rigamonti 2007). Mindful of the ongoing philosophical debates around dualist and monist conceptions of moral rights, the Italian delegation’s memorandum was deliberately vague, suggesting that the potential article could either fall under a separate right of personality, or be subsumed into copyright law, depending on the preference of the attending delegates (Rigamonti 2007).

The ambiguous memorandum immediately came under fire, with four objections raised. Germany and Austria questioned the potentially perpetual nature of moral rights, advocating for an expiration date, which matched that of the economic rights of copyright, and Poland argued in favour of their own dualist approach. In order to deal with these challenges, the proposed article was amended, and no longer touched on the issue of the duration of moral rights. Germany and Austria and Poland subsequently backed down and supported the Italian proposal. Despite these conceptual concerns, the European nations largely supported the concept of moral rights, which made compromise manageable. The proposal was rejected outright by the bloc of common law countries, who argued that moral rights “weren’t part of their copyright tradition”, suggesting the debate on moral rights had been forced on them with little warning (Rigamonti 2007, p. 117; see also Banks 2004, p. 17).
This is how the topic of moral rights divided the conference into two opposing sides, split between the continental and common law legal traditions. What is particularly interesting for our purposes is the disproportionate role that the newest member of the Berne Union - Australia - played in negotiating a compromise. Australia, alongside the U.K., was one of the more vociferous opponents to the suggested article and the Australian delegate Sir William Harrison Moore was instrumental in working towards a solution (see Banks 2004). With Eduardo Piola Caselli still determined to get some form of moral rights into the text of the Berne convention, he turned from advocate to diplomat, seeking to convince Harrison Moore that a workable article around moral rights would not conflict with common law. Firstly, Caselli argued that the bulk of the proposed Article 6bis was already protected under common law, and following a change of the phrasing of the article from protecting “moral interests” to an author’s “honor and reputation”, Harrison Moore conceded the point (Rigamonti 2007, p. 118). Harrison Moore’s further point of contention, that Australia would refuse to substantially amend its federal copyright statute, was deemed no longer relevant, as the other delegations did not view this disclaimer as an obstacle to complying with the Berne Convention (Rigamonti 2007). After extensive negotiations and much debate, article 6bis was incorporated into the Berne Convention. Australia acceded to the Rome Act in 1935, and moral rights became a part of Australian common law.

The history of moral rights underlines the influence of culture in legal reform, particularly during these pre-legislative moments of negotiation and compromise. In debates throughout the Rome conference, the fundamental point of disagreement was not to do with a minor technicality during the drafting of the article, but rather around what was “right” for common law countries, and the tradition that these countries held. The delegates revealed a significantly affective and emotive relationship with their legal framework. Furthermore, this initial process of establishing a framework of moral rights begins the process of imagining particular subjects who will be beneficiaries of these rights. In what follows, I offer a detailed analysis of the Australian introduction of moral rights. My analysis will show how the process of granting moral rights to the author involves a complex renegotiation of relationships with other subjects of law and
the difficulties of extricating an individualist creative author from these relationships. This process also carries a cultural aspect that influences who was considered to be a beneficiary of these reforms, with particular legal cultures supporting specific discursive framings of the author subject.

The Australian Story of Moral Rights

It took the best part of the twentieth century to introduce moral rights to Australian copyright law. The following section will examine the convoluted path towards enactment and I will begin by providing a brief outline of this journey. The Spicer committee stood as the first chance to enact moral rights in law but the opportunity was missed and it wasn’t until a number of artists lobby groups began to petition the federal government in the late-1970s that moral rights was placed back on the agenda. A 1979 symposium of artists and arts industry professionals on moral rights paved the way for further policy engagement and this was followed by the release of a Copyright Law Review Committee report on moral rights in 1988. Although the report recommended enactment, the issue lay dormant for a number of years before a bill in the late 1990s eventually saw moral rights become a part of Australian law. The following section will explore this complex history, assess the influence of particular legal cultures throughout the process of legal reform, and highlight how particular rights discourses around moral rights clashed during the reform process.

The Spicer Committee

The Spicer Committee represents Australia’s first independent engagement with the question of moral rights. Despite becoming a signatory to the Berne Convention it wasn’t until 1958 that moral rights were first formally considered by Australian legal reformers. The Statute of Westminster 1931 freed imperial dominions from being automatically subject to Acts from the United Kingdom parliament (see Reynolds et al. 2012). Therefore when the Copyright Act 1956 (U.K.) was passed, Australia was at liberty to decide whether or not these amendments fit its own legislative framework and choose its own path in regards
to copyright law. It was in this context that the Spicer Committee was formed on the 15th of September, 1958. The committee was to:

Examine copyright law in Australia, and to advise which of the amendments made in the U.K. (Copyright Act 1956 U.K.) should be incorporated into Australian copyright law, and what other potential amendments or additions should be made (Neil O’Sullivan, cited in Report of the Committee Appointed by the Attorney General of the Commonwealth to Consider what Alterations are Desirable in The Copyright Law of the Commonwealth of Australia [Spicer Report] 1959, p. 7).

As Benedict Atkinson (2007, p. 282, 286) notes, these terms of reference were “limited”, which led to an overly “conservative, cautious [and] legalistic” approach to the issue of legal reform. Rather than take this opportunity to chart a new direction for Australian copyright law, the emphasis on the British reform process in the terms of reference shows the extent to which Australia would rely on British law when conducting this review.

Atkinson’s critique is supported once the committee’s approach to the issue of moral rights is examined. There were only a handful of public submissions that touched on the subject of moral rights, which meant that during the thirty-seven meetings held over the committee’s lifetime, the specific issue of moral rights was given cursory attention (Banks 2004, p. 30). The committee supported the introduction of a provision, which dealt with the false attribution of authorship, so Australia could satisfy its international obligations following the 1948 Brussels Convention (Spicer Report 1959). However, as the minority opinion in the Copyright Law Review Committee 1988 report on moral rights (1988, p. 34) goes on to outline, the Australian position was “greatly assisted” by the United Kingdom’s recently released 1951 report of the Copyright Committee (The Gregory Committee Report 1952), which had recommended against the formal recognition of moral rights. In a similar fashion, the Spicer Committee concluded that despite receiving representations regarding the incorporation of moral rights, “no further protection for artists should be provided for” (Spicer Report 1959, p. 90). They suggested that any required terms could be inserted in an artist’s contract of sale, and that defamation law was sufficient for any issues
concerning the reputation of the artist. The Spicer committee preferred to watch the United Kingdom create precedents, and then adopt their solutions, taking a very conservative approach to the possibility of independent legal reform (Atkinson 2007).

1979 Symposium on Moral Rights

The Spicer committee’s response typified the general indifference common law countries had towards the doctrine of moral rights as a whole, which were seen to be a tolerable foreign imposition, rather than a legal doctrine worthy of discussion. The mood shifted significantly following the introduction of Australia’s first wholly independent copyright law: the Copyright Act 1968 (Cth). Around this period advocates within the legal and artistic communities started to investigate the possibility of enacting statutory protection for artistic moral rights within Australian law and the Australia Council\(^{34}\) and Australian Copyright Council (ACC) committed significant resources to the project. The Visual Arts Board of the Australia Council set up a subcommittee on contracts and copyright in 1977, and recommended that the Copyright Act should be amended in order to better protect moral rights, submitting a number of policy guidelines to the Australian Attorney-General (Australia Council 1980, p. 2, 6).

Following a subsequent recommendation of the sub-committee, a national symposium was held over two days in November 1979 at the Sydney Opera House. It was Australia’s first substantial national conversation around the issue of moral rights since they were introduced to the Berne Convention in 1928. A close analysis of the historical record reveals that the initial claim for moral rights was carefully linked to a particular concept of the author subject, one that was positioned as separate from other subjects of copyright law. As we will soon find out in this chapter, this attempt to separate the author from other subjects ran into substantial difficulty later in the process of enactment, underlining the situated nature of the author subject.

Art historian Alwynne Mackie began the symposium discussion by noting the central problem of moral rights in Australia: the absence of a compelling story.

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\(^{34}\) The Australia Council is the central arts advisory and funding body for the Australian Government.
Setting a task for the assembled group of artists and lawyers, she argued that they needed to “look at the underlying philosophy of moral rights and try to sort out just why we think these things are important” and doubted whether they could get a “story”, which would cover “all of the arts” (Australia Council 1980, p. 50). Although most attendees agreed that some form of statutory moral rights needed to be implemented in Australia, there was very little consensus in the discussion following. Librarian Alan Horton noted that while the meeting had brought about “solidarity between groups”, there was a confusion around what exactly constituted moral rights, with participants talking about “copyright”, “industrial rights”, and other “contractual rights” alongside the moral rights question (Australia Council 1980, p. 71).

Over the two days of the symposium, the most notable developments concerned Mackie’s original question of how to shape an agreeable discourse around moral rights. Restating her initial provocation at the end of the first day, Mackie wanted to know why an artist could claim moral rights whereas a carpenter couldn’t (Australia Council 1980). Interestingly, the ensuing discussion often touched on questions of elitism, as attendees attempted to develop a narrative that would be amenable to the wider Australian public. Composer Barry Conyngham took an economic view of the argument, suggesting that up to a certain level, artists have to accept a certain amount of potential “bad usage” from the general public (Australia Council 1980, p. 75), whereas on the second day, artist Ivan Durant contended that art was a totally different matter, and that this social status deserved a level of protection. These early attempts at coming to grips with the practicalities of moral rights came up against a challenging question, repeatedly raised during the symposium: “Why are artists special?” (Australia Council 1980, p. 66). While the symposium discussion wasn’t able to reach a final resolution, a majority of the 120 artists and arts administrators who attended favoured “continuing work on draft proposals to amend the Copyright Act” (Australia Council 1980, p. 96).

In July 1983, the Australia Council Policy and Planning division appointed Paul Bick and Sylvia Martin as consultants, “to advise on whether legislation to protect artists’ moral right should be introduced, and if so what form it should
take” (Martin and Bick 1983, ‘Preface’), in preparation for an anticipated call for submissions on moral rights from the newly formed Copyright Law Review Committee (CLRC). The report recommended introducing legislation to protect artists’ moral rights, specifically the rights of authorship and integrity (Martin and Bick, 1983), as well as undertaking an education campaign “to inform all sectors about moral rights” (Martin and Bick 1983, p. 5). Developing their argument, the report explained that the infringement of moral rights was an under-reported issue, particularly in the visual arts, listing case upon case of potentially actionable moral rights violations, and that some sort of legislative remedy was required (Martin and Bick, 1983). The report was well received and contributed to the growing clamour around the artistic communities of Australia for some kind of statutory moral rights protection.

1984 discussion paper and the 1988 report on moral rights

As the Australia Council predicted, the CLRC was asked by the Attorney-General to prepare a report on moral rights. The CLRC (1984) released a discussion paper in September 1984, which explained the recent debate around moral rights and outlined key issues on which the committee sought comments from the general public. Around the same time as the discussion paper was released, the Australia Council maintained its commitment to the education of the general public, conducting a series of public seminars across Australia in regards to moral rights in order to further the conversation about this proposed legislative regime.

The committee received forty-four submissions in total, and took four years to prepare the report, releasing it to the public in January 1988. Rather than responding positively to the growing demand for reform as many expected the committee to do, an assessment of the original document reveals that the committee was split. A five-person majority recommended that no legislation should be enacted, arguing that it was “inappropriate to introduce legislation to protect moral rights at this time” (1988, p. 1). The majority opinion did recognise that the current law tended to force the author into an unequal bargaining position in relation to the purchaser of a work or an employer. But when it came
to dealing with moral rights in the form of a contract (1988) they revived an old debate, arguing that the theoretical basis for moral rights was not compatible with common law. The majority opinion also claimed there was a lack of support for the introduction of moral rights in the general community, citing the consistently poor attendance of the Australia Council seminars throughout 1984 (1988), meaning that the general public was unlikely to support the new laws. Finally, it was noted that the only basis for introducing a law was compliance with the Berne Convention, and there was little “international-level” criticism of Australia’s current position (1988, p. 11). Responding to the over-arching concerns around moral rights, the majority opinion suggested that contract negotiations between author and employer or publisher were still the most productive method for establishing moral rights, but conceded that a public education campaign could have some effect (1988).

In comparison, the four-person minority decision was a much more cohesive document, and took up the bulk of the one hundred and thirty page report, dwarfing the majority opinion’s terse twenty-four-page section. More importantly, in terms of influencing the broader policy debate, the minority opinion was able to outline a convincing argument, by drawing on the bulk of the public submissions. Twenty-two of thirty-three submissions supported some form of moral rights and only two were totally opposed to the concept (1988). This general support helped to bolster the minority case, which framed the introduction of statutory moral rights as “fair and equitable”. They were able to point to the submissions as evidence of “demand within the community” and also cited the growing concern around Australia’s international obligations to the Berne Convention, as well as noting the advent of technological change (1988, p.35-36), referring to these looming social changes as “unfriendly technological advances” later on in the report (1988, p. 56). Although they accurately predicted some problems around the issue of collective authorship, the opinion as a whole offered qualified support for legal reform.

Moving towards a moral rights regime
The Labor Government accepted the recommendations of the CLRC in full but the majority decision was met with widespread criticism from the public. Academics were particularly vocal, with David Vaver savaging the majority opinion later that year, arguing that it was based on “expedience and niggardly positivism” (Vaver 1988, p. 296). Sam Ricketson (1989) also critiqued the decision, arguing that Australia was in breach of its international obligations and that no legal argument could properly justify for non-compliance. A year after the decision, a seminar entitled “Moral Rights Protection in a Copyright System” was convened by the Institute for Cultural Policy Studies at Griffith University, inviting “eminent speakers” to debate the topic (‘Proposed moral right legislation for copyright creators’ 1994, p. 20; see also Anderson and Saunders 1992), and in 1990, a number of copyright interests invited the ACC to put a case to the Attorney General, outlining a practical, workable moral rights scheme. The ACC responded in 1992 and supported the adoption of the minority recommendations of the CLRC (‘Proposed Moral Right Legislation for Copyright Creators’, 1994). During this time industry groups which represented creators approached the Government separately, arguing for the introduction of moral rights legislation (see ‘Proposed Moral Right Legislation for Copyright Creators’, 1994).

In addition, a controversial case around this period centred on an artist’s right to control future uses of their work and in the process became a national controversy, boosting the profile of moral rights reform advocates. As Matthew Rimmer outlines (2002a; see also 2002b), the Daubists - a group of South Australian artists who often re-used other artists’ work in their own exhibitions, by painting on or even cutting up the canvasses - were involved in a court case after the practice drew the ire of Charles Bannon, whose art was “daubed” by a member of the group. The lack of moral rights legislation at the time meant that the dispute was eventually decided via an out of court settlement. However, as Charles Bannon was the son of current South Australian Premier John Bannon a media circus ensued and the Daubists were labelled vandals and thieves by the national press. These debates highlighted the lack of official legal redress for artists, like Bannon, who didn’t have recourse to moral rights, and also gave the issue a greater public profile throughout the 1990s.
The Government was also busy during this time, placing the issue of moral rights on the agenda of both the Standing Council of Attorneys-General (SCAG) and the Cultural Ministers’ Council. Clearly responsive to the public mood, the Government was also responding to growing concern about Australia’s international obligations. As I outlined earlier in this chapter, common law countries had collectively argued that moral rights could be protected across a number of statutes. But in the late 1980s this informal union started to break apart, with a number of countries such as the United Kingdom and Canada (and to a lesser extent the United States) introducing increased statutory protection for moral rights. Australia was starting to look like a follower, rather than a leader and risked being left behind. It is no surprise then, that the cultural policy of centre-left political party the Australian Labor Party identified moral rights as an area of copyright that needed review (‘Proposed moral right legislation for copyright creators’ 1994, p. 2). Following the Labor Government’s re-election in March, a discussion paper entitled Proposed Moral Rights Legislation for Copyright Creators was released on 26 August 1993, recommending a legislative moral rights scheme for Australia. Unsurprisingly, the dispute over Daubism featured as a representative case of moral rights violation in the discussion paper (Rimmer 2002a).

The legislative process

The proposed legislation was comprehensive and the Government had clearly paid attention to the extensive criticism and debate in the lead-up to its release. The moral rights of integrity and attribution would be introduced into Australian copyright law, subject only to a test for reasonableness, which would finally satisfy Australia’s obligations under the Berne Convention. However there were serious misgivings about moral rights’ impact on commercial operations. The discussion paper predicted these problems, and went into some detail regarding the issues surrounding authorship of films (‘Proposed Moral Right Legislation for Copyright Creators’, 1994) and also floated the possibility of a waiver, which would allow creators to waive their moral rights to “a specific work or film or to works (or films) generally” (‘Proposed moral right legislation for copyright
creators’ 1994, p. 50). These were problematic areas, which would be discussed in detail in later Senate hearings. But although the Labor Government got as far as releasing an exposure draft bill in February 1996, by March of that same year, they were voted out of office, stalling the progress of a moral rights bill.

1997 Copyright Amendment Bill

The incoming Coalition Government was committed to some form of moral rights protection and introduced the Copyright Amendment Bill 1997 to Parliament in June 1997. In a similar fashion to the legislation proposed by Labor in 1994, the 1997 bill largely followed the wording of Berne, based around the rights of integrity and attribution, but it diverged on a key point. While it borrowed the concept of the right of integrity, the bill reframed it as a right of integrity of authorship, drawing on the French concept of the inalienable whole between work and person, but narrower in the sense that it focused on derogatory treatment (Adeney 1998b). The House of Representatives passed the bill on 25 June, however the Senate chose to refer provisions of the bill, in particular the moral rights provisions, to the Senate Legal and Constitutional Legislation Committee, for further inquiry to report by 2 October 1997, largely to do with questions around the waiver provision (Adeney 2001).

Senate inquiry: Copyright Amendment Bill (No. 2) 1997

The Senate inquiry ran over two days and dealt with three schedules: (1) moral rights, (2) employed journalists’ copyright, and (3) importation of goods with copyright packaging and labeling. In regards to moral rights, which dominated the first day of proceedings, the issues of substance referred to the controversial ability to waive moral rights, as well as the ongoing problem of the authorship of films. As previously noted, there was a great deal of interest in the legislation’s passage, which no doubt contributed to the passionate arguments outlined throughout the hearings, as well as the 196 submissions received from a range of organisations including the ACC, numerous entertainment and media industry bodies and a number of interested individual artists and citizens. The final section of the chapter will provide further detail regarding the Senate hearings,
framing these problematic issues around a broader discussion of the position of the authorial subject in law.

What concerns us now, however, is the progress of the bill itself. The committee released its report in October 1997 and outlined a number of recommended amendments to the moral rights schedule of the Bill, “in order to make it more appropriate, practicable and workable” (Senate Legal and Constitutional Legislation Committee Final Report [hereafter SLCLC Final Report] 1997). They proposed extending the right to claim authorship of a film to directors, screenwriters and producers, as long as the producer was a human person and not a company; they refused to make any distinctions between pure and commercial art, ignoring the submissions of the advertising industry; and they re-emphasised the lack of retrospection to the laws (SLCLC Final Report 1997). The Senate Legal and Constitutional Committee also recommended “the extension of a waiver at the time of commissioning a work or film”, however the Government failed to reach a compromise with the affected industry parties, forcing the government to withdraw the moral rights provisions from the 1997 Copyright Amendment Bill (SLCLC Final Report, 1997). This left the provisions in a “limbo-like state” (Adeney, 1998, p. 179), as the Government continued to consult with parties, looking for a solution.

1999 - 2000: From Bill to Act

Extensive debate over the following months finally led to a breakthrough. A March 1999 working party provided the Attorney General with a negotiated outcome, which saw the proposed waiver removed in favour of a nuanced co-authorship agreement (Banks 2004). With the final obstruction to the Bill removed, the Copyright Amendment (Moral Rights) Bill 1999 was finally able to be introduced to the House of Representatives on December 8 1999, by Attorney-General Darryl Williams. In his second reading speech, the Attorney General noted that the bill was in part a response to the ongoing demand for Australia to meet its international obligations to the Berne Convention (Commonwealth of Australia, House of Representatives, December 8 1999). These practical concerns played a key role in driving the passage of the bill
forward but he was careful also to mention “respect for the integrity of creative individuals”, which he saw as the basic reasoning behind the bill. Following a Senate review on 7 December 2000, the Parliament passed the Copyright Amendment (Moral Rights) Act 2000, and Australia’s first comprehensive moral rights scheme became law.

Authoring a film: Marking the boundaries

In the previous section I outlined the chronology of moral rights in Australia, charting its journey from ignored obligation in an international treaty to eventual enactment in Australian law. I will now turn to the subject of the author and analyse how the boundaries of authorship were constituted and renegotiated throughout this process and the subsequent impact this had on the author’s relationships with other subjects. These narratives of authorship will be examined though an in-depth study of the Senate committee hearing that dealt with the problematic question of locating authorship in film. The ways in which these aspects were debated as well as the pragmatic and minimalist shape that moral rights eventually took in Australia offers an interesting and instructive study of how relationships between subjects of copyright law are structured and defined.

The question of locating authorship in a cinematographic film was one of the more controversial aspects of the proposed bill. With the collective nature of film making it a difficult medium for moral rights to contend with, the majority of the opening day was spent dealing with this issue. The draft bill defined the “principal director and the principal producer, where the producer is a natural person” as the “key creative contributors to the final product” (Senate Legal and Constitutional Legislation Committee Hearings [SLCLC] 1997, p. 3), but as the hearings would go on to show, the question of authorship and the author’s legally-enshrined privilege was not so easily located. Various industry groups challenged this particular framing of cinematographic authorship and in so doing underlined the essentially unstable nature of the author in law and in turn offered a series of clear examples of its interrelations with other subjects of copyright law.
The Australian Writers’ Guild (AWG), accompanied by a number of prominent screenwriters, were the first to articulate their vision of an author in the Senate hearings, suggesting that “writer” be added in the legislative definition of “author” and the “principal producer” removed from the same definition (SLCLC 1997, p. 22). In his opening statement, AWG President Geoffery Atherden noted that the lack of recognition for writers was “an insult” and suggested that Australia’s writers were rated “no higher than sound effects people” (SLCLC 1997, p. 23). In stating this claim Atherden was echoing numerous creative workers before him who had positioned a particular type of author and a particular form of creativity as the beneficiary of these reforms (see Australia Council 1980). This concept of the author was also far removed from the type of quotidian authorial practices that engender the protection of copyright law, and which would soon receive additional moral rights. Instead, they sought to entrench a separate and autonomous authorial ideal into law, one (ideally) that engaged in a creative practice entirely removed from other subjects of copyright law.

This particular narrative of authorship had been circulating for a number of years throughout Australian artistic circles as they developed an argument for the introduction of moral rights (see this chapter’s earlier treatment of the 1979 National Symposium). However the narrative immediately ran into conceptual hurdles during the Senate inquiry. The first stumbling block emerged when the AWG delegation was unable to directly identify who authored a film. Pressed by Senator Bernard Cooney on an adequate way to phrase the legislation, screenwriter Ian David acknowledged the difficulty of being able to specifically locate acts of authorship in a film:

> It is such a moveable feast. Sometimes the director is there right from the very beginning; sometimes the director comes in, at the behest of the producer, during the production phase. The cinematographer has a tremendous amount of influence, as do many other people (SLCLC 1997, p. 33).

Furthermore, the guild acknowledged that producers could possibly have a creative capacity, with David describing them as “crucial to the filmmaking
process” and acknowledging that they interceded and “create[d] narratives and characters”, albeit “rarely” (SLCLC 1997, p. 33).

The screenwriters’ conceptual framing of the author was slowly dismantled as the day continued. Various parties commented on the difficulties of locating authorship in a film and as each speaker outlined their argument, notions of creativity and subjectivity were examined in an increasingly complex fashion. For example, responding to the AWG delegation, a contingent of advertisers suggested that the entire concept of moral rights was unworkable in their industry, particularly once considerations moved away from auteur-led films and towards the commercial realm of advertising. In her opening statement Federal Director of the Advertising Federation of Australia Beverley Dyke argued that there needed to be a clear distinction between the artistic and commercial spheres of creativity and requested that advertisers be excluded from the moral rights legislation. She noted that in developing a thirty second commercial “there could be anywhere up to 20 people involved in the process ... not just one or two identifiable creative people” (SLCLC 1997, p. 36), a phenomenon far removed from the notion of authorial creativity advocated earlier in the day.

Dyke also outlined the ongoing dynamic and changeable nature of this creation, identifying a range of potential creators within the lifespan of an advertising campaign. In the initial development of a campaign, the agency would rely on “writers, directors, producers and strategists on staff” to develop ideas, alongside a number of “freelance photographers, cameramen, tape editors, freelance directors and producers as well” (SLCLC 1997, p. 36). This meant that “two dozen different contributors” could lay claim to be “the parent of that campaign” with “six people on the agency side, six on the client side and up to 10 peak creative contributors on the freelance production side” (SLCLC 1997, p.37). However, this was only the beginning of the process. The changing of ads in response to consumer testing or the altering of long-standing advertising concepts and characters who had proven to be successful meant that advertising texts lived in a state of “constant adaptation” (SLCLC 1997, p. 37). Coming from this environment of collaboration, change, use and re-use, the advertising
delegation questioned the ability to locate a sole source of creativity and indeed challenged the validity of such a concept in a commercial setting.

Television broadcasters echoed these concerns about the continual interrelatinon between the use of existing content and the authoring of original content in the commercial sphere. Legal counsel for television station Seven Network, Catherine Rothery discussed the complex nature of authorship that occurred in commercial television. She noted that:

[In F]ormulaic or serial production—each episode is very similar to the one that went before it and the one that comes after it—it is very difficult to single out a director or a producer as having any particular property or right in that project or program compared to the other contributors to it (SLCLC 1997, p. 52).

Rothery outlined a range of “non-creative” and collaborative methods of production that operated in the commercial sphere, highlighting particular practices of use and re-use that regularly featured in the everyday creative practice of broadcasters and production companies. Much like the advertisers before her, the broadcasters’ argument raised an interesting problematic around the boundaries that existed between use and creation, and suggested that the firm line that the aforementioned writers and artists wanted to draw between creators, mere contributors (such as lighting directors) and users of copyrighted work was potentially problematic.

In response to these claims Senator McKiernan challenged the clean distinction between “pure” and “commercial” art and in so doing further underlined the difficulties in clearly separating acts of creativity from use, re-use or even theft. The Senator noted that works such as film sequels had a questionable claim to “pure” creativity and instead relied heavily on (studio-sanctioned) use of existing ideas and were often released for commercial gain:

The distinction then on pure art, where moral rights ought to apply in the area of pure art, were we to accept your proposition and advance it to the attorneys or to parliament and the parliament accepted the idea, could we not run into a problem down the line where, for example, a film such as *Shine* could be determined to be pure art, but because it becomes a commercial success, *Shine*
The question posed by the Senator revealed the role of creators in the film industry to be substantially hamstrung by a range of commercial considerations that regularly embraced repetition, collaboration and re-use over sole individual genius or an auteur-led vision.

These commercial considerations highlighted by Senator McKiernan, but also discussed throughout the day saw the issue of ownership and theft emerge as an active point of discussion. These issues came to the fore when writers and cinematographers discussed the possibility of enacting a waiver system for moral rights. Atherden (SLCLC 1997, p. 25) argued that the waiver was “economic blackmail” with writers “壓ured into signing away their rights with the threat of not getting work” and these concerns were echoed by cinematographer Christopher Moon. He claimed that a waiver would “allow a copyright owner to unreasonably infringe on an author’s rights” and would stand as “an unfettered guarantee that no film artists would be able to enjoy their rights” (SLCLC 1997, p. 27). Throughout these conversations, commercial actors such as film studios and producers were framed as potential infringers, forcibly taking a work wholesale from the original creator with the waiver allowing them to do so easily by exploiting a clear imbalance of power.

Such debates underlined the complex relationship that writers have with the more commercial elements of the film industry. The language used by the screenwriters throughout the hearings suggested that they clearly saw the more commercially-oriented film producers as potential “pirates” who could take their creative work and substantially alter the content, edit it or reproduce it. The waiver system operating alongside other commercial practices (where copyright is often already signed away through contract) would mean that there would be fewer legal avenues for writers to access if they felt their work was being misused. These questions of power and ownership raised in the hearings underlined the instability of the authorial role, the complex ways in which concepts of ownership, authorship, use and theft intertwined throughout the
discussions and the varying hierarchies of power that operated in and around copyright law.

From the 1970s onwards the author as a deserved beneficiary of moral rights served as a compelling narrative developed by artists and was pushed strongly by the delegation of screenwriters on the day of the hearing. Yet throughout the day other delegations argued that the realities of film production demanded an alternative vision of the author. These arguments were advanced by specific industry representatives and these parties had a clear self-interest in mind. However, what is interesting for this thesis is that these claims also inadvertently acknowledged the prospect of a relational author. Representatives for producers and the advertising industry noted that the act of creation was a difficult thing to locate and noted that creativity involved use and re-use alongside independent creation. Similarly, discussions around the weakness of a waiver system brought up questions concerning theft and ownership, with the delegation of screenwriters looking to reframe the producers’ authorial claim as potentially piratical. The significant disquiet with the proposed moral rights scheme suggests a number of problems with the legislation. So why was moral rights enacted in the form that it eventually took? As mentioned earlier, in the end the producer (if the producer was a human person), writer and director were granted moral rights in a film and no distinction was made between commercial and fine art. Furthermore, even though the waiver provision was removed, the moral rights holder could still consent to omissions,35 “diminishing the potency of moral rights”. (Golvan 2007, p. 141)

If we turn to the second reading speech, we can see that throughout this back and forth with various arms of the film industry, the Liberal Government (and indeed arguably the Parliament as a whole, considering that moral rights was a bi-partisan reform) had a very specific notion of how moral rights would operate in practice. Attorney General Daryl Williams (Commonwealth of Australia, House of Representatives, December 8 1999, p. 13027) explained that “enforcement of moral rights through the courts will be an exceptional occurrence”. Instead the reforms stood as a way of building “upon existing good

35 See Copyright Act 1968 (Cth) s195AW, 195 AWA and 195 AWB
industry practice” and a way of raising “awareness ... of the need to respect the creativity of authors and artists”. Rather than attempting to solve the various contradictions raised throughout the Senate hearings, parliament enacted minimalistic reform, which sought to provide a set of authors with some symbolic respect and little else in the way of actionable legal rights. The practical impacts of this reform will be discussed in the following section, where I analyse one of the few moral rights cases to have made it to the judicial system.

A post-script to enactment: moral rights and entrenching the corporate author

| Meskenas v ACP Publishing Pty Ltd [2006] FMCA  (Meskenas won) |
| Hill v Lang [2011] FMCA (Case dismissed) |
| Perez & Ors v Fernandez [2012] FMCA (Perez & Ors won) |

**Figure 1:** Moral Rights cases in Australia

At the time key scholars like Adeney (1998a, 1998b, 2001a, 2001b) and Loughlan (2000, 2001) were writing, moral rights had only just been enacted in Australia, and therefore much of the attendant Australian legal scholarship was speculative in nature. However, moral rights have now been a feature of Australian copyright law for over a decade, so in closing this chapter, I would like to explore the actual operation of moral rights in practice, to see whether the introduction of this new regime of rights has had any practical significance. Has the introduction of this new set of rights reconfigured cultural understandings of the author? Is this a set of rights regularly invoked by authors? Has it drastically limited the legal viability of derivative works in the Australian market? The following analysis of one recent moral rights case Perez & Ors v Fernandez, will serve as a site from which to discuss these issues.

February 10 2012 is a date that stands out in the brief statutory history of moral rights in Australia. It was the date when judgment was passed in one of the few cases that considered the infringement of moral rights following the introduction
of the statutory provisions in 2000. *Perez & Ors v Fernandez* concerns the unauthorised alteration and subsequent dissemination of hip-hop track *Bon Bon* following the breakdown in negotiations between Armando Perez (a rapper from the United States also known as Pitbull, who co-authored and performs *Bon Bon*) and Jaime Fernandez (a club promoter and DJ who goes by the name DJ Suave) over a possible Australian tour. Leading up to the proposed tour, Fernandez was sent an Audio Drop\(^\text{36}\) of Perez saying “Mr 305 and I am putting it down with DJ Suave”, with Perez referring positively to Fernandez’s DJ moniker in the Drop. Following the collapse of the proposed tour, Fernandez kept the Audio Drop, mixed it into the beginning of the *Bon Bon* track and began to stream it from his website.

Driver FM explains in his judgment that this “distortion” of the work infringed Perez’s moral right to integrity of authorship.\(^\text{37}\) Firstly, *Bon Bon* had not been released in Australia, which meant that many consumers would assume that the version released by Fernandez was the official track. Fernandez also “benefited by falsely representing a positive association between himself and Mr Perez”. As Driver FM notes, associations form a vital part of how hip-hop and rap artists are perceived. The fact that Fernandez did not authorise the association makes it prejudicial in itself, but there would be additional harm to his reputation once consumers - already aware of the bad blood between the two parties following the failed tour proposal - heard the altered track. Driver FM noted that “[l]isteners in this class will know the significance of Mr Perez’s associations as an artist, and will understand the alterations to the song made by Mr Fernandez to be mocking Mr. Perez’s reputation”. These activities were deemed sufficient enough that Driver FM awarded damages of $10,000 to Perez, for infringement of his moral rights.

The judgment recognised Armando Perez’s role as a hip-hop artist and that his associations with various acts formed an important part of his artistic reputation. It is clear in this case that Perez’s moral rights were infringed.

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36 An audio drop, also referred to as a DJ drop, is a sample that is used to identify the DJ. The drop is often sampled in the middle of an extended DJ set in order to highlight who is DJing. The drop can be a recording of the DJ self-identifying or, as is the case in this situation, a rapper or an actor identifying the DJ positively.

37 *Copyright Act 1968* (Cth) s195AQ
However, when considering the impact of moral rights in Australia, it is worth examining the broader cultural and legal context which allowed Perez to claim these particular rights. Firstly, it is of interest that the court’s detailed contextualisation of the hip-hop genre didn’t take into account the actual act of sampling and its role as a tool in hip-hop’s creative arsenal. *Bon Bon* itself - the subject of the litigation - drew substantially from existing creative works:

> [T]he Bon Bon song itself is not entirely original. It’s an arrangement of the successful, *We No Speak Americano*, by Australian artists Yolanda Be Cool and DCUP and the nineteen fifties song, *Tu Vuo’ Fa’ L’Americano* by Renato Carosone. The Yolanda Be Cool song also uses a sample of *Tu Vuo’ Fa’ L’Americano* (*A case involving the moral right of integrity* 2012).

Therefore, rather than standing as a wholly unique work, the backing track of *Bon Bon* featured a highly familiar riff, which relied heavily on samples from other popular songs. Perez also deployed this strategy in earlier tracks with songs such as “Americas War” featuring a noticeable sample from Estelle’s song *American Boy* and a constant repeating of the chorus from Edwin Starr’s *War*: “War, what is it good for? Absolutely nothing”.

This frequent use of sampling and cultural referencing within Perez’s tracks underlines the complex position of the author in the hip-hop genre and furthermore, suggests that Parliament’s goal of maintaining a purely symbolic moral rights framework was always going to be a difficult task. The support of Perez’s record label and position within the music industry means that he has been able to draw on a range of cultural texts throughout his career and do so legally, through the licensing of samples (see McLeod and di Cola 2011).

Therefore, rather than “stealing” noticeable musical samples, through a careful deployment of legal and corporate structures Perez is able to claim authorship of particular works that rely heavily on samples. Importantly for this chapter, the language used in the moral rights amendment therefore does not just stand as a form of symbolism and rhetorical “respect” for authorship (see Commonwealth of Australia, House of Representatives, December 8 1999), but instead further reinforces this authorial claim. Perez is now able to claim that his authorial reputation and integrity is invested in these copyrighted works.
Perez’s authorial position - supported by a range of cultural and corporate factors (for example, substantial financial backing) - allows him to license samples, avoid a charge of infringement, plagiarism or piracy and subsequently claim moral rights. This financial backing is not readily available to all artists engaging in similar practices. Licensing samples is an expensive business and many amateur and independent artists instead sample works without a license and risk the possibility of getting sued (see McLeod and DiCola 2011; also see Rimmer 2005, p.43 for a discussion of the Australian Federal Court’s lack of fondness “for the practice of sampling”). Within the current framework of copyright law such acts are considered to be infringing, and these creators are unable to claim moral rights in their work. Therefore, moral rights become embroiled in a legal framework that reinforces a particular form of corporate-sanctioned authorship. Questions of integrity and reputation are subsequently implicated in a range of problematic issues around authorial subjectivity. A creator’s moral connection to their work is predicated on a legal framework that through its current operation, attempts to regularly re-enforce and maintain a separation between authors, users and pirates.

Furthermore, the fact that Perez was able to limit the dissemination of a new remix which simply added a few lines of a vocal sample, also raises significant concerns for other remix artists. Future sample-based works could be deemed to be potentially prejudicial, even if they have successfully licensed the sample (see ‘A case involving the moral right of integrity’ 2012). Scholars (see Sainsbury 2007; Suzor 2008) suggest that acts of parody will not necessarily breach an author’s moral right of integrity. A transformative parody of a copyrighted work will not directly impugn an author’s reputation, and parodic and satirical treatment could be considered “reasonable excuses” for derogatory treatment. However, both of these comments concern concepts of parody and satire, very specific forms of speech involving either imitation for humorous purposes or drawing on works in order to present a critical viewpoint on society. Arguments for a broader consideration of remix and mash up cultures call for a broad spectrum of re-use beyond these specific parameters (see O’Brien and Fitzgerald 2005; 2006), and reputational issues outside these specific arenas need to be
considered. At the very least, the lack of moral rights cases at the present moment suggests that there is a need for careful judicial interpretation of these two opposing trends in any future decisions.

Conclusion

In closing this chapter, it is useful to reflect on how various subjects of copyright law interacted during the debate around moral rights and following the subsequent enactment of a statutory framework. We saw writers arguing that they were involved in a form of creative practice that was radically different from “sound effects people” (SLCLC 1997, p. 23), a hip-hop artist deploying moral rights in defense of a heavily sampled work, a commercial television employee noting the “formulaic” production of commercial television (SLCLC 1997, p. 52) and writers accusing producers of infringement (SLCLC 1997). Each of these examples outlined the contested nature of authorship and indeed the subject of the author proper. The author - as the subject of moral rights - was not obvious in the proposed legislation, but rather needed to be teased out through a series of discussions leading up to enactment. However, once we consider these interactions between subjects, it is debatable whether these issues around authorship can ever be truly “solved”.

The examples outlined above show that the author is always imbricated in a series of complex relationships with the user and pirate, with particular acts of creation raising questions of both use and “theft”. Creation often involves collaboration, use and re-use and in certain cases the need to alter or even copy existing work without authorial sanction in the professional sphere. These processes of negotiation and interrelation challenge attempts by scholars to frame the author as a hegemonic subject in law (see Gibson 2006; Halbert 2007). Once we recognise this relational process and acknowledge, that this subject is inextricably bound to the pirate and the user through a series of complex relationships, the author subsequently becomes radically contingent. As seen throughout this case study on moral rights, the author instead evolves through an ongoing cultural discourse consisting of formal and informal legal
cultures, and is regularly reshaped as parties attempt to reconfigure its relation to use and infringement. The question of exactly who an author should be is bound up with an equally important question that follows: who then is a pirate, and who a user?

My analysis continues in the next chapter, which is focused on the emergence of the user as a subject in culture and law. I outline how the user has shifted from a subject that was largely considered as a consumer of cultural goods, to an active creative participant in the wider cultural milieu. I begin by providing a history of use and consumption before turning to the contemporary era to sketch out the latest scholarly and popular interpretations of this emerging subject. I discuss how the user has been interpreted in law, and the problematic current tendency to ascribe “creation” to the user and the legal ramifications of such a trend.
Part II

The Rise of the User
Chapter Three

THE USER: THE CULTURAL PARADOX OF CREATION

In the following chapter I examine the subject of the user and detail how this subject has been approached in legal doctrine and cultural discourses around law. In taking this dual approach, I signal the importance of both legal doctrine and legal cultures in shaping subjects. In short I outline how legal conceptualisations of the user influence legal cultures and how cultural understandings of the user influence law. Continuing a process that begun with this thesis’ study of the author, I will assess how these two separate but occasionally intertwining trajectories shape and re-shape the user, continually altering its relationships with other subjects. By accounting for the contingent and relational status of the user, the ensuing analysis adds to existing understandings of subjectivity in law. It allows us to examine critical points where the user interrelates with other subjects and assess the implications of these interrelations for copyright law both in Australia and internationally.

My analysis is focused on both tracking and understanding the ever-changing nature of this subject. I begin this task by outlining how the user is currently understood in statutory law. I discuss the two competing models of user exceptions in Western copyright law: fair dealing and fair use alongside alternative ways “the user” is approached in law. I will then outline chronologically how the user has been considered in cultural discourse. This section will detail the slow shift from viewing this subject as a pure consumer of copyright works, to a general cultural recognition of the user as a subject with somewhat more agency, before critiquing the current conceptualisation of the user as a creative agent worthy of recognition. Finally, I will situate these developments in a broader theoretical discussion around how copyright law engages with the subject of the user. I discuss how a relational understanding of law can resolve some of the conceptual and legal challenges posed by the contemporary attempts to locate creativity in the user subject.
The doctrine of copyright law and the user

It has been common practice in contemporary intellectual property scholarship to criticise copyright law for failing to recognise the user. Joseph Liu (2003, p. 397-399; also see Cohen 2005; Gibson 2006) for example, claims that the copyright law of the United States lacks a comprehensive theory of use. He goes on to explain that although the interests of consumers of copyrighted materials have been represented in the Copyright Act of the United States (the jurisdiction that Liu focuses on), “very little has been written about the precise shape and scope of this interest”. Liu chooses to deploy the term consumer throughout his analysis, but he notes that an array of terms are used to describe this subject as “copyright law and commentary contain no universally accepted generic term for those who, access, purchase and use...copyrighted works” (Liu 2003, p. 400). This lack of definitional rigor is a concern for Liu (2003), who contends that the subject he terms the “consumer” is developing an increasingly complex relationship with copyright owner interests, and therefore needs to be sufficiently theorised.

Johanna Gibson (2006, p. 79) echoes this narrative of silence around the role of the subject, she terms the “user”. She considers users to be a priori disenfranchised by the doctrine of copyright law and the dominant ideology of creativity that pervades it. For Gibson (2006, p. 80), this disenfranchisement is important as it allows law to frame the user as “passive” and “anonymous”, and limit policy discussions to the primary audience of intellectual property rights holders. This strategy ultimately sees users displaced from the creative process and the various dynamic creative interchanges between authors and users ignored, in favour of a binary and wholly separate conceptualisation of creativity in law. Through a strategic deployment of actor-network theory (see Callon 1986; Latour 2005; Law 1992) Gibson calls for greater recognition to be paid to the user, and for this contested subject to be reconsidered as an actor rather than simply an “object” of law (Gibson 2006, p. 138).

I support the general tenor of the above critiques, but I am wary of drawing as firm a line as Liu (2003) and Gibson (2006) when looking at the supposed
failings of copyright law in regards to this subject. Liu’s general claim that there
is a definitional impasse around this subject is a productive point but is
overstated. As I outline in the chapter below, although a range of terms have
been deployed in order to explain the subject, cultural discourse has generally
settled on one term or another at particular points in time. A range of academic
literature refers to the term “user” regularly (see Benkler 2000, 2006; Cohen
2007; Gibson 2006) and the notion of “user rights” in copyright law has been
discursively present for a significant period of time (Ginsburg 1997; Patterson
and Lindberg 1991). Furthermore, the historical provenance of fair dealing laws
in the law of the U.K. and Australia, the presence of fair use in U.S. law since
1976 as well as a range of broader provisions within copyright law indicates that
the modern doctrine of copyright law has had some concept of use, and indeed a
user in mind.

Therefore, I suggest that while the user is not fully articulated in law nor can we
say that it has been wholly ignored (see Liu 2003; Gibson 2006). Once we
consider the recent reforms throughout the Commonwealth,38 which sees law
paying increased attention to the complex role of the user in the digital sphere, it
is difficult to view the user as an entirely passive subject in thrall to the claimed
authorial bias of copyright law (see Gibson 2006). I therefore propose an
alternative strategy to begin this chapter: looking at the rights the user has been
given in law in order to assess exactly how law has come to grips with the
subject. The following comparative study of use in Australian law and the fair
use exceptions in the U.S. reveals that statutory law does recognise a user; it just
happens to be a particularly specific concept of the user that is regularly
formulated through the lens of copyright owner interests.

Use in Australian law: Fair dealing and beyond

In Australia, users are granted specific rights in relation to the use and
reproduction of copyrighted works as part of the Copyright Act 1968 (Cth).
Under fair dealing, Australians are able to use or reproduce copyrighted works
without permission for the purposes of research or study, criticism or review,

38 See the Australian Copyright Amendment Act(2006)and Canadian Copyright Modernization Act (2012) discussed in chapter four.
parody or satire, reporting news, or professional legal advice.\textsuperscript{39} It is notable that these rights are granted to acts that are usually the province of a particular field or occupation, such as education, journalism, law. Australia does not retain a general exception for use. Importantly, fair dealing is “not defined in the act and the determination of whether a particular use is ‘fair’ is left up to the courts”, with case law “limited to a handful of cases”.\textsuperscript{40} Not only is the act limited to these particular activities, but also even in these situations the specific use may retrospectively be considered “not fair” by the courts (De Zwart 2003).

As Melissa De Zwart (2003) explains, the “indeterminate scope” of fair dealing is due to its evolution as a judicial restraint on the rights of copyright owners. Since the 1700s copyright doctrine recognised that there needed to be some limits to the rights of exploitation granted to copyright owners, but fair dealing was not introduced into statute in the United Kingdom until 1911\textsuperscript{41} and to Australia in 1912.\textsuperscript{42} The result was a piecemeal response to developing exceptions to copyright law as particular issues emerged:

Early cases that recognise an embryonic form of fair dealing, although not articulated as such, allowed translations and abridgements of works on the basis that they promoted the development and use of material for the public good. Courts also permitted the use of quotations for the purposes of review (De Zwart 2003, p. 5).

It was possible to see a general philosophy of social utility behind the development of these exceptions. However, by the time the concept of fair dealing eventually became statutory law Australia was left with a series of highly specific exceptions for users. Furthermore, rather than these exceptions emerging from a consistent theory or philosophy of use, they instead emerged in

\textsuperscript{39} Copyright Act 1968 (Cth) s40 - 43
\textsuperscript{40} Melissa De Zwart (2003, p. 3) notes that ‘Lord Denning’s formulation from Hubbard v Vosper is still recognized as the classic definition of the concept’:

It is impossible to define what is ‘fair dealing’. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as the basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations come to mind also. But, after all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal of fact must decide.

\textsuperscript{41} Copyright Act 1911 (Imp)
\textsuperscript{42} Copyright Act 1912 (Cth)
a haphazard fashion and always in *reaction* to particular conflicts centred on copyright law (see De Zwart, 2003).

Looking firstly at these exceptions a particular concept of the user emerges from Australian statutory law. It is largely assumed from the range of activities detailed that the use copyrighted content must carry a clear public benefit. The reporting of news, the pursuit of education, reviewing and critiquing existing works and humorous cultural commentary fit this category and underline the assumption of a publicly minded user. The available defences are generally institutional or utilitarian and evoke to particular professional spheres and activities. Even the parody and satire provisions, which were introduced in 2006 (see chapter four), were directly linked by then Federal Attorney General Phillip Ruddock to the occupations of cartoonist and comedian, suggesting more practical and occupational ends than mere ‘use’ (Ruddock 2006b).

In addition to the fair dealing exceptions, a range of further exceptions and statutory provisions develop the concept of a user in Australian law. A prospective user is able to use ideas, which are unable to be copyrighted, use a less than substantial part of a copyrighted text, use work which has fallen out of copyright or use material for purposes covered by statutory licenses, pursuant to a fee paid to the copyright holder. Furthermore, once someone has purchased a copyrighted work, they are also able to lend it to other people through the first sale doctrine. There are also a number of provisions that allow institutions such as libraries or universities to reproduce works for archival or educational purposes suggesting that law views public institutions like libraries as a representative space for ordinary users. With its general public access and ability to offer information for free, I suggest that libraries are presented in the legislation as representative spaces for ordinary users, where they can access information easily and at limited cost.43

Collectively these various exceptions offer a broader scope for the user to operate in and suggest that copyright law broadly considers the user in its deliberations.

43 The Australian Copyright Council has a comprehensive list of user exceptions available at http://www.copyright.org.au/find-an-answer/browse-by-a-z/
and subsequently attempts to manage some sort of balance between authors and users. This examination of the user in Australian law therefore presents something of a rejoinder to the existing academic discourses around the user outlined earlier (Liu 2003; Cohen 2005; Gibson 2006). It is possible to agree with Liu (2003) that like the United States, in Australia there is no clear philosophy or theory of the user or consumer. However, copyright law has always had to consider and frame an ideal user and it is possible to look at law and sketch the outline of a user. Therefore I argue it might be more productive to avoid suggesting that the law has wholly ignored the user, and instead critique the problems that emerge once we account for how copyright law functions in practice.

The exceptions outlined above are relatively generous and in theory would appear to provide a fairly equitable balance between users and authors. However, recent tendencies in legal reform and the general mechanisms of copyright tend to undermine this balance. As Niva Elkin-Koren (2010, p. 27) points out, users have to manage significant transaction costs when attempting to use existing works:

The copyright mechanism requires prior permission. Consequently, any user who wishes to make use of a pre-existing work must first acquire an appropriate—and often costly—license. The user must determine which license is necessary, identify the different copyright owners, negotiate a license to use the work and pay the license fee. The high cost involved in licensing could create barriers that make it difficult for users to participate in generating content.

In addition to the costs outlined above, users are also placed in a difficult position when attempting to re-use copyrighted material due to Australia’s extension of the copyright term to seventy years after death (see Rimmer 2006). The extension means that a range of artistic works will take longer to fall out of copyright.

Finally, I note that the broad tendency in Australian law is to offer specific exceptions rather than flexible and open-ended provisions (see Christou and Maurushat 2009). The benefits of this approach is that users have a clear set of
provisions outlined and are able to assess whether or not they can “use” copyrighted content. However, the corollary of this approach is that unless copyright law has anticipated a use, it is considered infringement, meaning that the legal framework is relatively inflexible and unable to respond quickly to technological advances and changing user practices. Indeed, as we leave Australia and examine the United States’ fair use exceptions, it is worth mentioning that the Australian Law Reform Commission (2013) is considering introducing such an exception in Australian law. As I will detail below, this approach will potentially allow for a much broader conceptualisation of use and the user in law.

The United States user: Fair use

The United States takes a different approach from the specific rights granted to an Australian user and instead has a fair use exception, which allows use and reproduction “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research”. Unlike Australia’s clearly delineated exceptions, these examples are illustrative rather than exhaustive. Legislation sets out four factors, which will be used to decide whether the use is deemed fair if challenged:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

This doctrine, which was codified in the Copyright Act 1976, favours transformative works (Cohen 2004) and arguably gives users in the United States more scope to use copyrighted material than in Australia (see Rimmer, 2006).

44 Copyright Act 1976 (U.S.) §107
Despite the apparent breadth of US fair use, as compared to the Australian framework of use, a number of substantial problems are associated with the operation of the exception. There are “gaps, overlaps, ambiguities, and inconsistencies in the statutory text” (Madison, 2005: 391), which create a range of problems in implementation and these have been addressed by a substantial body of literature (Fisher III 1988; Gordon 1982; 1992; Hilderbrand 1999; Tushnet 2004). I will attend to a handful of the most obvious issues. The first important issue to note is that the derivative work right - factor four - allows rights holders to potentially hinder “interesting, creative, and culturally significant reuses of their works” (Tushnet 2004, p. 545) if it is judged that these reuses have a negative effect on the rights holders market. Copyright holders have regularly relied on a broad interpretation of this fourth factor to challenge content, which has drawn directly on copyrighted works. Rebecca Tushnet (2004, p. 544) explains:

An influential court decision held that sampling, defined as quotation from sound recordings in new songs, was “stealing” even though the resulting work contained a large amount of original material. Another court found that a book of Seinfeld trivia questions, containing material largely created by the authors and not by the producers of Seinfeld, was an infringing derivative work. The same thing happened to The Cat NOT in the Hat! A Parody by Dr. Juice, a commentary on the O.J. Simpson murder trial written and illustrated in the style of Dr. Seuss.\(^{45}\)

The broad scope of fair use at first glance obscures the difficulty of defending use, and articulating why your use should be considered “transformative” and not “derivative”. The general trend of U.S. case law, particularly in major decisions, is to support the rights of existing copyright holders instead of taking a more generous interpretation of the exceptions as Tushnet (2004) notes above.

Michael J. Madison (2005, p. 393 - 394) outlines a complementary series of “problems” around fair use that shed further light on the underlying issues surrounding these exceptions. Madison argues that in an ideal situation under

fair use all “productive” use - for example, documentary makers using copyrighted audio and video excerpts - would be seen as legitimate use. Similarly, any personal use (such as time-shifting content), and creative personal use - for example editing objectionable content from a text for personal use - would also be allowed (see Madison 2005). However, Madison notes that in all three situations, the doctrine of fair use is unclear and often unhelpful in formulating viable defenses for these actions. Exactly what constitutes “productive” use, how personal use should be construed and when creative personal use becomes derivative is entirely unclear and law lacks both clear criteria and vocabulary to contribute to solving these problems. As Madison (2005, p. 401; also see Hilderbrand 2009) explains the “[c]ourts have failed to build a common law of fair use, one that consists not merely of many cases applying a common rule, but instead a cluster of cases in which judges are listening to, echoing, and responding to one another in articulating their senses of the law.” This leaves the United States as a country with a long history of fair use and an abundance of fair use theory but no coherent body of fair use law, perhaps explaining the problematic trend towards refusing to acknowledge transformative works outlined above.

The final point to make is that a defense of fair use can also be expensive. U.S. Copyright Law provides theoretical support of fair use but in practice, users cannot effectively rely on fair use as a legal defence (see Lessig 2004). There are significant financial costs involved with any attempt to defend use as “fair”, especially as any re-used content of significant or potential value can draw legal action from well-resourced corporations. As Lawrence Lessig explains, this leaves the user with two options:

You either pay a lawyer to defend your fair use rights or pay a lawyer to track down permissions so you don’t have to rely upon fair use rights. Either way, the creative process is a process of paying lawyers—again a privilege, or perhaps a curse, reserved for the few (Lessig 2004, p. 107).

Fair use is a reactive defence to copyright infringement, which can leave the user in a financially perilous position if they lose their case.
Therefore, in a similar fashion to Australian copyright law, the statutory law of the United States presents us with an under-theorised but still visible framing of the user. A generous interpretation would suggest that the fair use exception presents wider access to the subject of the user than Australia. The lack of specificity in the fair use doctrine can be seen as a positive, because according to law, everyone is a potential user. However, a closer assessment of the four fair use factors suggest that non-profit, personal or transformative use that draws on a minimal part of the original work will be looked on more favourably than use that could impact on the commercial performance of the original work (see Madison 2005). Drawing from these precepts and keeping in mind the history of judicial decisions outlined by Tushnet (2004) earlier, fair use situates the user - and the act of use - largely within the non-commercial sphere. The reactive nature of the US fair use defence, as Lessig (2004, p. 287) notes, also suggests the user is someone who can afford a lawyer.

In comparing these two sets of user exceptions we can come to some brief conclusions about the legal framing of the user. Both legal frameworks suggest a subject that - to an extent - needs to operate outside the economic structures of copyright law. This subject of the user - as well as engaging in the economic contract that largely underlines copyright law - needs to be able to engage in particular forms of non-economic use for the general good of society, or the public interest. However, it is clear that both models limit the agency of the prospective user through their practical operation. Australian copyright law positions the user in statutory law quite specifically and does not offer a broad conceptual framing of this subject. Alternatively, the fair use exception offers a wider concept of the user in theory but as outlined above, the practical operation of this exception sees the user constrained, pushed towards operating in non-commercial spheres.

Collectively, these various framings suggest that copyright law views the user as carrying a potential negative impact for creators rather than as a potential creator. Unlike the author, the user does not stand as a comparatively viable

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46 Sophia Christou and Alana Maurushat explore this discursive tendency in Australian copyright law reform in their article “'Waltzing Matilda' or 'Advance Australia Fair'? User-generated content and fair dealing in Australian copyright law” (2009). University of New South Wales Faculty of Law Research Series. Working Paper 29.
and separate subject in law but is instead roughly mapped out and defined by exceptions to the authorial remit. In the following section I present an complementary analysis of the user that identifies the key cultural discourses in the broadcast and digital era that also shaped this subject. Key to this cultural analysis is recognising that “user” itself is a term bounded by particular temporal cultural discourses. Therefore the following section takes a chronological route. I identify the initial birth of the user through the subject of the consumer and a range of broadcast media practices, which emerged from these practices of consumption in the domestic environment. I then turn to the digital environment in order to outline how various digital practices led to the subsequent transformation of the user, to the “creative user” a problematic concept where creativity is assigned to a user subject. Through this analysis, I examine how cultural discourses contribute to the shaping of legal subjects and explore the contested position of use in both culture and law.

Cultural discourses of use and consumption

During the late nineteenth and early twentieth century, the user that features in public discourse today was nowhere to be found. Instead, it was the consumer that emerged in cultural discourse with the consumer revolution instigating a slow but substantial period of change in social life. The late nineteenth century saw the emergence of a range of consumer goods, which subsequently “meant that consumer interest and consumerist approaches could apply to a wider range of life activities than before,” (Stearns 1997, p. 109). No longer was the consumption of goods simply one facet of an individual’s life, instead consumption infiltrated all areas of society and became a “full scale collective and individual preoccupation” (McCracken 1987, p. 156). The subject of the consumer emerged through a number of complementary cultural trajectories, following these social changes.

As commercially produced goods replaced previously homemade or inherited items and as marketing began to develop as a practice, an individual’s concept of self was slowly linked to their consumption habits (see Bourdieu 1984, Stearns 1997). This freedom to purchase saw the individual separate from the broader family environment and their status concerns to emerge “as an increasingly
autonomous consumer” (McCracken 1987, p. 150). A second trajectory saw the consumer develop as a cultural subject as advertising began to develop into a mature industry. No longer just concerned with the spreading of information and awareness about products, instead advertising “carried information about concepts of self ... and a range of other cultural information” (McCracken 1987, p. 150) helping the individual “fulfill new cultural concepts of the ‘person’, the ‘body’, and the ‘self” (McCracken, p.159). Part of advertising’s cultural role involved the shaping of the consumer proper. Marketers increasingly had to ask themselves, exactly who was the consumer? Through these cultural processes, individuals were reconceived and repositioned as autonomous consumers, connected to the market more so than the town or family.

This new subject of the consumer carried little agency and was largely viewed as the end point in the industrial production value chain (see Bruns 2008a, 2008b; McCracken 1987). Unlike modern interpretations of consumption, which rest on notions of pleasure (see Bourdieu 1984; Featherstone 1991), the act was viewed “as a matter of necessity rather than choice” (Bruns 2008b, p. 9). Consumers always had the option to withhold purchase as a strategic move, but “power structures in the industrial chain were ... strongly slanted in favour of producers and (to some extent) distributors”. Product development was hierarchical and secretive so user feedback was extremely limited and consumer satisfaction was a comparatively minor aim of any major company. The emerging practice of market research appeared to give consumers some agency in the production chain, but this was still limited to choosing between “Coke and Pepsi” (Bruns 2008b, p. 9). In short, the consumer was more or less imagined as a passive agent in this industrial economy, expected to offer feedback sporadically and simply engage in the purchasing of products.

These broad cultural trends place the limited institutional and professional framing of fair dealing within a specific historical and cultural context. The broad population, rather than being understood as subjects who might actively engage with and even alter copyrighted works were instead viewed as the end point of a three-stage production, distribution and consumption process. Only a handful of socially productive uses were imagined that would possibly differ
from the simple act of consumption and the majority of the Australian population were not considered to be active participants in this process. Therefore the discursive shift towards the notion of a user subject is a shift of particular consequence, as the term “user ... implies a more active role than that of the consumer” (Bruns 2008b p. 14; see generally Bruns, 2008a; Jenkins, 2006). One of the major factors in this shifting cultural subjectivity was the rate of technological development across the twentieth century, significantly contributing to emerging sense of agency. The following section will discuss the introduction of radio and the VCR and outline how these technologies and the range of media practices surrounding them contributed to this reshaping of the consumer subject and the emergence of the user.

The analog user: Radio dreams and VCR realities

One of the earlier examples of this shift from consumer to user can be located in the introduction of the radio, which was initially launched “with the possibility of many-to-many user-led interactivity” (Hartley and Notley 2005, p12; also see Barnouw 1966; Hartley 2000; Fuller 2005; Johns 2009). The radio was a user-led invention, with hobbyists developing the medium through experimentation, much like the early days of the internet. This development was acknowledged by famed theatre director and playwright Berthold Brecht, who saw radio as a public device that would be “capable not only of transmitting but receiving, of making the listener not only hear but also speak” (Brecht 1979/80, p. 25). Manufacturers and governments suppressed this potential early on in radio’s history (Hartley and Notley 2005), but radio’s ability to enable user production and creativity was never fully quashed with amateur and pirate radio (see Fuller 2005; Johns 2009) a constant presence throughout the twentieth century.

This sense of active use and the ability to step beyond the role of the consumer was also supported through televisual “innovations and adaptations” such as the transistor-based TV, which extended the frontiers of the domestic television, and

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47 Hartley and Notley provide a cogent analysis of the significant role national public policy and legal frameworks played in the development of the radio. Despite the possibility of two-way communication embedded in early forms of radio, this possibility was suppressed by a combination of law and policy that regulated the airwaves. However, Hartley and Notley also note that popular uptake of radio used the technology as a form of ‘entertainment and information’, practices which also lent support to the one-to-many broadcast model.
broke down its function as “the fixed centre of domestic entertainment in the living room” (Thomas 2008, p. 93). People began to gain control and agency over their broadcast signal at this important juncture, control which only increased following further technological advances:

A number of other peripheral machines began to appear around the television set during the 1970s and 1980s, including games consoles, optical disc players such as Laserdisc and Selectadisc, programmable VCRs and early home computers ... Taken together, these new domestic technologies dramatically enlarged the possibilities of television, well before what we now think of as the era of digital communications (Thomas 2008, p. 93).

With these technologies extending the traditional broadcast television and considered alongside the user-led innovation during the early days of radio, the early beginnings of a user subject, one that carries an agency beyond that granted to the consumer becomes easier to identify.

However it was not until the introduction of the VCR in the 1980s that this emerging discourse of agency became firmly situated in both discourse and practice and directly impacted on copyright law. Studying the discourse of magazines from this period reveals an emerging sense of agency, noticeable in seminal articles reporting on the “revolution” the VCR would engender. A famous Newsweek cover positioned the VCR at the heart of a broader media revolution and the accompanying article noted that the theme of the uprising was “power to the people” ('The Video Revolution' 1984, p. 50). Continuing this insurrectionist tone, Newsweek argued that the technology directly challenged the “tyranny” of TV, not just through the ability to “time-shift” or watch restricted content but also by freeing the audience from the strictures of television programming. As VCR user Barbara Riley explained “We used to watch a lot of shows to get to a show ... Now we just set the timer ... We’re watching less TV” (The Video Revolution 1984, p. 57). The emergence of “mom-and-pop retail stores” (The Video Revolution 1984, p. 57) providing a wealth of rental and purchasing options to consumers also contributed to this emergent sense of consumer freedom and the sense of an agency beyond that of simple consumption.
This discourse of agency was also echoed in a theoretical turn that re-positioned the consumer as an active participant in the industrial structures of mass media. A growing body of research in the 1980s critically interrogated the passive consumer of the industrial, broadcast society, a subject that was seen to be central to a vast body of communications research; particularly around media effects (see Adorno 2001; Herman and Chomsky, 2008; McChesney, 2004). Leading media and cultural studies scholars (Ang 1991, 1996; Fiske 1987, 1991; Hartley 1996; Lumby 1999), argued that rather than the media and popular culture functioning as an all-encompassing ideological bludgeon, which directly influenced viewers’ habits and practices, viewers and consumers were able not only to retain a critical distance from popular culture and the media, but were able to produce their own divergent meanings and associations. This scholarship was receptive to the changing perceptions around the relationship between consumers and media and their research helped to contextualise these moments of technological change.

To take one example, the above scholarship usefully outlined the highly material ways the VCR was providing consumers with a new sense of agency. As Ien Ang (1996 p. 9 - 10; also see 1991, p. 59 - 60) explains, the VCR was especially popular amongst marginalised groups such as migrants, and audiences of liminal content (such as viewers of hardcore pornography) who had been poorly served by “centralist, modernist television”. The ability to access content (either ethnic or obscene) that would never appear on broadcast television, record television programs at home to watch at a later date and even rent movies on a whim underlined a sense of consumer agency, with people freed from the strictures of the television program guide. VCR take up was relatively high with roughly half of U.S homes owning one nine years after its initial launch meaning that these changes weren’t restricted to a small portion of society (see Potter et al. 1988). Instead broad swathes of media users no longer identified with the passive mass-audience imagined by the broadcast industry, and slowly this notion of the consumer gave way to an “active” individual user that retained both agency and choice (Ang 1991, 1996).
This cultural agency made its mark on law in the 1984 thanks to the Betamax case, a precedent-setting Supreme Court decision, which ruled that videocassette recorders (VCRs) should be deemed legal due to “their potential for productive non-infringing and fair uses” (Hilderbrand 2009, p. 89). Taking a technological angle this decision simply acknowledges that copyright law cannot restrict innovative technology that could be potentially used for non-infringing purposes. Indeed, this was the eventual story of the VCR with Lucas Hilderbrand (2009, p. 100) correctly noting that the videocassette recorder was largely used for “consumptive use”, rather than inspiring a home video revolution of amateur media creation and consumption. However, the decision of the Supreme Court also understood that such a ruling gave freedom to the user with the majority opinion noting that although some users might infringe copyright using a VCR, the legitimate and potentially beneficial uses of the technology outweighed the threat of possible infringement (Hilderbrand 2009).

These changing media practices also led to key legal decisions being made in Australia during the late-80s and early-90s around the legality of video and cassette tapes. In WEA International Inc v Hanimex Corp Ltd (1987) a record company brought an action against the tape manufacturer Hanimex, arguing that their advertisement authorised the infringement of their copyrights. The ad stated: “if you don’t want your favourite recordings ruined, use FUJI GTI care tapes” (Napthali 2005, p. 17). However, Gummow J found that the case rested on a speculative notion of potential authorisation and that the accusation lacked “the presence of, control of the means of infringement and knowledge of it at the relevant time” (Napthali 2005, p. 17). The case law was developed in a later High Court decision - Australian Tape Manufacturers Association Ltd v Commonwealth (1993) – that underlined the fact that the inability of the vendor to control the “ultimate use” of the blank tapes precluded a finding of authorisation (Australian Tape Manufacturers Association Ltd v Commonwealth [1993] HCA 6). Subsequently, this required copyright owners to sue individual users for the act of making an unauthorised copy on a recorder.

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49 See also Australian Tape Manufacturers Association Ltd v Commonwealth (1993) HCA 10
Due to the clear logistical and evidential demands on copyright owners, this essentially created a de-facto home-recording right in Australia.⁵⁰

These cases stand as a paradigmatic example of the gradual cultural shift from the consumer to the user and the need of law to respond to these shifts in both technological agency and changing subjectivities of use. The palpable sense of excitement and revolutionary potential that was imbued in the device could not be ignored by the Supreme Court and the decision to legalise the technology allowed the user to come to the fore and be provided with both legal and cultural agency. Indeed, it is notable that in terms of a strict reading of the fair use exceptions, the dissenting opinion in Betamax may actually be the more legally persuasive. The fact that the majority opinion took such a generous interpretation of fair use, suggests that these emerging cultures of use, and indeed VCRs themselves, were vital in defining statutory fair use (Hilderbrand 2009). The decision contributed significantly to the broad re-thinking of the shadowy subject that was the obverse of the author, and instead of continuing the historical tendency of viewing the consumer as simply the end point of the industrial life-cycle, the majority decision allowed the user to come to the fore and begin function as an active curator of content.

User agency in internet culture: Apple and the shaping of the digital user

This reshaping of the consumer continued apace and much like the VCR and the radio, the introduction of digital technology into the domestic environment further altered the subject of the user and generated new subjectivities of use amongst the general public. In the following section I will use the work of Jean Burgess (2012) to outline a particularly influential discourse running through the history of computing where the user was substantially re-defined. This trajectory takes us from the early hacking subculture towards Apple’s commercial framing of the user. I contend that these moments contributed to a direct extension of user agency within the broader culture. It further develops the notion of the “active” user and identifies creativity as an agency central to the contemporary user experience. From its humble beginnings in the early 1980s,

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⁵⁰ A similar situation occurred in the United Kingdom. See CBS Songs Ltd v Amstrad Consumer Electronics [1988] UKHL 15.
the digital user emerges as the creative hero of the mid-2000s but in doing so leaves copyright law with a number of problematic issues with which to contend.

Computers were a device originally limited to a highly select population of scientists and technicians and the early technology industry was linked directly to the institutional structures of scientific research and military operations. For a number of years, when it came to computers, the quotidian digital user was an absent subject and computers were machines operated and “used” by professionals (Burgess 2012; also see Light, 1999). However, alongside this institutional and professional culture, a subculture of hackers slowly emerged, enthusiasts and experts who were interested in testing the limits of these new technological devices. There is no doubt that a “politics of transgression” was present in the act of “hacking” (Coleman 2012, p. 100; also see Sterling 1992), as hackers often dismantle and re-assemble commercial technologies or infiltrate online networks and draw on various ethical frameworks in order to justify such transgression. However as Burgess (2012) notes, the hacker community was also deeply interested in questions of user agency.

One of the more notable examples of this interest can be found in a quote from a Homebrew Computer Club newsletter, a legendary hacking club based in Silicon Valley, which boasted Steve Jobs and Steve Wozniak - future founders of Apple-as members:

> By sharing our experience and exchanging tips we advance the state of the art and make low cost home computing possible for more folks ... it is important for the general public to begin to understand the limits of these machines and that humans are responsible for the programming (‘Homebrew Computer Club Newsletter #4’ 1975).

Burgess (2012, p. 31) correctly identifies the emergence of a user agency “embedded in the hacker ethic” and goes on to note that this interest in empowering users had a direct impact on the wider population once computers entered the domestic environment. The first iterations of early personal computers assumed that users would want to program music or games, and not just passively play programs created by others. It is possible to argue that this
ideology has faded over the years, particularly following the introduction of Graphical User Interfaces, which simplified computer interaction for many users. However, once we look at the discourse surrounding Apple products throughout the 1990s and 2000s, this notion of approaching computers and digital technology as spaces for creation and not just passive use is remarkably persistent.

Apple has long been known for its commitment to innovative advertising since its famous 1984 ad - a Ridley Scott directed ad for Apple’s Macintosh computer - which was run to great acclaim during the 1984 National Football League super bowl (‘1984 Apple’s Macintosh Commercial (HD)’ 1984). Despite the vastly different advertisements that have run during two decades of Apple, the ads have consistently reinforced one dominant theme: that of creative individualism. The late 1990s Think Different (1997) advertising campaign used a range of figures from history including Pablo Picasso, Bob Dylan, John Lennon, Yoko Ono and Albert Einstein and explained that these celebrities were “not fond of rules” and had no respect for the status quo, which might cause people to view them as crazy. However, as Burgess explains (2012, p. 35), these qualities were transferred to the user through Apple’s commercial discourse: “Apple is creative, non-conformist and innovative, through the slogan ‘think different’ these qualities of distinction are offered to the user … it is possible for the ordinary people, with the aid of the right tools, to aspire to great creative achievements”. This discourse extended the agency of the active user which emerged during the analog era. Users were no longer just an active participant in their consumption choices but were granted a creative agency in their own right.

This creative agency was developed further in later Apple commercial strategies. The original iTunes advertising campaign “Rip. Mix. Burn” encouraged users to take advantage of the new iTunes platform and an inbuilt CD-RW drive to burn mix CDs. Inherent in this slogan was a notion of providing users with control and creative agency over their music collection, a discursive strategy confirmed by Apple CEO Steve Jobs in the adjoining press release. Jobs outlined a notion of quotidian user creativity supported by simple and intuitive Apple software:
iMac has evolved into an entertainment center, where you can create desktop movies, manage your digital music library and burn custom music CDs ... iMovie and iTunes are so easy to learn and use, even your parents can use them without getting confused (‘Apple Unveils New iMacs With CD-RW Drives & iTunes Software’ 2001).

Despite these common themes emerging throughout Apple’s commercial strategies, this notion of the creative user was still implied rather than articulated. However, the launch of the iLife suite in 2003 explicitly located creativity within the “ideal” user (Burgess, 2012, p. 37).

The iLife suite linked together four of Apple’s key applications - iTunes, iPhoto, iDVD and iMovie - and allowed all of the applications would work together seamlessly. When launching the iLife at Macworld in January 2003, Steve Jobs situated iLife as a key suite for the “new digital lifestyle” and claimed that iLife would “do for our digital lifestyle, what Microsoft Office did for digital productivity” (‘Steve Jobs introduces 12”-17” PowerBooks, iLife & Safari - Macworld SF’ 2003). The accompanying press release emphasised this seamlessness as key to user creativity:

> [U]sers can now select music from their iTunes library to use in their iPhoto slideshows, movies or DVD menus from directly within iPhoto 2, iMovie 3 or iDVD 3—without interrupting the creative process by having to switch back and forth between applications [my emphasis] (‘Apple Introduces iLife’ 2003).

No longer is creativity seen to be ephemeral and only of access to artists, authors and other creative professionals; instead creativity is ordinary and present in every home with iLife software or indeed an Apple product. For Burgess, one of the major impacts of this campaign is the “blurring of the divide between professional creativity production and everyday technological or media consumption”.

Before turning to the web 2.0 discourse, a cultural and corporate discourse which emerged in the mid-2000s as an attempt to come to grips with this “blurring of the divide”, I will briefly summarise the above chronology. Across the twentieth century the concept of the user slowly emerged thanks to a
combination of new technologies, commercial and social discourses and emerging social practices. This subject was also gradually granted creative agency, a process evidenced through the detailed examples of the VCR and the commercial strategies of Apple. The impact of the user retaining creative agency culturally and what these different legal and cultural interpretations of the user mean for the future of this subject will be explored further in the following section.

Web 2.0 and the emergence of the “creative” user

The Web 2.0 “moment”, a term which sought to explain a series of cultural and technological changes that occurred around the mid-2000s, is an important cultural juncture in the history of the user. Following the dot-com crash of 2000, which left investors and technology gurus alike reeling, questions were being asked about the viability of the emerging digital infrastructure of the internet. However, in a matter of years, the launch of crowd-sourced encyclopedia Wikipedia (2001), social networks MySpace (2004) and Facebook (2004) and video-sharing website YouTube (2005), radically reshaped the online experience of the general public. With an emphasis on creating content, sharing experiences, contributing to a broader knowledge base and strengthening social ties, these websites not only created new trajectories of knowledge and sociality, but for many scholars and public advocates (Benkler 2006; Bruns 2008a, 2008b; Jenkins 2006; Lessig 2008; Shirky 2008) these websites also collectively represented a radical shift in discussions around creativity and use.

One of the more prominent advocates in this post-crash era is Tim O’Reilly (2005). He argues that these websites fundamentally empower users to the extent that this digital ecology represents a vastly different experience to the World Wide Web of the mid-1990s, or indeed any other period in history. The term Web 2.0 was coined at a conference he hosted in 2004 where he described the phenomenon as:

... the network as platform, spanning all connected devices; Web 2.0 applications are those that make the most of the intrinsic advantages of that platform:
delivering software as a continually-updated service that gets better the more people use it, consuming and remixing data from multiple sources, including individual users, while providing their own data and services in a form that allows remixing by others, creating network effects through an “architecture of participation,” and going beyond the page metaphor of Web 1.0 to deliver rich user experiences.

The broad concept that O’Reilly popularised has been subsequently developed by scholars. Yochai Benkler (2006, p. 276) argues that the current digital environment has allowed users to take a more active role in culture, with the “radically declining costs of manipulating video and still images, audio, and text ... qualitatively [changing] the role individuals can play in cultural production”. Clay Shirky (2008) extends these ideas, noting that these practices challenge traditional institutionally sanctioned forms of creation and information dissemination such as journalism.

Strangely enough, *Time* magazine was the most radical interpreter of this moment in the cultural zeitgeist. In 2006, the magazine famously announced that “You” was the person of the year, collectively awarding this hallowed title - one, which had previously been held by the likes of Winston Churchill, Adolf Hitler and Mahatma Gandhi - to all of us. Inside the magazine - emblazoned with the now-famous reflective mirror cover - was a paean to the Web 2.0 era: “We made Facebook profiles and Second Life avatars and reviewed books at Amazon and recorded podcasts. We blogged about our candidates losing and wrote songs about getting dumped. We camcordered bombing runs and built open-source software” (Grossman 2006). This profile embodies the utopian ideology of Silicon Valley but manages to take it one step further, with prolific writer Grossman arguing that while “Silicon Valley consultants call it Web 2.0, as if it were a new version of some old software ... it’s really a revolution.’ Tying together the various strands of cultural ephemera which refer to this particular moment in the zeitgeist, the *Time* magazine profile represents the ultimate end point of these discussions, the identification of a new cultural subject: the creative user.
The novelty of web 2.0 could be seen to be substantially problematic, as since the birth of the internet, users have been participating actively in communities through bulletin boards, forums and mailing lists. Indeed, as this chapter outlines, there is a strong discourse of agency and creativity that resides within the user subject throughout much of the twentieth century, with Apple mobilising a similar discourse as early as the mid-1980s (see Allen 2013 for a critique of this discourse). However, as Yochai Benkler points out, the real change may not be found in the practices themselves, which have a long historical provenance, but instead, their scale. What was once a niche activity, limited to hardcore fans of cult shows or privileged early adopters of technology, is now a form of media practice and usage which is entrenched in daily life (see Benkler 2006; Jenkins 2006). It is of course important to recognise the historical specificity of the web 2.0 discourse, but we can also acknowledge that contemporary cultural understandings of the creative user can build upon this particular history, and enable the rapid emergence of “putatively new forms of media subjectivity” (Lobato et al. 2011, p. 900).

Returning to Steve Jobs’ launch of the iLife suite in January 2003, it now stands as an accurate premonition by Apple of the importance and value of user creativity. The launch both foreshadows and sits on the cusp of a moment where cultural discourse reframes the user. Earlier concepts of the user - both in terms of scholarship and society at large - comfortably acknowledged the separate roles of author and user within an industrial and cultural hierarchy. This is evident in the text of law itself as noted earlier but it is also clearly present when looking at earlier technologies like the VCR, which entrenched altered but still largely consumption-oriented media practices. Although the introduction of the VCR was framed as a revolution and clearly a case of the user being granted a significant amount of agency, no one was suggesting that users were physically creating the popular culture they were engaging with en masse. Even in earlier Apple advertisements, the user was presented as a revolutionary figure, but the discourse around use and creativity was still emerging and inferred rather than specifically highlighted. This sense of active use was still just that: “use” and although there were pockets of amateur creativity (for example pirate radio or
amateur super 8 films), there was no direct linking of these practices to the wider cultural framing of a user subject.

Following the above cultural and technological changes this discourse has altered substantially, and the theoretical frameworks outlined above attempt to straddle the activities of use and production co-currently. This reframing becomes only too evident as popular, policy and scholarly discourses are examined. The creative user is a recent enough subject to be assaulted with neologisms as various parties attempt to come to grips with the changing cultural landscape. Some of the more prominent attempts to describe these practices include consumer co-creation (Potts, et al. 2008), user generated content (UGC), produsage (Bruns 2008a; 2008b) and the “pro-am” revolution (Leadbeater and Miller 2004). There are minor differences between each conceptualisation. For example, Charles Leadbeater and Paul Miller (2004, p. 20) describe the “pro-am” as someone who “pursues an activity as an amateur, mainly for the love of it, but sets a professional standard”, whereas UGC is regularly “imagined as a disruptive, creative force, something spontaneously emerging from the creativity of individual users” and largely defined in opposition to “professionally produced content that is supported and sustained by commercial media businesses or public organizations” (Lobato et al. 2011, p. 900). Despite these minor variables, all of these categories attempt to speak to the uncertain phenomena of large-scale amateur creativity, and have gained purchase within both academic and policy circles.

Between authorship and use: tensions and boundaries

The cultural discourse that emerges around the creative user in the wake of web 2.0 is significant as the neologisms outlined above begin to formally articulate what has been a longstanding tension between the subjects of the author and the user and the pirate. An ongoing problematic in the doctrine of copyright law is the process of identifying exactly what qualifies as use, what qualifies as infringement and what qualifies as authorship. As the long-standing doctrinal debates about the fair use exceptions in the United States discussed earlier in this chapter suggest this is a profoundly difficult process. One person’s use can
be seen to be sufficiently transformative to be considered an original work in its own right and thus an authorial practice or the use could be for educational purposes and therefore also an act protected under fair use. Alternatively, that same use can also be considered derivative and therefore a form of use unsanctioned by copyright law and therefore a direct infringement.

In common disputes that occur around sampling and fan fiction, these are the types of issues and tensions that come to the fore (for a general overview see McLeod and DiCola 2011; Tushnet 1997). In each of these examples, a copyrighted work is re-configured and used in a different creative context by a second party. Throughout these cases it is unclear whether this use is considered to be authorial, mere use or piratical. Of course, particular norms such as the licensing of sampled content (see McLeod and DiCola 2011) and the increased willingness of intellectual property owners to embrace the growth of fan fiction (Tushnet, 1997) have emerged within and alongside legal doctrine. However these norms have tended to shirk these conceptual questions rather than solve them, with corporate owners, fans and samplers mutually searching for the path of least resistance rather than grappling with the difficult tensions that circulate around originality and creativity in law.

If we briefly turn to the practice of fan fiction, we can see a direct example of how these tensions between authorship, use and infringement are avoided. The conversation around fan fiction has seen scholars emphasising the lack of market harm involved in non-commercial uses and has even seen large companies engage with their individual fan cultures through co-creation. To provide a brief example, Lucasfilm “launched a mash-up site to encourage creators to mash up scenes from the Star Wars series with their own music or images uploaded to the Lucasfilm server” (Lessig 2008). However, Lucasfilm retained full exclusive rights to their content, the mash-up that was eventually created, as well as commercial and non-commercial rights to any original content uploaded during the process. As Lawrence Lessig (2008) emphasises, this example reminds us that there is a fundamental hierarchy that is reinforced through these partnerships.
The above process is a denial through contract of a number of clear rights under law in regards to a fan’s intellectual property, as well as a denial of any potentially original acts of creativity that may arguably be enacted through the process. The emphasis on non-commercial use may be beneficial for fans that wish to develop only derivative content, and do not seek to engage in commercial exploitation. The issue here is that although this discourse of non-commercial use may be useful for some fan cultures, non-commercial amateur creativity has started to be directly incorporated into law in order to clarify the subject of the user. The 2012 copyright modernisation reforms in Canada offer a good example through which to explore how these cultural discourses around creative use and the social response to these practices have impacted on law. On one hand, the user emerges as an increasingly clear figure and is directly addressed through law, with attendant rights and responsibilities. However, creative acts of the user sit awkwardly within legal doctrine, with supposedly liberal exceptions only reinforcing existing creative and corporate power structures.

Unintended consequences of user recognition: Canada’s Copyright modernization act

Canada’s recent *Copyright Modernization Act* represents “the most significant changes to Canadian copyright law in decades” (Geist 2012a) and involves a raft of alterations to the regulation of copyright. The act contained a number of important reforms that favored user rights including the legalising of time shifting and format shifting, a cap on statutory damages for non-commercial infringement and a broad series of exceptions facilitating greater ease of use for educational purposes (see Geist 2012b). While many of these exceptions were already in place in other commonwealth countries (for example, Australia formally legalised the de-facto legal practice of time shifting in 2006, discussed in chapter four), Canada also introduced a relatively dramatic exception, which went significantly further than many other jurisdictions in regards to user rights: the user-generated content exception, also known as the “YouTube” exception (Geist 2012c). The provision “establishes a legal safe harbour for creators of
non-commercial user generated content such as remixed music, mash up videos, or home movies with commercial music in the background” (Geist 2012c).

The exception directly addresses the subject of the creative user, which this chapter has been concerned with. But despite its outward appearance as a timely piece of legal reform, the exception represents a denial of creative agency to the user. Like Australia, Canada retains a similarly narrow list of specific exceptions where users can defend themselves against claims of infringement if they are engaging in particular activities such as research or study. The “YouTube” exception stands as a dramatic alternative to previous statutory exceptions, offering a broad space of “non-commercial use” for the user to operate in. However, the concept of “non-commercial use” immediately discounts the transformative elements of actions like remix, mash-up or the deployment of professional content in amateur settings. If a work is sufficiently transformative and fixed in an original form, this work can and should be considered authorial. By sectioning off creative user practices into a non-commercial space, this work now begins to operate through the oxymoronic concept (in the case of copyright law) of non-authorial creativity.

These tensions and conflicts were directly addressed during the Australian Law Reform Commission into copyright law. The commission proposed enacting a similar exception into Australian law in 2012 and Bowrey (2012) critiqued the suggestion in a submission, noting the problems with such framings of user “creation”. She explains that the entire concept of non-commercial use is a profoundly problematic one, because it “sends the message that the copyright owner is prima facie entitled to recompense for any use of their work”. Continuing, Bowrey notes that:

[T]rue transformative works are not substitute works for originals. They are not piracies because they serve a different cultural function to the original ... If there is a legitimate cultural justification for permitting transformative use, any such right should not be then diminished and curtailed to non-commercial uses.
Her comment outlines the problems surrounding the discursive identification of user creativity and the problems that an entrenched cultural hierarchy around creativity can bring in terms of developing relevant legal frameworks.

Bowrey is speaking in the Australian context but her concerns are equally valid when considering this recently passed Canadian exception. The attempt to restrict particular practices to non-commercial spheres underlines the inability of copyright law as it is currently constituted to directly address these complex issues around the notion of creativity, an evasion discussed earlier on this chapter. Unwilling to explore the tensions and blurriness that exist between the acts of “use” and “authorship”, law instead prefers to rest on separate and fixed subjects that can be easily categorised and organised in a hierarchy of creativity. As seen in the Canadian reforms, this hierarchy is one where the author is able to draw on cultural objects to develop their creativity and still gain compensation for their work, and maintain a market monopoly. Conversely a user - despite their creative agency - can be denied the mantle of the author, and their work denied legal status as a copyrighted work.

From the above example of recent legal reforms in Canada, it is possible to both welcome and critique these emerging discourses around web 2.0. They offer a step forward in terms of conceptualising creativity and begin to acknowledge the complex relationships that exist between subjects of copyright law. However, these discourses that surround the user largely deny legal creative and authorial agency to the user, directly contribute to the hegemonic tendencies of the copyright doctrine around authorship and fail to seriously engage with the politics of creativity. Amateurism is prized throughout these narratives but too often the user simply helps capital to extract itself from rigid systems of regulation and control. There is a constant failure to provide direct financial recompense to “creators”, who are seen by copyright law to be “users”, and the terms “user generated content” and “amateur”, suggest a preference for seeing particular types of creation as “non-authorial”.

As discussed in chapter two, defining the author that received moral rights was a process involving significant relations of power. Particular groups were able to
articulate their claim to moral rights and develop a discourse of authoring and authority that allowed them to situate their practice within the subject of the author. This authorial ideology and power continues in the contemporary neologisms explained above, but in a more subtle fashion. Rather than identifying these creators as authors, these neologisms tend to focus on the act of both creation and use, not only denying creative agency to a large public, but also reinforcing cultural hierarchies around who can create and under what conditions. This issue speaks to the obscuring - rather than revelatory - nature of these terms (Coleman, 2012), and the ways in which this supposed revolutionary language can end up re-enforcing existing power relations.

Rethinking the user: accounting for competing tensions

The tensions evident in the Canadian example of legal reform underline the inherent problems with copyright law’s structural isolation of the user. Copyright law has a need to firmly locate acts within the purview of particular subjects. Original and transformative creativity for example needs to reside in the subject of the author. Alternative transformative and creative contributions of other subjects must either be reshaped as “authorial” or be diminished and subsequently reframed as “non-commercial” or “infringing”. This need for structural integrity and relatively inflexible subjects means that legal doctrine is willing to accept practical solutions to complex problems such as the licensing of samples, rather than undertake a conceptual investigation of the position of an act like creativity within law. I suggest that these pragmatic solutions paper over the difficulties of maintaining an autonomous approach to subjectivity in copyright law. In contrast, a relationalist model of the user can productively account for these tensions and recommend a possible avenue for reform through the work of Coombe (1998) and Cohen (2005).

To begin our analysis, what impact would a relationalist user have on our understanding of copyright law? Firstly, we would have to reframe the user as a situated - as opposed to a separate - subject (see generally Cohen 2005; Craig 2011). The cultural trajectory of the user outlined earlier shows, much like the author, the user operates in a contingent fashion and has a complex relationship
with other subjects of copyright law. Rather than functioning as a stable and predictable subject, the user is directly influenced by legal doctrine and wider legal cultures that surround this subject. The user has been understood in variety of ways, from its narrowly defined position in statutory law at the beginning of the twentieth century, to the wider creative agencies granted to it since. This transition of the user subject underlines the importance of acknowledging that subjects - and their relationships with other subjects - are influenced and shaped beyond legal doctrine. Both informal and formal understandings of legal subjects are influenced by a range of discourses that circulate around practice and subjectivity.

Therefore, a relationalist user would productively account for the influence of culture in the shaping and reshaping of legal subjects. This stance develops my initial analysis in section one, which questioned the ongoing assumption of authorial dominance and suggested that law, carries a generative power that can reshape and challenge existing relationships between subjects. This chapter’s examination of the user, and in particular my account of the creative user, reveals that this reshaping cannot simply be enacted through law but is a process that also requires cultural support. This finding endorses the scholarly critique of Saunders (1992) outlined in chapter one and recognises that attending to cultures of law is just as important as considering the law itself (see Bowrey 1996; Coombe 1994, 1998). In this chapter I suggest that in a similar fashion to the author, we cannot simply find the user solely in the text of the law or in historical documentation but instead we have to pay attention to how the subject is shaped and defined through everyday cultures of law.

A relationalist user would also directly challenge copyright law’s current understanding of creativity, acknowledging the user’s role in ongoing processes of creation and cultural development. Julie Cohen (2005, 2007) offers an account of the user and creation that works well within the aforementioned relationalist model. She emphasises the role of the user in the process of locating creativity noting that since “everyone is a user of artistic and cultural goods first and a creator second (if at all), an account of creativity constrained by situatedness must begin with users” (Cohen 2007, p. 1179). Her account
therefore moves beyond the “conventional dichotomies between author and consumer, author and imitator, author and improver, and author and critic that pervade the copyright literature” (Cohen 2007, p. 1179), offering an alternative narrative, challenging the passive and reactive role that law generally grants to the user. Exploring these concepts through a material reading of how people access culture, Cohen goes on to outline how the abstract market-based system that copyright law engenders, fails to account for the ways in which creativity and use actually function. Artistic and intellectual culture should not be understood as a set of products, she notes, but rather as a set of interconnected and relational networks of actors, resources, and emergent creative practices (Cohen 2007).

Acknowledging these shifts carries significant implications for the broader project of this thesis that seeks to outline how these three key subjects of copyright law can be understood through a relationalist model. Through this acknowledgement of the power of both law and culture, we see a complex dynamic in operation between the space of legal doctrine and formal and informal cultures of law. Rather than subjects being constituted through formal spaces of legal understanding, which have a closer relationship with legal doctrine and “law on the books”, we also have to account for quotidian processes of legal understanding established in industry discourse and interpretations of law in the broader community. This influence could be seen directly in the brief example of the Canadian Copyright Modernization Act above, with these legal reforms driven substantially by cultures and practices of use and an increasingly influential cultural discourse around the user, rather than by particular trends in legal doctrine. The aptly named “YouTube” exception was less about how copyright law had traditionally viewed use, but instead was responding to the public’s expectations around how copyright law should operate in this comparatively new arena.

This leads us to a dramatically altered understanding of subjectivity in copyright law. Once transformative power is granted to the “everyday struggles over meaning” (Coombe 1998, p. 7) we must recognise that “people’s anticipations of law ... may actually shape law” (Coombe 1998, p. 9). No longer can subjects like
the user be viewed as relatively stable and only occasionally changing through the slow process of legal reform or judicial decision making. Instead, if we are to account for these quotidian cultural discourses, such subjects must be viewed as radically contingent. This quotidian discursive contestation creates subjects that are constantly in flux. Law can only ever temporarily legitimise its preferred separation of subject positions before this generative cultural discourse destabilises these subjects and brings to light again the blurriness and messiness of subjectivity in law.

The benefit of a relationalist model is that by accounting for more than one subject and focusing on the relationships between subjects (Nedelsky 1993, 2001) means that we can follow this messy and uneven process more accurately. To take this chapter as a general example, the subject that sits at the heart of this chapter - the creative user - is not a formal legal subject. It is rare that this subject will be discussed in legal doctrine and indeed according to a strict reading of copyright law; its name is an oxymoron to an extent. In copyright law, you create an original work and are deemed an author, operate as a non-productive or non-transformative actor and are positioned as a user or infringe copyright and are considered a pirate. However, as seen in this chapter, the creative user exists in culture and has subsequently been re-interpreted in particular jurisdictions. Yet it sits awkwardly on the borderline between two key subjects of copyright law and is unable to be fully attended to under a liberal model of copyright law, which relies on the separation and autonomous nature of subjects. Such interstitial moments of subjectivity and their impact on wider questions around creativity and authorship need to be accounted for. A relationalist model provides the theoretical tools to productively explore these complex subjects and to react to the radically contingent nature of subjectivity in law.

Conclusion

The results of this analysis advance this thesis’ exploration of a relationalist approach to copyright law. In this chapter I underline the importance of accounting for collective cultural understandings that circulate around law and
highlight the broader methodological value of studying these interstitial subjects. Through a relationalist approach, I outlined how these cultural shifts both influenced how particular jurisdictions approached the user in law and asked fundamental questions about the role and function of creativity in copyright law. The emergence of the creative user at this particular point in time challenges an existing liberal philosophy of copyright law which is unsuited to fine-grained conceptual analyses. However, I also noted that these cultural discourses do not necessarily map on to legal frameworks and that discussions around networked forms of creativity need to be approached critically when considering legal reform.

I also explored the impact of law on culture, noting that existing legal hierarchies around creativity were regularly echoed in wider society and often internalised by informal understandings of law and legal subjects. This suggests that despite the import of the cultural shifts described above, formal methods of legal interpretation still retain significant hermeneutic power. It is of course worth noting that these legal narratives have not dulled the persistence of the creative user as a scholarly and cultural trope. Therefore I suggest in closing, that these parallel - yet occasionally intersecting - trends, as seen the example of the Canadian reforms, must be further explored as they play a key role in the constitution of subjects in copyright law. Theoretical frameworks such as the relationalist approach developed throughout this can recognise these complex interactions between legal doctrine and wider cultures of law and provide an accurate account of how these two forces interact.

These findings will be extended in the following case study of the enactment of the Copyright Amendment Act 2006. The chapter will track the legislative trajectory of the amendment, enabling a clear assessment how various cultural changes associated with the broader web 2.0 discourse impacted on the process of legislative reform and challenged long-standing questions around use and creativity. Building on the work already begun in this chapter, the following case study will go some way towards exploring both the ongoing legal problems centred on the user’s ability to claim creativity, as well as provide further evidence for the benefits of a relationalist account of copyright law.
Chapter Four

CASE STUDY: COPYRIGHT AMENDMENT ACT (2006)

An audience member is at a concert of a major recording artist touring Australia. She dances half-heartedly throughout the opening songs waiting in anticipation for the artist’s international hit. Then the guitarist on stage plays that famous opening riff. Suddenly mobile phones are thrust in the air as fans start to take photos and videos of the song. Not wanting to forget the moment, she quickly grabs her phone and starts shooting a video like the audience around her, capturing both the artists’ performance and her own experience as a keepsake. This activity has occurred since the emergence of phones capable enough to shoot video in the mid-2000s, and the act has become increasingly common following the emergence of smartphones, to the point that a number of commentators have debated the pros and cons of using your smartphone at concerts (Fonarow 2013; Johnston 2012; Roberts 2013). However, this commonplace activity does more than simply highlight the issues surrounding modern day etiquette at concerts. The amateur recording of a performance through a smartphone also tells us a lot about copyright law and how it deals with the problem of subjectivity.

To return to the audience member at the concert, it is worth thinking about how copyright law would view her actions. The act of recording a concert can be seen as infringing a copyright owner’s right to the sound recording generated by an artist’s performance.\(^{52}\) It also ignores the need to secure permission from the performer to record the concert\(^{53}\) and could also potentially infringe the performer’s moral rights of performance.\(^{54}\) However, the recording itself involves some form of labour, originality and skill on behalf of the recorder. A recording that documented one’s own personal experience at a concert as opposed to merely recording the concert in order to copy the song could be considered to be authorial in its intent. An alternative approach would be to

\(^{52}\) See Copyright Act 1968, supra note 634, s10AA

\(^{53}\) See Copyright Act 1968, (s248G (1))

\(^{54}\) See Copyright Act 1968, s195ABA,a195AHA, s195ALA.
note that everyday Australians are engaging in the practice and similar to other complex practices of music consumption that involve acts of sharing and fandom (such as burning a CD for a friend or taping music off the radio) we could potentially approach this act as a similarly complex user practice, negotiating aspects of creation, fandom and infringement.

The variety of ways copyright law could view this act underlines law’s need to draw boundaries around particular subjects but also the blurriness and uncertainty at play around these subject positions. In this chapter’s case study of the Copyright Amendment Act 2006 I focus on the user and explore the difficulties involved in maintaining boundaries around this subject throughout the reform process. Apart from the Australian fair dealing exceptions (discussed in chapter three), the 2006 Amendment Act features as one of the rare times that the subject of the user is seriously addressed in Australian copyright law. Drawing on a range of artifacts, including news articles, letters to the editor, transcripts from Senate committee hearings, and submissions to senate inquiries, I map three framings of the user that were proposed during this period; assess the forms of use that were allowed and denied; and outline which framing of the user was ultimately successful. My analysis in this chapter highlights the complex processes of boundary setting in law and discusses the broader implications of codifying subject-positions. It also extends my collective examination of subjects of copyright law, the problematic trajectories of creation and use that inform everyday new media practices and further supports my positioning of the user as an unstable and contested subject-position in both culture and law.

The chapter will proceed by outlining the political and cultural background that led up to this moment of reform, before moving on to the legislative history of the act itself, briefly describing its passage through the Federal Parliament. The amendment Act itself consists of a number of detailed schedules, so I will limit my analysis to schedule 1, which deals with the extension of criminal liability and schedule 6, which introduces new copyright exceptions into law. These two schedules directly refer to the subjects of the user and the pirate, and the broader discourse concerning the subjects that the Federal Government framed these
reforms around. The case study will then turn to the 74 submissions provided to the Senate Committee, with a particular focus on a sub-section of submissions from key stakeholders that clearly articulated their vision of a preferred user subject that would emerge from the reforms, before assessing the media’s reaction to these changes and examining their framing of the user. I will conclude the chapter with a broad discussion around the implications of codifying a legal subject of the user as well as highlight possible futures of the private use exception.

Political and Cultural Background

The Federal Government’s decision to act on user rights was directly influenced by the successful negotiation of a Free Trade Agreement between Australia and the United States (known as the Australian and United States Free Trade Agreement, hereafter AUSFTA) in 2004. The AUSFTA substantially affected Australia’s copyright law, extending the scope of protection for rights-holders but it failed to address the impact these reforms would have on Australian users (see Bond et al. 2007; Meese 2010; Weatherall 2007). In addition, the wide ranging reforms wrought by the AUSFTA failed to address the pace of technological development during the 2000s, which made the everyday new media practices of Australians effectively illegal. These developments led to a unique set of circumstances in which the rights of the user could no longer be ignored by legislators and brought the issue of user rights the forefront of the copyright reform process in the mid-2000s.

The AUSFTA was one of the most significant copyright reform efforts undertaken by Australia in its history. A free trade agreement between Australia and the United States had been in the works for a number of years, and the Federal Cabinet finally placed it on their agenda in 2000. The United States officially committed to the negotiation of a Free Trade agreement in September 2002, and on 14 November 2002, a formal announcement was made. President George W. Bush travelled to Canberra in 2003 during negotiations, and highlighted intellectual property as an “important issue” (Rimmer 2006). North American governments had continued to push for stronger intellectual property
protection through bilateral agreements, and international treaties were seen as setting only “minimum standards” (Drahos 2001). This perspective was apparent during negotiations. Despite being signatory to the majority of international treaties covering intellectual property, Australia was accused of having a weak and inefficient intellectual property regime by U.S. negotiators. U.S Trade Representative Robert Zoellick demanded that Australia extend the duration of its copyright term; provide broader protection for technological protection measures, greater protection for performers rights and stronger enforcement of the rights of copyright owners (Rimmer 2006). This ramping up of copyright standards was a stated aim of the free trade procedure with U.S. objectives clearly stating that they would “seek to have Australia apply levels of protection more in line with U.S laws and practices” (Stoler 2004, p. 98)

In terms of intellectual property rights, the Australian government was submissive to the demands of the United States. Ministers contextualised the adoption of U.S law by couching it in terms of “harmonisation”, implying that Australia had to play “catch up” on the world stage of intellectual property. Speaking at a conference, Federal Attorney General Phillip Ruddock warned of increasing global standards, which Australia needed to meet:

> It is sometimes in Australia’s interest not to lag behind emerging standards of important trading countries. It is clear that an international standard is emerging amongst our major trading partners for a longer copyright term. In these circumstances, term extension is a necessary and positive thing. It will ensure that Australia remains a competitive destination for cultural investment (Ruddock 2007).

Considering the speed at which vast changes were supposed to be made to the entire IP framework, the Federal Government saw IP as little more than a bargaining tool in the wider scope of the AUSFTA. Indeed by the final stage of negotiations, it was clear that considerations were of a political nature, with the passing of the AUSFTA legislation seen to be a test of the new Labor leader Mark Latham’s foreign policy merit and commitment to the relationship between Australia and the United States, rather than anything to do with the minutiae of copyright legislation (Weatherall 2007). Placing the AUSFTA negotiations
within this context, it is no surprise that Australia succumbed to its more powerful geo-political partner, the United States, with the Australian Department of Foreign Affairs and Trade (DFAT) admitting that the agreement to extend of the copyright term was the “single biggest concession that Australia made in the negotiations” (The Senate 2004b, p. 49).

The AUSFTA was signed by Zoellick and Australian Trade Minister Mark Vaile on 18 May 2004 in Washington D.C and a significant overhaul of Australian copyright law needed to take place if Australia was going to satisfy the demands of the treaty by the deadline of January 1 2007. The requirement to develop a practical legislative response to the AUSFTA saw the Attorney General’s Department release a number of exposure drafts over a short period of time. The majority of the drafts were either directly related to the treaty, such as the Technological Protection Measures provisions or dealt with longstanding issues of concern like enforcement measures and criminal law provisions. However, the draft that gained the greatest public response was the Fair Use Review, undertaken by the Federal Attorney-General’s Department. Released in May 2005, it would address an increasingly important question amongst the community: whether copying for private use should be legalised, leading to its colloquial name of the “iPod Inquiry” (Weatherall 2007, p. 978).

Motivations and contexts for the Fair Use Review

The Fair Use Review was partly established in response to substantial criticism from the Senate Select Committee on the Free Trade Agreement between Australia and the USA. The committee was established in order to examine the agreement, ensure it was in Australia’s national interest and assess the impacts “of the agreement on Australia’s economic, trade, investment and social and environment policies” (‘Terms of Reference’ 2004). Following the release of the committee’s final report, the IP section had a significant impact as it amplified existing concerns that the wider public had about the impact of the AUSFTA on Australia’s copyright law. Drawing on a variety of submissions, including those made by academics, non-government organisations and user groups, the committee noted that despite the Government claiming that the AUSFTA would
harmonise the copyright laws between Australia and the United States, the process was very selective. A host of new laws, in particular the extension of the copyright term, were introduced with little consideration for “amendments that correspondingly protect the interests of copyright users”. The committee argued that despite the rhetoric of harmonisation and balance, the AUSFTA “tilted the balance towards copyright owners to an unacceptable degree” (Senate 2004a, p. 77).

The committee also unexpectedly engaged with the problem of private copying themselves. A discussion between Chairman Senator Peter Cook and Mr Chris Creswell, a consultant with the Copyright Law Branch of the Attorney-General’s Department, revealed that Senator Cook was in breach of copyright, due to his habit of recording Australian football matches on Friday night so as to not miss the first few quarters (Select Committee on the Free Trade Agreement between Australia and the United States of America 2004). This exchange was indicative of the committee’s wider concern for the general lack of user protection and went on to inform their final report. The report suggested that “the application of a broad, open-ended ‘fair use’ doctrine ... [would provide] an opportunity to regulate the fair use environment [and] to harmonise the activities of many Australians with the legal environment” (Senate 2004a, p. 75).

In addition to the recommendations from the Senate committee, the Fair Use Review was also responding to a broader cultural shift. The development of the internet alongside other forms of personal technology such as the iPod engendered a number of new media practices that presented a challenge to a legal framework, which had previously been organised across industrial lines (Discussed in chapter three, see also Benkler 2006; Jenkins 2006; Litman 2001; Rimmer 2007). These socio-cultural changes substantially altered the scale and nature of private copying. Problematically for consumers, Australian law did not protect the most basic forms of content manipulation, private copying and content storage, let alone the extensive forms of remix being found on the internet (see Fitzgerald and O’Brien 2005; 2006; Lessig 2008). This led to the paradoxical situation where iPods were being sold in droves to enthusiastic
consumers who were using them liberally, despite it being illegal to transfer any copyrighted music to a computer and then to the machine itself.

Once the issue of fair use was put on the Government’s reform agenda it received support amongst the media. The rights of the user emerged again as a central point of concern with journalists noting the strangeness of a situation where a significant proportion of the Australian population was breaking the law through basic use of technological devices. For example, an editorial (2005) from the most popular newspaper in Australia, Victoria’s *Herald Sun*, welcomed the proposed changes to “antiquated laws that were written well before the dawn of the computer age”. A longer article in the *Green Guide*, a technology and television supplement to Melbourne newspaper *The Age* was equally effusive. Technology reporter Charles Wright noted the importance of reviewing “what is arguably the most user-unfriendly copyright regime in the Western world”. He suggested that his call to participate in the fair use review was “[p]erhaps the most important piece of advice this column has offered in 15 years” and that “[n]o other single act is likely to have such a profound influence over your ability to join the citizens of other nations ... in enjoying the benefits of digital music and video without unreasonable constraints”. Another common genre of reportage was the “vox pop” with consumers who were typically dumbfounded that the use of their iPod was even illegal (Butterly 2005). These media reports collectively noted the importance of user rights and the need to loosen the legislative grasp around user activities, particularly as the AUSFTA had increased regulation in a number of other areas.

This type of reportage made a particular set of ambit claims in relation to law and the user in claiming that the current relationship between law, technology and practice was fundamentally unbalanced. The *Green Guide’s* call to arms suggested that there was an element of citizenship practice involved in being able to consume digital media and video, highlighting the political resonances behind media enjoyment and access. Instead of deferring to existing positive law, this claim balanced Australia’s legal framework against notions of citizenship and the subsequent imagined demands of the user. In arguing that

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55 In 2004, 4.4 million iPods were sold in Australia (‘Apple sales humming right along in Australia’ 2005)
law needed to maintain pace with technology, the Herald Sun editorial positioned technological development and users’ ability to deploy these technologies as the key factor in relation to establishing future norms and codes of conduct. The existing framework of copyright law was placed in contest with these alternate perspectives on for “use”. Collectively, this discourse saw the upcoming Fair Use review as integral to the future Australia’s ongoing engagement with digital technology, rather than just another commonplace Governmental legislative process.

The Attorney-General’s department, facilitating the review, was tasked with deciding whether to introduce either a broad fair use provision, as in the United States, or specific exceptions for a number of “common consumer practices” like video-taping shows off the television for later viewing. Over the ensuing months, and following submissions from stakeholders, it became clear that a “broad ‘fair use’ provision was not consistent with the Government’s position on copyright law, and [that] a number of new but specific exceptions would be introduced” instead (Bond 2007, p. 297-298). The public became aware of this new direction in May 2006, when the Attorney General’s department circulated a press release detailing the results of the Fair Use Review. As well as offering specific exceptions for private usage the Government would counter these allowances with stronger enforcement measures against piracy, including on-the-spot fines. These provisions revealed a new framing of the user; opening up a space for users to operate within the legal confines of copyright law, wholly separate from the author and the pirate. This goal became something of a mantra for the Attorney General following the launch of the press release, with Ruddock regularly claiming that the reforms would “strike [a] balance” (Ruddock 2006a) and make things “fairer for users and tougher for pirates”.

The passage of the Copyright Amendment Act (2006)

The proposed legislation was released in the form of two exposure drafts on 22 September 2006, with one “proposing a series of new exceptions to copyright

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56 During the Fair Use review submissions were not placed online. Law academic Kim Weatherall provided a collection of the available submissions on her blog Weatherall’s law, which was cross-posted on lawfont.com (Weatherall, 2005).
infringement (that is, comprising the outcomes of the Fair Use Review), [and] the other a rewrite of the criminal provisions in copyright law” (Weatherall 2007, p. 982). When the Amendment Bill was tabled in Parliament on 19 October 2006 the Bill ran to 216 pages, and consisted of 12 schedules, “including the drafts already released, plus reforms to the statutory licenses for libraries and educational institutions, evidential presumptions and the jurisdiction of the Copyright Tribunal” (Weatherall 2007, p. 982). This approach gave the bill the appearance of an “omnibus” of copyright reform, as it managed to “truncate” years of domestic policy debates around copyright into a single document, and when the bill was referred to the Senate, an inordinate amount of pressure was placed on the Senate Standing Committee on Legal and Constitutional Affairs to develop a final report by the 10th of November (Weatherall 2007, p. 983).

This pressure was most apparent in the very short timeframe for public submissions: six working days. The inquiry was advertised in The Australian newspaper on 25 October 2006 and submissions were due by 30 October 2006 (‘Senate Standing Committee on Legal and Constitutional Affairs committee 2006’ [Hereafter, Senate Report 2006] p. 2). The committee received 74 submissions. They diverged in a typical fashion, with groups representing copyright owners or rights holders supporting those parts of the Bill which strengthened copyright protection, often questioning wider exceptions to copyright infringement. Conversely, consumer rights groups argued that the bill was “weighted towards copyright owners” (Senate Report 2006, p. 11). Public hearings were held in Canberra on 7 November 2006 and again due to the limited time available to the committee it was a relatively rushed affair, simply providing Senators with a chance to discuss the fine detail of particular submissions with experts and industry representatives. Throughout the discussion, the Attorney General’s department was already actively working on drafting issues, and other problematic areas in the legislation debated during the day. There was no user representative on the intellectual property enforcement consultative group (Commonwealth of Australia, Senate, 7 November 2006), a notable absence considering the presence of publicly oriented organisations like the Australian Digital Alliance, the Electronic Frontiers Foundation and the
Internet Industry Association of Australia who could have potentially acted in this role.

It is worth noting that the absence of the user in the consultative group may have been due to the particularly problematic and elusive status of the subject throughout the reform process. Despite the Government’s constant invocation of the user, actual users were rarely present in these debates and were therefore unable to shape the policy narrative. In a similar fashion to the subject of the author, who was a difficult subject to identify during the moral rights reforms discussed in chapter two, the location of the user was equally unclear. However, whereas the moral rights reforms saw an array of parties speaking at the Senate committee in order to claim or buttress their authorial status, there was lots of discussion about the user but little interaction with users. More so than the author subject, critiqued in section one of this thesis, these events underline the difficulty of locating the user and the unclear boundaries that surround this subject. As we will soon see, the question of “Who is a user?” was still a difficult one to answer even after the passage of these user-centric reforms.

The Standing Committee on Legal and Constitutional Affairs published their report on 13 November, extending their deadline of 10 November by three days. The final report provided a clear set of recommendations which managed to cover most of the concerns raised throughout the review process. They recommended a narrowing of the strict liability provisions and a redrafting of the time-shifting and format-shifting provisions. The committee also noted the attempts made by the Attorney-General’s department to re-assess the controversial provisions regarding fair dealing for research and study and official copying of library and archive material (see Senate Report 2006, p. ix - xi). A supplementary report by the Australian Labor Party echoed much of the concern voiced by Senators and stakeholders alike in regards to the entire legislative process, noting that “the complex nature of the issues, coupled with the extremely short timeframe set by the Government for the inquiry, has seriously hampered the committee in its efforts to comprehensively consider, and report on, all the evidence before it” (Senate Report 2006, p. 45). The standing committee report was relatively well received and led to some significant
changes to the Bill, with “the government circulating two sets of amendments on 28 and 30 November 2006 ... removing some of the criminal offences and fixing obvious drafting problems” (Weatherall 2007, p. 984). Following these adjustments, the Act was passed on 5 December 2006, ending a busy three years of Australian copyright reform.

The Copyright Amendment Act 2006:

- Amended the Copyright Act to make it legal for people to tape TV or radio programs in order to play them at a more convenient time.
- Made it legal to reproduce material such as music, newspapers and books into different formats for private use.
- Added parody and satire to the existing list of fair dealing exceptions.
- Introduced a tiered regime of offences, with each offence dependent on the state of mind of the defendant.
- Provided law enforcement officers with a wider range of options depending on the seriousness of the relevant conduct, ranging from infringement notices for more minor offences, to initiating criminal proceedings to strip copyright pirates of their profits in more serious cases.
- Introduced “strict liability” offences, which require no proof of fault. For acts committed on the lowest tier, the infringer doesn’t need to know that they are committing infringement; the act simply has to occur.

(Commonwealth of Australia, House of Representatives, 19 October; Copyright Act 1968 [Cth]; Weatherall 2007)

Figure 2: A summary of the new reforms
Who is the user? Public visions of intellectual property

In the previous section I outlined the political and cultural background behind the Australian Government’s decision to embark on a series of user-centric copyright reforms. I then offered a brief sketch of the legislative process and discussed the severely truncated reform timeline in which the legislation moved from bill to act within a period of months. The important points to note from this section are the growth of a cultural discourse around the subject of the user that partly motivated these reforms, as well as the notable absence of users from the reform process. In the following section, I will explore how the user was framed by various parties during this period by examining the legislative process that occurred prior to the enactment of the amendments. I will then critique these framings and draw out the various implications of these competing conceptualisations of use. In so doing I will extend my analytic lens from the previous chapter and account for how the user interrelated with both the author and the pirate during this time. I suggest that the contingent status of the user that is present throughout the reform process highlights the impossibility of locating a separate user subject and underlines the limits of copyright law’s current philosophical framework.

Imagining use: Three framings of the user

The discourse of the Attorney General’s department presumed that the user would be seen as an entirely obvious subject position and in the proposed amendment act delineated a range of new agencies for the prospective user. As outlined in chapter three, Australian copyright law already had user exceptions for educational purposes, criticism, news reporting or professional advice under fair dealing.\(^57\) The 2006 reforms aimed to capture a wider remit of user practices such as facilitating private copying that did not necessarily benefit the wider public in the way previously imagined by law. Rather than engaging in an educational or professional activity, the reforms created a space in law where a user could engage in the use of copyrighted material for entertainment and in a number of cases do so legally. Throughout the reform process the Government

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\(^{57}\) See Copyright Act 1968 (Cth) ss40 - 43
also attempted to position the user as separate from other subjects regulated by the \textit{Copyright Act 1968} (Cth). The user was seen to hold some sort of middle ground in between the institutionally recognised author and the extra-legal pirate, consistently echoed in the Attorney-General’s stated goal of making the law “fairer for users” and “tougher on pirates” (Ruddock, 2006a; 2006b).

So who \textit{was} the user? Throughout the submission process and in public discussion, the Federal Government positioned the user as an “ordinary” Australian. However, stakeholders had different ideas about what this meant in practice. Organisations linked to the copyright industries saw little productive potential in the user, and even viewed some basic forms of use like format shifting or time shifting as damaging if copyright owners went unrewarded. For example, the Australian Society of Authors argued that “some of the proposed exceptions to copyright infringement may impede or interfere with emerging markets for authors in the digital environment” (Australian Society of Authors 2006). In contrast, the majority of media reportage positioned the reforms as a positive way to avoid criminalising everyday media usage (see Butterly 2005; Murray 2006). At the advocacy end of the spectrum were the user rights and digital industry groups, such as the Internet Industry Association (2006), the Australian Digital Alliance (2006) and Electronic Frontiers Australia (2006), who saw the user as a potentially generative and innovative force and railed against restrictive reforms. In their view these reforms not only limited the scope for future innovation but also potentially restricted consumer engagement with new technologies.

As discussed earlier, it was of particular note that the general public failed to provide views on what their image of the user would be. No doubt there were diverse views amongst the public about how they viewed their own media consumption and creative practice (as there are still today); however, there was a lack of formal engagement in the submissions process and also in traditional fora such as public submissions and letters to the editor. While this might suggest a limited public interest in the reforms, it is important to remember that the public voice is mediated through journalistic practice. The reforms garnered little publicity in the news, ignored for more “newsworthy” stories, which also
limited public response to the reforms. The muted public response suggests that powerful copyright stakeholders held a substantially greater interest and investment in the subject of the user, than the broader population themselves, highlighting the importance of these moments of reform to stakeholders.

Below I outline the three aforementioned framings of the user that emerged from the various publics of IP involved in the legislative process. These separate concepts of what being a user entailed offer a number of agencies to the user and limit the subject at different points. The framings work cumulatively, with each user slowly gaining increased agency in each imaginary, moving from a passive consumer, with a tendency towards piracy, to a technologically adept, socially-oriented consumer. The final user is positioned as a creative subject, who has the potential to add significantly to culture, and draw on culture in order to develop their creative potential. Following this brief summary of the three framings of the user that emerged from the reform process, I will discuss each framing in detail through a relationalist lens and outline how different groups of stakeholders coalesced around a particular framing and from then developed a particular narrative of use.

**Figure 3 (Below): Three framings of the user**

<table>
<thead>
<tr>
<th>The “Traditional” user</th>
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<tbody>
<tr>
<td><strong>Scope of Agency</strong></td>
</tr>
<tr>
<td>- Consuming purchased content</td>
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<tr>
<td>- Using content in line with existing exceptions in the Copyright Act.</td>
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<tr>
<td>- Using existing copyrighted content to create parodies</td>
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<tr>
<td><strong>Agencies Denied</strong></td>
</tr>
<tr>
<td>- “Copying”, time shifting or format shifting damaging to future markets.</td>
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<tr>
<td>- “Ordinary” users possibly can become pirates, if not already engaged in piracy</td>
</tr>
<tr>
<td>- Creative acts drawing on existing culture seen to be suspect</td>
</tr>
<tr>
<td><strong>Representative parties</strong></td>
</tr>
<tr>
<td>- Australian Copyright Council, Copyright Agency Limited, Media</td>
</tr>
</tbody>
</table>
Entertainment and Arts Alliance, Australian Federation Against Copyright Theft, Screen Producers Association of Australia, Australian Recording Industry Association (who alone did not support the parody exception).

The “Ordinary” User

Scope of Agency

- Consuming purchased content
- Using content in line with existing exceptions in the Copyright Act.
- Using existing copyrighted content to create parodies
- Likes to use media conveniently (e.g. time shifting, format shifting).
- Sometimes this has creative outcomes (e.g. recording live concerts)
- Is seen to be technologically literate

Agencies denied

- It is assumed that most creative acts are produced from traditional sources of content
- Piracy is seen as illegal, but certain industry understandings of piracy are often challenged.

Representative parties

- Apple.
### The “Creative” User

**Scope of Agency**

- Consuming purchased content
- Using content in line with existing exceptions in the Copyright Act.
- Using existing copyrighted content to create parodies
- Likes to use media conveniently (e.g. time shifting, format shifting).
- Sometimes this has creative outcomes (e.g. recording live concerts)
- Is seen to be technologically literate
- Is a culturally active user
- Is a potential creator, if not already creating
- Culture is seen as a source to build from

**Agencies denied**

- Piracy is still seen as illegal, but certain industry understandings of piracy are often challenged.

**Representative parties**


### The “Traditional” User

Drawing from the set of submissions presented to the Senate committee, I identify the traditional user as a particular framing of the user deployed by organisations linked to traditional copyright industries, such as collecting agencies, industry lobby groups and media and arts trade unions. These organisations were sceptical of the proposed reforms and rejected the majority of attempts to provide the user with any sort of agency. The discourse used by these parties revealed their preference for an “ideal” user that consumed content through approved channels (e.g. purchasing or renting) and retained a highly limited spectrum of “use” beyond that, suggesting that even the term “user” was problematic with these parties. This vision of the user was carefully deployed with various submissions framing the wider public as unruly users that needed to be controlled and reigned in, rather than outright pirates. However, their reaction to various reforms revealed a deeper suspicion of the Government’s proposed user subject, who they charged with undertaking activities that were potentially piratical in nature at various points in the reform process.
This approach was clearly seen in the reaction of the copyright industries to the time shifting and format shifting reforms. Submissions framed the attempt of users to privately format or time shift content as inherently damaging to future and existing copyright markets (Copyright Agency Limited, 2006; Australian Society of Authors, 2006; Screen Producers Association of Australia, 2006). A number of bodies argued that this activity effectively removed a possible opportunity for copyright holders to exploit copyrighted material, and damaged potential emerging markets like the provision of “catch-up” TV or alternative format provision. For example the Screen Producers Association of Australia (SPAA) (2006, p. 5) asserted that:

The underlying assumption of this section of the Bill must be that when a user has bought a product, they would be unwilling to buy a copy in another format ... SPAA believes that this is incorrect and that a consumer may wish to have copyright material in several formats and indeed are sometimes willing to pay for the copyright material in several formats.

This approach essentially located the activity the reforms were supposed to legalise as a form of economic “theft” from copyright owners. Not only did these submissions position such user practices as only marginally different in outcome from outright piracy, but it also revealed how these parties viewed the active user: as an aspirational pirate, if not one already.58

This framing of the user was also evident in discussions around the revamped strict liability offences. The Australian Federation Against Copyright Theft (AFACT)59 submission wholeheartedly supported the new offences and praised a “balanced and workable” package (2006a, p. 4). In a supplementary submission AFACT also challenged the characterisation of “regulation” as criminalisation (2006b). AFACT argued that consumer behaviour was simply being regulated in a particular fashion, and noted that particular behaviours needed to be restricted, as piracy could begin due to something as simple as: “a person

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58 See Patricia Loughlan’s (2006; 2007) work around the regular use of the term theft for a detailed discussion about the problematic use of this simple metaphor when describing practices such as copying, and the weighted social meanings that become attached to these acts.
59 AFACT (currently known as the Australian Screen Association) is an anti-piracy lobby group with direct links to the Motion Picture Association of America and has been in operation since 2004.
copying the film in a cinema with an ordinary camcorder”. While the framing of strict liability offences operating under criminal law as a simple matter of regulation could be seen as a canny piece of public relations, even the use of the term “regulation” spoke volumes about how an organisation like AFACT viewed the user. The fact that “[o]rdinary Australians” like “[d]octors, lawyers, factory workers, mothers, students” amongst others were involved in “copying” and “swap clubs” suggested that anything other than pure consumption of copyrighted material through purchase was immediately suspicious (AFACT 2006b, p. 1).

If we turn to the broader discussion of the philosophy of copyright law that is intertwined throughout this thesis, this particular framing of the user seeks to rest firmly within the ontology of liberal political philosophy that I seek to problematise. In the narrative of use presented above, the parties see the user as a subject that needs to be clearly separated from the author and the pirate and its agencies clearly defined. The logic being that the easier acts of use can be identified, the easier it is to identify piratical behavior. However, as seen in the statements of these parties, practices like private copying that many others consider to be “use” are framed as potentially piratical. Looking at this concept of use through a relationalist lens, we see the user and pirate overlapping in this discursive framing, with only a limited space of pure “use” granted to the user before acts become piratical in their intent. As the theoretical frameworks of Cohen (2007) and Craig (2007; 2011) argue, such discursive interrelations between subjects limit the possibility of a separate ontology of the user and instead underline the “situated” nature of these subjects.

The “Ordinary” User

This goal of locating an easily identified and separate user subject was echoed in a second user framing: the ordinary user. The subject makes its first appearance discursively as part of the Government’s own narrative around copyright reform, with the Attorney General claiming to legislate with the everyday digital habits of the ordinary Australian in mind (see Ruddock 2006a). The ordinary user was an ideal subject presented by the Government but was subsequently claimed by the
Australian media and a submission from Apple. Both the media and Apple challenged the Government’s own framing of this user and assumed the role of speaking out on behalf of Australians, outlining exactly what “ordinary” Australians expected from the reforms. The initial announcement of the bill and the public discourse established by Government won general media approval at the launch of the fair use review (see Butterly 2005; ‘Crime Stopper’ 2005; Wright 2005), but the problematic passage of the bill through parliament meant that by the time it was enacted, the re-drafted amendment was framed as a government “back down” from overly stringent laws (Murray 2006), rather than as the Government generously legalising common digital practices.

The vast majority of mainstream media coverage took this moderate position. Reporters and opinion writers seriously questioned the Government’s claim that the amendment was a bill that would resonate with ordinary consumer practice, and noted that if it wasn’t for a host of drastic last minute changes to the legislation, a number of everyday consumer activities, including audience members recording live concerts on their mobile phones would have been illegal in the eyes of the “copyright police” (Murray 2006). These criticisms mapped out a substantially different type of user from the framing proposed by the copyright industries. Time-shifting and format-shifting were framed as much needed reforms for consumers in Australia, but media also raised concerns around criminalising user practices like recording at concerts and the strictness of the criminal provisions. The Australian media felt that some creative agency should be granted to this user and that certain claims of piracy against Australian consumers were open to challenge.

Leading up to the enactment of the bill, certain sections of the media suggested an even broader role for the ordinary consumer. The Australian Financial Review (AFR) offered the most comprehensive coverage in the lead up to the bill’s passing, with their opinion pages the site of a rhetorical battleground around the quality of the reforms. Allan Fels60 and Fred Brenchly61 (2006) co-authored a piece on 28 November 2006 that lambasted the reforms, claiming

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60 Former head of the Australia Competition and Consumer Commission
61 Former editor of the AFR
that the strict liability offences, the proposed expansion of the Technological Protection Measure (TPM) definition and the overly prescriptive time shifting and format shifting exceptions meant the reforms were ultimately “a shocker for ordinary consumers”. On the same day, Peter Moon (2006), a Melbourne IT lawyer, wrote an opinion piece in a similar vein suggesting that future technologies like Personal Video Recorders (PVRs) and normal consumer practices were being unnecessarily restricted by this spate of over-regulation. It only took a few days before the Attorney General Phillip Ruddock had an opinion piece published in the AFR on the day of the bill’s enactment noting that many of the more extreme strict liability offences and drafting issues had been dealt with in the Senate (Ruddock, 2006b). Ruddock continued to position the reforms as beneficial for “ordinary Australians” but it was all too clear that this subject of the “ordinary user” was highly contested and was granted different agencies, depending on what purpose it served.

Apple Computer provided the only submission that fully articulated an imagined “ordinary user” in line with the subject advocated in various arms of the Australian media. It is important to note that Apple’s 42-page submission to the committee was highly strategic as the committee would ultimately decide whether or not to legalise the ongoing use of one of their most popular products: the iPod. Reading the submission with this context in mind does not wholly obviate the value of their own framing of the user. Apple argued that Australia “need[ed] to reconsider its approach to exceptions to copyright infringement” (2006, p. 2), but rather than positioning the new exceptions as a valuable commercial boon for the company, Apple argued that they were speaking on behalf of confused and bewildered ordinary consumers who just wanted to “do the right thing” (2006, p. 7).

This self-appointed representation on behalf of the ordinary consumer began with Apple explaining that the difficulties and complexities of copyright law had been a regular point of conversation between the company and its customers. The submission noted that the company had “… received queries from consumers concerned about infringement of copyright - it is evident that Australians want to “do the right thing”, but find ridiculous the current state of
the law which inhibits what is seen as legitimate domestic copying (Apple 2006, p. 7). Apple’s line of argument continued with the submission suggesting that there were numerous new media practices that - although illegal - “ordinary people” considered “reasonable”:

Most ordinary people regard such practices as a reasonable use for music that they have paid for. However, whether copies are made from CD or LP, and whether they are made to iPod, CD or tape, these practices remain an infringement of copyright under current Australian law (Apple 2006, p. 7).

In a similar fashion to sections of the Australian media, Apple sketched out a space for a user that was largely opposed to piracy and copyright infringement, but retained an ability to work with the latest technology to access content at their own convenience and pleasure. It was the appeal to “ordinariness” that was most revealing, with both sections of the Australian media and Apple suggesting that the general public was engaging in practices that demanded a substantially different user subject from the framing of the user the copyright industries proposed.

In articulating this particular framing, these parties had a similar goal to advocate for the “traditional” user: to create - in both language and law - a space in which the user could operate, separate from the pirate and the author. However, the debates around exactly what agencies should be granted to an “ordinary” user underline the difficulty of entrenching a “pure” user, with no piratical or authorial agencies. If we consider the time-shifting and format-shifting exceptions that were framed as a boon for ordinary Australians, it is worth noting that the “uses” allowed were myriad in their scope and evoked agencies beyond that of mere “use”. The satire or parody exceptions were framed as user exceptions, allowing users to draw on existing works in order to make a satirical or parodic point. However, these acts were arguably creative in their scope and clearly underlined the presence of an authorial component in law’s conception of use. Similarly, previously piratical activity such as the recording of VCRs and the legalisation of iPods was recast as “use” and reveals an underlying piratical heritage in this conceptualisation of the user. Like the “traditional”
user, the “ordinary” user had particularly complex relationships with other subjects, relationships that were not explored in depth throughout the reform process.

The Creative User

The final subject to emerge from my analysis is that of the creative user. The emergence of this subject in the wider policy reform process shows a clear link between informal legal cultures and the development of legal doctrine already noted in chapter three. The creative user directly challenged the limited concepts of use that were still present in the discourse of Australian newspaper journalism and Apple. These parties were focused on advocating for amendments that decriminalised the “ordinary consumer” and enabling consumers to use the latest technologies. In contrast, there were a handful of stakeholders who saw a more autonomous role for the user, and viewed these amendments as a missed opportunity to mobilise the creative and innovative capacity of the Australian population. A collection of user rights groups, public broadcasters and Google advocated for a flexible copyright law that recognised the inherent creativity of the Australian public, and the economic benefits that flowed from introducing a legal framework that encouraged these practices.

Google Australia’s submission functioned as something of a broad manifesto for the creative user, and framed the issue surrounding the bill as one about creativity and innovation rather than new media practices and methods of content consumption and access. For example, the company claimed that:

Creativity does not recognize national boundaries, but national laws can determine whether a country’s innovators are embraced in a secure legal framework, or stifled and forced to seek a safe haven elsewhere. It is no exaggeration to say that Australia is now presented with an opportunity to create a technology environment in which the next Google can rise from Australian start-up to global brand (Google 2006, p. 1).

This call to arms was followed up with a criticism of the specificity of fair dealing exceptions, which attempted to fit the “square peg of creative innovation into the
round hole of statutory definition”. Google supported fair use “as a tool both for protecting copyright owners and for encouraging innovation” (Google 2006, p. 2).

Google saw the user as a vital part of the creative process - a hub of residual and untapped creativity and their submission’s placed creativity at the heart of the legislative process. However, it is worth noting that much like Apple, Google also have specific corporate interests and established ways of working that they sought to protect. Their submission referenced their ongoing Google Books project, which relied heavily on U.S. fair use provisions in order to avoid agreeing to a costly settlement deal with the Author’s Guild (a U.S. advocacy group for writers). It also argued for a clarification of the law around search engine indexing, proposing an exception that exempted search engine caching, indexing and archiving from infringement, when a protocol to prevent such a process was not used. Google’s mission to “organize the world’s information and make it universally accessible and useful” (‘Google - about’, n.d.), often requires practices that are potentially infringing. Therefore, despite articulating high-minded ideals of innovation and creativity, their suggestions for reform were pragmatic and focused on protecting their own industrial practices.

National public broadcaster the Special Broadcasting Service (SBS) also underlined the complexity of “use”, which had been identified as an “ordinary” and quotidian activity by Government. SBS (2006) noted that these reforms would also have ramifications for professional users, explaining that the amendments around format shifting would afford the organisation a significant amount of flexibility when it came to archival practices. This complexity was also seen in the submission of another public broadcaster, the Australian Broadcasting Corporation (ABC) who noted that “exceptions to copyright infringement play[ed] a key role” in the ABC operations. This was evidenced in their suggestions to amend exceptions around libraries and archiving in order to make sure they also apply to the ABC. They also requested broader fair dealing exceptions for governmental and political discussion, public interest discussion, orphaned works and new technologies trials, as well as a general statutory license for public broadcasters (ABC 2006). These two submissions further underlined the complexity of the user and showed that creative use could
in fact be conducted at an industrial level, be professionally productive and also facilitate broader creative and archival practices within an established organisation.

The creative user was more clearly articulated in arguments presented in the submissions of Electronic Frontiers Australia (EFA) and the Australian Digital Alliance (ADA). ADA welcomed the parody and satire exceptions that would be introduced, but noted that the Bill would “not allow for new and innovative uses by consumers other than parody and satire” (2006, p. 2), suggesting that potential creative agencies of the user were to be denied by the legislation. Both EFA and ADA argued that individual exceptions were too limited and technologically specific to be of any use and EFA demanded “a flexible open-ended exception to copyright, such as fair use, to keep pace with new and emerging technologies and reduce the dependence on legislative intervention to fix problems after they have occurred” (Electronic Frontiers Australia 2006, p. 6). In a similar fashion to Google, both parties demanded a broad space of agency and operation for the user that would not only allow for the convenient use of their own content, but also a wider creative agency that went beyond that of parody and satire and would be managed on a case-by-case basis. Collectively, these parties recognised the creative capacity of the user and saw the legalisation of these practices as economically and culturally beneficial for society.

It was only in this framing of the user, that the limitations of a structurally separate user subject were considered. Situating “use” as the starting point for innovation and creativity, these advocates criticised the limited framing of the reforms, with Google (2006, p.3) noting that discarded frameworks like the proposed fair use exception, provided direct “support for cultural and technological innovation”. This narrative underlined the limitations of understanding the user as a subject wholly separate from the author and the pirate. Throughout these submissions there was a clear articulation of the user as a subject that retained an authorial capacity and a need for copyright law to promote “creativity, innovation and development” (Electronic Frontiers

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62 ‘The ADA is a broad coalition of copyright users and innovators who support copyright laws that strike a balance between providing reasonable incentives for creators, on one hand, and the wider public interest in the advancement of learning, innovation and culture, on the other.’ (Australian Digital Alliance 2011)
Australia 2006, p. 1). Within this framing of the user, the user was seen to directly interrelate with the author, if not functioning as an active creator already, at least as a direct precursor to the types of authorial creativity supported by copyright law. However, this is where the exploration of this interrelation ended, and advocates failed to interrogate the actual “use” of the term user or indeed the various paradoxes and problems that came with advocating for a creative user, which have been discussed in depth in chapter three of this thesis.

What’s the use? Beyond the limits of these user framings

These three framings of the user played an active role in the broader public debate around the reforms but only one would be victorious and become codified in law. The final text of the act reveals that the ordinary user won out over the other two framings on offer, and now clearly resides in the text of the law. I use the victory of the ordinary user as a departure point from which I look at what law considers the limits of acceptable use, discuss the implications of translating cultural understandings of the user into law and explore the problems that come with aspiring to locate a separate user subject in law and in practice. This analysis develops the larger argument of this thesis by situating the evidence provided above in relation to discussions of the contingent subject of the user, as discussed in chapter three. It also further clarifies how the user is entwined in contingent and dynamic relationships with the author and the pirate and outlines the unbalanced hierarchies and power relations that persist throughout these ongoing processes of mutual definition.

Assessing the various agencies granted to the user in the amendment act, we see how Government drew on particular cultural narratives of use and discarded others in order to sketch out a particular user subject. The legalisation of format shifting and time shifting not only decriminalised everyday consumers, which was one of the most pressing concerns according to sections of the Australian media, but also legalised the use of iPods and other MP3 players, which represented a victory for Apple, but also (as Apple would argue) for everyday consumers. Importantly, not only did these amendments widen the scope of
“use” to incorporate “ordinary” and “everyday” activities undertaken by Australians, but it wholly rejected the demands of copyright industries to treat the subject position of the user in law as an “unruly” figure, that was allowed little to no agency in regards to managing the content that it owned.

Similarly, the lack of a broad fair use amendment or wider exceptions for creative practice, both of which were demanded by proponents of the creative user imaginary, further support my contention that the ordinary user was the preferred user subject in law. Interestingly, despite the introduction of parody and satire fair dealing exceptions, which belatedly recognised that the ordinary Australian user needed to be granted some creative agency as well, the practices arguably involve legally recognised authorial practices - involving the creation of potentially sufficient transformative original content in a fixed form - both examples were culturally framed as examples of “user rights” that deserved to be enacted in law. This suggests that the granting of creative agency to the ordinary user is problematic, leading to a substantial overlap between the boundaries of the user and the author, and raises questions about the effectiveness of efforts by Government to establish and codify clearly separate borders between the user and other subject positions of copyright law.

Indeed if we consider the progress of this amendment act, it becomes increasingly clear that these distinctions between the user, the author and the pirate can never be firmly entrenched. This is partly due to the generative power of various quotidian practices and informal legal cultures that consistently challenge the boundaries of various subjects of copyright law. As this section has discussed, the challenge that everyday practice presents to law is that it demands the ongoing legitimation and re-legitimation of subjects in both culture and law. As outlined in part one, subjects are not just historically contingent (see Rose 1988, 1993; Woodmansee, 1984), but operate as quotidian contingent formations that demand regular legitimation in order to be sustained legally and culturally. But this demand for legitimation does not emerge out of nowhere. As this case study of the Copyright Amendment Act (2006) shows, these attempts at formal and informal legitimation are often driven by quotidian practices that present a direct challenge to existing legal subjectivities.
Indeed the reform process of the mid-2000s was partly provoked by a broad cultural recognition that copyright law had failed to address quotidian user practices satisfactorily. Acts like time-shifting content on a VCR or using an iPod, substantially challenged the current legal framing of the user and these types of potentially problematic types of user practice formed a significant part of the cultural push behind these reforms. In addition, another important cultural narrative around user creativity was also present throughout the reform process. Although the subject of the creative user was not provided with formal legal legitimation at the end of the reform process, cultural influence was substantial enough to partly motivate the consideration of a general fair use defense. Collectively these cultural narratives of use underline the importance of these particular discourses and remind us that legal concepts of the user are always going to be contested. Even after the fact of enactment, user practices and discussions around use will constantly test the chosen legal framing of the “ordinary” user. The recent decision of the ALRC to float the possibility of enacting a general fair use exception - mentioned earlier in this thesis - is just one example of how ongoing cultural changes and the activities of industrial interests like Apple, Google, universities and libraries continue to place pressure on the legal codification of these subject positions.

The problems with the Government’s aim to legislate for a bounded user subject also become clear once we analyse the three dominant discourses of use that were predominant throughout the reform process. Collectively, these competing discourses underline the value of accounting for multiple subjects of copyright law when analysing these moments of reform as this thesis does. The contested position of various user practices means that the user can never be wholly separated from other subjects of copyright law. Once one considers how many acts and agencies discussed throughout this period carried an authorial or piratical aspect, the user begins to emerge as a subject, which interrelates quite directly with other subjects of law. As we account for these various discursive framings of the user alongside the range of cultural practices that challenge the framing of the user subject, it becomes increasingly clear that efforts to directly locate a separate user subject was always going to fail.
This critique allows us to further explore how the process of relationality works in copyright law as well as consider the benefits of taking this specific analytic approach. As the first part of this thesis outlined, particular agencies of the user and the pirate can be located in the authorial subject, which directly challenges law’s attempts to formally define and codify the author. This issue was also seen in this chapter, where the user as a formal subject of law was constantly challenged by practices seen - for example - in the cultural emergence of user creativity, which pushed back against these formal and informal framings. These moments underline the benefits of thinking beyond a liberal political philosophy that continually demands a consistency and internal logic that these contingent subjects cannot offer. Instead of searching for an ideal separation between subjects, a relational approach to law allows us to account for these interstitial moments of overlap between subjects and explore the informal and formal processes of legitimation in a new light.

This chapter also offers an alternative way to approach the wider framework of intellectual property. I note law’s ability to create realities and constitute possibilities (Coombe 1998) and the continual possibility of contestation within the law. Such an approach challenges the framing of copyright law as a static and repressive legal framework that is evident in much of the current scholarship. Debora Halbert’s work (2006) for example, is a paradigmatic example of the tendency of scholars and writers to frame intellectual property law as a structure that must be wholly resisted. Halbert raises many useful points about the repressive outcomes of recent legislative changes in and around IP (see Lessig, 1999; Drahos, 2001; Litman, 2001; Rimmer, 2007 for context). However, setting a political goal of “resisting” a particular legal structure tends to obscure the micro-politics of law and the spaces of negotiation that occur in law, which have been explored in this chapter. Such an approach positions law as a monolithic structure wholly separate from culture, rather than accounting for these quotidian contestations and resistances that are already taking place as part of law’s operation.

Conclusion
Therefore, as this chapter ends, an increasingly complex understanding of the relationship between the author, the user and the pirate emerges. This chapter has provided a comprehensive case study of the *Copyright Amendment Act 2006*, drawing on archival research and documents from the public record, in order to provide a contextual history of this legislative change and explore the position of the user under Australian copyright law. Numerous framings of the user emerged throughout the legislative process, and it was the agencies granted to the “ordinary” user that were eventually enacted in law. The amendment act signified something of a legal shift towards understanding the user in a positive light. The user was granted significantly more agency around using content they had purchased and even was provided with some creative agency. However, a further analysis of these amendments revealed that this narrative of “ordinariness” obscured a highly complex process of conceptualising the user in law.

I will continue this examination of boundary setting in law and my ongoing analysis of unpacking the various subjects of copyright law in a more radical fashion in the next chapter. I now turn to the pirate in order to further this thesis’ analysis of three key subjects of copyright law and the relationships that exist between them. I will outline linkages between the extra-legal subject of the pirate and the author, highlighting the relational connections between each figure as well as the broader generative and creative capacities of the pirate, through a study of the pirate in early modern England and Enlightenment France. I look to unpack the multifaceted cultural constructions of this subject, and provide an alternative set of conceptual tools through which to think understand piracy and thus its relationship with authorship and use.
Part III

Approaching the Pirate
Chapter Five

THE HISTORICAL PIRATE: EARLY MODERN ENGLAND AND ENLIGHTENMENT FRANCE

The pirate has been consistently evoked throughout the history of copyright law to refer to, and has subsequently inspired, a diverse array of pirate imaginaries over time. Today, the term “pirate” is liberally used to describe those who have been seen to be breaching copyright law, yet it doesn’t just evoke images of rows of computer towers in a back room, adjacent to a pile of blank discs ready for commercial reproduction and distribution, or the ubiquitous footage of the youthful and impressionable “movie downloader” found on the beginning of most DVDs (see Loughlan 2007). It also carries a deeper cultural resonance, reminding us of bands of renegades, hijacking European ships returning from colonial outposts, or in the contemporary era, perhaps of the two most evocative pirate imaginaries which exist co-currently: The machine-gun wielding Somalian pirate, a martyr-rebel refugee of globalisation, and Johnny Depp’s, Keith Richards inspired, Captain Jack Sparrow, the debonair star of the hit Walt Disney franchise Pirates of the Caribbean (Ali and Murad 2009).

As these brief portraits of piracy suggest, at the heart of the pirate imaginary, there is an ambiguity about the role and scope of the pirate, which can be seen in the evolving discourse concerning online copyright infringement following the rise of Napster in 1999. Initially content industries began fighting back viciously tarring downloaders as self-interested thieves and suing individuals (see Bowrey and Rimmer 2002; Choi, 2006; Rimmer 2007; David 2010). However, by the end of the decade it was impossible to maintain this line of attack in public. Even the most virulent defenders of intellectual property laws like the Motion Picture Association of America (MPAA), now resignedly describe downloaders in a similar fashion to western conceptualisations of the Somalian pirate (Ali and Murad 2009): part villain and part martyr. In the music industry’s eyes downloaders became more or less small fry caught up in the much bigger
question of how content industries would reshape and become economically sustainable, following the rise of the internet.\(^63\)

In the following chapter I suggest that such ambiguities and complexities around piracy and the subject of the pirate must be welcomed and explored, rather than avoided in favour of a reductive analysis. I begin this critique in the first section of this chapter by offering a methodological and disciplinary evaluation of existing scholarly work in law around the pirate. Drawing on a range of postcolonial (Larkin 2004, 2008; Liang 2005a, 2005b; Pang 2005; Sundaram 2010) and historical (see Johns 2009; Darnton 1971, 1982a, 1982b, 2003) scholarship, I suggest that attempts to understand the pirate solely through law lead to a substantially under-theorised subject. Offering a corrective I discuss a number of illustrative moments during the early modern period - namely *The Stationers v The Patentees (1666)*\(^64\) case and the role of piracy during the Enlightenment- that point to the co-emergence of the author and pirate subjects and critique the scholarly interpretations of these examples. Focusing on the complex historical relationship between the author and pirate throughout this chapter, I argue that such moments reveal the generative and authorial capacities of piracy, complicating our understanding of the pirate subject and underlining the value of a relationalist analysis, which can attend to these interrelations.

**Identifying the pirate: moving beyond law**

Scholars have tended to treat piracy and the people behind the act, as events and actors, which can be solely analysed and explained away through the framework of law. This is a common approach undertaken by both supporters (Ginsburg see 2002, 2007) and opponents (Vaidhyanathan 2003; Lessig 1999, 2002, 2004, 2008) of the contemporary expansionist tendency in intellectual property law.\(^65\)

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\(^63\) This approach to intellectual property enforcement has been confirmed by the former director of special projects for MPAA Robert Bauer, who notes that the industry group’s approach has changed. The MPAA now isolates ‘the forms of piracy that compete with legitimate sales, treat [such piracy] as a proxy for unmet consumer demand, and then find a way to meet that demand’ (SSRC 2011 66).

\(^64\) *The Stationers v. The Patentees about the printing of Rolle's Abridgment (1666)* Cart. 89; 1. Bl. 113; 6 Bac Abr 507.

\(^65\) Jane Ginsburg (1997; 2002; 2007; 2013) has been critical of much of the scholarly literature centred within critical copyright studies, which she considers to be regularly dismissive of the function and role of copyright law in supporting artistic works. However, she too advances a similar critique to critical copyright scholars about piracy, noting that ‘[e]xclusion of home taping Peter
These scholars argue that the solution to the increasing number of users copying works illegally (either involuntarily or deliberately but on a small scale) is invariably a legal one: to bring these transgressors back into the legal fold. This form of scholarship undertakes a familiar analytic process, interpreting piracy entirely within the framework of copyright law. Firstly, an analysis of the problems and contradictions of the legal framework takes place, and then through locating unjust or illogical applications of the law, a critique and diagnosis of intellectual property law can occur. Scholars aim to recover “everyday”, formerly legal practices which have since been made illegal and a call for “balance” is made, with reform occurring entirely within the existing hierarchies of legal doctrine.

Pirates have also been regularly ignored in the body of IP scholarship dealing with copyright law’s history. Influential historicist works tend to focus solely on the ideological rise of the individual author, the myth of genius and its codification in law, at the expense of “corporate, collective and collaborative” potentialities of authorship (Woodmansee 1994, p. 28; see also Woodmansee 1984; Rose 1993; Woodmansee and Jaszi 1994). Pirates emerge through deeper historical analyses of the early modern period, however this emergence is always contextualised within a larger study of the publishing industry (Feather 1988, 1992, 1994) or the internal regulation of the Stationers’ Company itself (see Arber 1875; Greg 1960). The act of piracy is discussed with an appreciation of its role during this period but barring some notable exceptions (see Johns 2009; Darnton 1971, 1982a, 1982b, 2003) the pirate rarely features in a major role as part of these histories.

Moving beyond the strictures of the above scholarship, an emerging group of scholars have developed a range of alternative cultural, historical and speculative lenses through which to view piracy (as discussed in the introduction). Lawrence Liang, Ravi Sundaram and Kavita Philip offer a post-colonial reading of piracy that challenges the western-centric viewpoint of scholars, highlighting the limits of the liberal political theory that undergirds much of the current legal
Collectively this research challenges the deployment of law as the sole organising structure through which to understand piracy and the subject of the pirate. It reframes piracy as a complex social and cultural act carrying a set of broader agencies than currently granted to it within legal scholarship. Historian Adrian Johns largely supports this approach. He argues that the act of piracy should not be conceptualised as “a mere accessory to the development of legal doctrine” (2010, p. 6):

Piracy cannot be adequately described, let alone explained, as a mere byproduct of such doctrines. It is empirically true that the law of what we now call intellectual property has often lagged behind piratical practices, and indeed that virtually all its central principles, such as copyright, were developed in response to piracy. To assume that piracy merely derives from legal doctrine is to get the history – and therefore the politics, and much else besides – back to front [my emphasis].

This historical analysis of piracy stands outside the boundaries that legal critique of intellectual property law regularly sets for itself. Johns (2010) acknowledges the inherently close relationship piracy has to intellectual property doctrine, but also notes that empirically supported historical analyses place the pirate as a precursor to intellectual property law. The pirate thus becomes a subject, which is informed by the development of law, but is able to be understood beyond the formalist legal understanding of the pirate as transgressor.

In acknowledging these conceptual moves I do not seek to remove the pirate from its contemporary position within the legal framework of copyright law, but
rather turn “the gaze of the law from the usual suspects of legality to legality itself and the relations that underlie its existence” (Liang 2005, p. 8 [my emphasis]). It is only by retaining this critical distance from the existing legal framework and acknowledging that piracy and the pirate are not solely determined by law, that a nuanced analysis of these concepts, and their own unique histories and trajectories, can take place. This approach acknowledges the pirate’s long-standing relationship with the framework of copyright law, while also allowing the pirate to be understood as a complex cultural figure. No longer is the pirate a default transgressor and no longer is the act of piracy forced to assert itself as something, which is either recoupable in law, or doomed to exist outside of it.

I will now begin to map out a history of the pirate via an exploration of John’s argument that the pirate was a central figure during the early modern period and vitally important in establishing and maintaining a nascent public sphere. Following this process - supported by seminal historical analyses of the early modern period (Blagden 1955, 1958, 1960a, 1960b; Cowan 2004; Tukonovsky 2003; Feather 1988, 1992, 1994) - I offer a critique of John’s stance. Contrasting his historical analysis with other scholarship focused on the early modern period (Darnton 1971, 1982a, 1982b, 2003; Turnovsky 2003), I offer further detail around how piracy may have materially operated during this period and clearly articulate the position and function of the pirate during this time. In thinking about these histories of piracy Johns (2010, p. 11) argues that “[t]he history of piracy is a matter of not just precepts but practices ... as we trace these practices through the generations, we often find ourselves in the province of conventions and customs rather than laws”. In providing the following historical analysis, I suggest that an approach to piracy that moves beyond law offers an array of conceptual tools, which can be used to think differently about the contemporary possibilities of the subject position of the pirate, and its changing relationships with other subjects of copyright law.

Re-discovering the Pirate in Early Modern England
There has always been a place for the general concept of piracy historically and complaints of intellectual misappropriation are dotted throughout history (see Hesse 2002; Marsterson 1940). However, much like authorship, a specific mixture of commercial and cultural ingredients was needed before our modern understanding of piracy could exist. Surprisingly enough, this mixture did not appear until the late seventeenth century, two centuries after the introduction of the Gutenberg press to England in 1471 (Johns 2009). When printed dictionaries of English started appearing in the early 1600s, the term piracy was nowhere to be found, however by the end of the century “[P]iracy suddenly appears everywhere. It is prominent in the writings of Defoe, Swift, Addison, Gay, Congreve, Ward, and Pope, and pirate suddenly starts to be defined in dictionaries as ‘one who unjustly prints another person’s copy’” (Johns 2009, p. 23). The increasing usage of the term “pirate” can be located to a specific time period in England, that of 1660-80, and as the term increased in popularity, it soon found its way into French, Italian and finally, German dictionaries during the late-seventeenth and early eighteenth century (Johns 2009, p. 24). But locating the term within this particular chronological period, directly implicates the pirate subject in problems which beset the print economy of the day, and ultimately, in the fallout from the English Revolution.

The Stationers’ Company: regulating knowledge before copyright law

The print economy of England in the early to mid-seventeenth century was founded on an established system of pre-publication censorship rather than the structural premise of individual property. As noted in chapter one, in 1557 the Crown issued a charter to the Stationers’ Company, a London guild of printers, which gave the members exclusive rights to legally produce books, which had to be previously approved by censors appointed to the Crown, and also the authority to confiscate any unsanctioned works (Feather 1992). This gave the guild a great deal of power, and structurally implicated government surveillance in the dissemination of information, tying censorship and trade regulation together, until the eventual passage of The Statute of Anne in 1710 (Rose 1993).66

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66 It should be noted that the effectiveness of this censorship has been challenged and a number of scholars have provided valuable analyses of how this system worked in practice. See generally Clegg, C 2004, Press censorship in Elizabethan England, Cambridge University Press, Cambridge; Lambert, S 1992, ‘State control of the press in theory and Practice: the role of the Stationers Company
The Stationers’ Company consisted of booksellers and printers. Members had to go to Stationers Hall to register the particular works they were publishing, if they intended to publish a specific book. While this originally functioned as a form of verification, noting that each work had been properly licensed by a member of the Stationers’ Company, this gave way to the custom of registering as a form of social propriety. When a member registered a book, no other member could print the title without the authorisation of the original enterer (see Feather 1988; also see Sisson 1960). There was a vast amount of capital outlay involved in printing a book (see Blagden 1955), from manufacture and printing, to warehousing and storage, and accusations of piracy were dealt with swiftly within the trade. The Court of Assistants functioned as the internal regulatory body and the sole recourse for owners of rights in copies to battle disorderly printing undertaken by renegade printers (Feather 1988; also see Arber, 1875; Greg, 1956).

The only alternative way to publish a book was for the Crown to bestow a “royal privilege” on a person, which gave individual publishers an exclusive and perpetual right to print particular works (Hesse 2002, p. 30; also see Feather 1988, p. 35 - 37). The linking of the divine persona of the royal to the ownership of knowledge, and the Stationers’ focus on maintaining internal harmony within the guild and largely good relations with the Crown, illustrate a society, which approached the question of dissemination and ownership in a different fashion to today. The royal privilege carried the aura of the divine royal persona, resonating with a society, which still had a cultural memory of knowledge as something, which emanated from God rather than from an individual. The guild system of the Stationers’ Company functioned with a communitarian ideal of ownership and in a similar fashion presented a model of knowledge management that differed substantially from our contemporary frameworks of knowledge regulation, namely intellectual property.

It is also worth noting that Scots Law and Northern Ireland Law were also in operation until the Acts of Union 1707 created a common jurisdiction across the United Kingdom. Subsequently, the power of the Stationers Company was geographically limited during their early years, their monopoly on printing only applying to England. In contrast Scotland had developed an alternative system of regulation through Scots Law, which carried a notable continental influence (see Mann in in Deazley et al. 2010). Furthermore, unlike England there was no “centralised limitation ... on the proliferation of presses” leading to the emergence of presses in smaller burghs and towns (Mann in in Deazley et al. 2010, p. 57). Therefore, the logic of the Statute of Anne was also to extend English law (and guild power) to Scottish traders. It was not until this point that the Stationers Company could comfortably claim an operational monopoly across the British mainland.

The changing print economy: a political and cultural revolution

The communitarian approach of the Company combined with a still quite medieval epistemology makes it easy to appreciate why the notion of the pirate was still an emerging concept during the early seventeenth century. Knowledge was derived from the heavens and the idea that individuals could own and control intellectual output was still in its infancy. Furthermore, questions of piracy were largely a matter for a monopoly guild system based on reciprocal rights, responsibilities and the trading of copyright, with questions of infringement an internal matter. However, in the midst of the social and political instability wrought by the English civil war, the renegade subject of the pirate began to solidify. As discussed in chapter one, the political situation of England shifted dramatically during the middle of the seventeenth century and civil war and eventual revolution saw Charles I beheaded and the new republic - the Commonwealth of England - ruled by a sequence of republican and military administrations. Due to this political upheaval, the legal and administrative structures that had regulated the book trade were effectively in abeyance (see Feather, 1988), and this lapse of the established legal order had a dramatic effect.

67 Act ratifying and approving treaty of the two Kingdoms of Scotland and England. [January 16, 1707]
on the existing regulatory system. The Stationers' Company linked their operations closely to the abolished royal government. They quickly established a partnership with the first Parliament that formed in 1640, in order to buttress their position but this relationship was highly unstable and failed to stem the revolutionary influence of the free presses.

The abolition of the Star Chamber and the High Commission in 1641 - two courts which functioned as an expression of the limitless judicial authority of the monarch’s power (see Kenyon 1986) and upon whose authority the Stationers’ Company rested - substantially damaged the already failing infrastructures of print regulation. In response, a flood of anonymous publications, pamphlets and piracies of existing titles spread (Feather 1988). A Parliamentary edict was issued in 1642 in response to the rise of unregulated printing, but a formal Ordinance for the Regulating of Printing, which re-established the Stationers' Company's “monopoly position and the pre-publication licensing of literature” (Rose 1993, p. 22), was not issued until 1643. This three year period of total deregulation saw popular presses and unregulated printing flourish (Feather, 1988; see also Blagden 1958.), and it was never wholly curbed.

Cyprian Blagden argues that this political shift was simply the final blow to cultural machinery, which was already “worn out” (Blagden 1958, p. 16 - 17). As he notes in his analysis of the Stationers' Company during the Civil War period, although they were briefly saved by “the bell” of Restoration under Charles II in 1660, it was clear that the established monopoly system would not be able to survive the rise of the free presses, a position supported by Brennan (2001, p. 5) who notes that “once the genie of unregulated printing escaped from the bottle, the policy justifications for any special controls at all seemed to be on uncertain ground”. The period of the Civil War saw the vital link between the Stationers’ Company and the royal prerogative “smashed”, and “the soldering of the link during the reign of Charles II did not last the century” (Blagden 1958, p. 17).

Re-imagining print’s past: The Stationers v The Patentees (1666)

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68 An Act for the Regulating the Privy Council and for taking away the Court commonly called the Star Chamber (1640).
These political and cultural changes during the Restoration period seriously impacted on how the English public related to the production, dissemination and reception of print. Unsurprisingly, as the following discussion of *The Stationers v The Patentees (1666)*69 outlines, this changing cultural relationship with the printed word also impacted on how the emerging subjects of the author and pirate were conceptualised. The key intervention in my analysis of the case is to place the work of Johns (2009) and Rose (1993) in conversation with one another in order to identify the interrelations between the author and pirate that occurred during this case. In so doing I critique the existing historicist analysis of this case. Rose (1993) refers to the case as the first time the idea that an author has property claim to their work is voiced in an English courtroom. However, drawing on the work of Johns (2009) I argue that this narrative overlooks the important role of the pirate subject during the case, and privileges an author-centric analysis over a relational approach, which can account for how both subjects were understood and defined during the case.

To provide some brief context, the case deals with Richard Atkyns’ attempt to revive a “highly profitable” hereditary patent on all books of the common law, granted by Elizabeth I to one of his ancestors. Following the abeyance of royal power during the civil war, some of the most profitable works of common law had been entered into the register at Stationers Hall. Atkyns claimed to be the inheritor of the royal patent, and demanded that the Stationers’ Company return them because their rights were subordinate to the property right of the Crown. The case is fascinating because in order to make such a claim, Atkyns had to rewrite the history of print in England. Leading up to the case he published *The Original and Growth of Printing*70 a tract that argued with glaring historical inaccuracy, that:

> [p]rinting was first introduced into England in 1468 at the instigation of Henry VI. As such, the right and title of printing rested with the Crown. England was indebted to the Crown for the introduction of printing and it was, therefore, only proper that the English people should suffer the regulation of printing (Brennan 2001, p. 1)

69 *The Stationers v. The Patentees about the printing of Rolle’s Abridgment (1666)* Cart. 89; 1. Bl. 113; 6 Bac Abr 507.

70 The full title is *The Original and Growth of Printing: Collected out of History, and the Records of this Kingdome. Wherein is also Demonstrated, That Printing appertaineth to the Prerogative Royal; and is a Flower of the Crown of England.*
This claim formed the basis of his argument in court and placed all aspects of contemporary print at stake. By challenging the history of print, which had been introduced by a citizen and functioned as a practice for private citizens, he attempted to reestablish the sole dominance of the royal privilege.

Atkyns was not solely driven by profit. He was also challenging the Stationers’ Company directly and hoped to put an end to their central role in the print economy. The reasons for this challenge can be understood through a brief assessment of the impact of unlicensed printing during the civil war. Booksellers expanded their ranks enormously during the war as they were able to feed on the political and religious controversies of the time, thanks to the increased production of popular pamphlets (see Halasz 1997). The lack of regulatory control or oversight of the presses in wartime also meant that the popular press of the 1640s and 1650s was “viciously partisan, violently sectarian, ruthlessly plagiaristic, and often wildly credulous” (Johns 2009, p. 30). This led the Restoration monarchy of Charles II to view popular print with a “queasy mix of respect, unease and fear”, and following two decades of printing politically charged, uncensored invective, this position found support outside of the palace (Johns 2009, p. 30). Recovering from years of civil war, the English public felt that profit hungry booksellers and their willingness to sell almost anything, had directly contributed to the bloody events of the civil war and some argued, even actively fermented discontent in order to boost sales (Johns 2009).

Furthermore, Atkyns argued, the Stationers’ Company could no longer claim to be a simple professional guild focused on the regulation of the printing trade. Booksellers and publishers had increasingly gained control within the Stationers’ Company, a power shift which many considered to be problematic. Christopher Barker was the first to record this shift of power at the time, noting that the valuable copyrights had passed from printers to booksellers, who “keepe no printing howse”, and instead lived off copyrights, gaining financial and organisational dominance within the Stationers’ Company (Blagden 1960, p. 4).

This fundamentally changed the relations within the guild, which had originally been set up as a company of printers (Blagden 1960) and the booksellers’ poor reputation subsequently impacted the company as a whole. London booksellers had become “wealthy and important men” largely thanks to their monopoly on ancient and modern classics, and were subsequently resented by much of the London public (Rose 2003, p. 78).

Atkyns considered the Stationers’ Company to be threat to good order. In his view the organisation was directly implicated in the political upheaval of the last half-decade, dominated by rich and powerful interests and one had a direct financial interest in the monopolisation of knowledge. What is particularly interesting about Atkyns’ argument though is the way he spoke about the Stationers in his treatise *The Original and Growth of Printing* and during the case itself. He regularly called the Stationers’ Company “pirates” invoking the long-standing Grecian meaning of the term, which defined the pirate as a threat to civilisation. As Johns (2009, p. 32) explains, this terminology challenged the Stationers’ regulatory role on two fronts. It suggested that they were ethically unfit to manage the print economy, with Atkyns arguing that booksellers were “prone to the mercenary corruptions ... routinely attributed to commercial life” and with increased profits were no longer interested in setting “moral limits”. In addition, it also questioned their role as managers of cultural texts, with Atkyns positioning their monopoly on valuable texts as a form of direct cultural theft from the community for personal gain. Throughout this debate Atkyns located the pirate at the heart of his challenge to the existing print economy and framed the economics of the print trade as substantially damaging to society at large.

With Atkyns challenging the whole system of print regulation, the Stationers’ Company unsurprisingly “[opposed his] bid in the name of the register system and the trade community as a whole” (Johns 2009, p. 31) and it is here that the scholarly interpretation becomes an issue. In their response to Atkyns’, the Stationers argued that their members’ right to publish was based on the “absolute property” that an author has in their “copy” and their subsequent right to transfer that property to anyone else. This claim is of particular import, as Mark Rose notes, because it is the first time that someone in an English court
claims “that an author has a property right in his work” (Rose 1993, p. 24). Prior to this point the author was relatively “unimportant” in this entire process of producing knowledge (Duguid 2010, p. 144) and once an author surrendered their copy to the booksellers, they made “little further contribution” (Duguid 2010, p. 144). However, needing to protect their trade monopoly, the Stationers used the author as a proxy, arguing for the proprietary rights of the author, all the while assuming that existing trade practices would keep the author in a subordinate position to booksellers and publishers (Chartier 2003).

For the likes of Rose (1988, 1993), it is clear that developing in opposition to Atkyns’ muddled, royalist argument, is the emerging property-owning author, albeit one constructed by an industry with a direct economic interest, in the success of this case. He follows a Foucauldian trajectory and locates both the social construction and historical contingency of the author in law. Despite a methodological and theoretical stance that wishes to both critique and historically situate the possessive individualism and Romantic ideology that permeates through our modern understanding of copyright law, Rose suffers from a not too dissimilar brand of essentialism. The teleological attempt to locate the construction of the author and the imbuing of the subject with a Romantic ideology means that for Rose (1993, p. 25), the Aktyns case stands as an example of an emerging - but still “incompletely developed” - author. I suggest that this sole focus on the authorial subject can be limiting as it presumes that a subject like the author can emerge with little to no interaction with other subjects of law.

Indeed by turning to the work of Johns (2009) we see an alternative subject of the pirate invoked during these same debates. As discussed above, the Stationers - in response to a charge of piracy - developed this emerging concept of the author as a property-owning subject. Following Johns, I suggest these interactions therefore should be explored, rather than minimised. The fact that “[a]uthorial property and piracy were thus being forged in contest with each other” (Johns 2009, p. 39) provides a clear example of interrelations between subjects; which can be ignored in author-centric histories of copyright law’s development (see Rose 1993). As we see in the above analysis of debates
surrounding *The Stationers v The Patentees (1666)* such an occurrence allows us to further explore the contingency of the author and the pirate, as well as interrogate the limits and borders of the pirate as a cultural category. The above analysis also lends further weight to existing critiques of historicist scholarship (see Bowrey 1996; Saunders 1992; Saunders and Hunter 1991), which were explored through my analysis of the debates around the emergence of the author in chapter two. I suggest that accounting for alternative subjects of law in moments such as these avoids the teleological approach taken by these histories and in fact sheds further light on how our modern notions of the author and pirate emerged.

The pirate, the Enlightenment and the public sphere

We see further evidence of relational interactions between the pirate and the author once we examine the role of piracy in public spheres across Europe during the Age of Enlightenment. The English public sphere is a valuable site from which to begin the analysis, as it existed as the “model case” and prototype for Jürgen Habermas’ thesis (Cowan 2004, p. 345; see also Habermas 1989, p. 42 - 43; 57 - 67). Studying how piracy operated as a practice during this period reveals the early productive capacities of commercial piracy, and supports the identification of the pirate’s co-constitutive relationship with the author. It also extends contemporary critiques of the public sphere and the Age of Enlightenment, work that highlights the contingent nature of the public sphere in both its form and function and emphasises the messy background to the Enlightenment, often framed as a rational political project only of interest to philosophers and salon attendees.

This takes us a number of decades beyond the Atkyns’ case and well into the 1700s. To provide some context I will identify the most salient historical moments leading up to this period. Atkyns won the case and his victory led to a substantial re-organisation of the print economy for the next few decades. The craft practices and traditions of printers were subordinated in favour of royal power until the reign of King Philip and Queen Mary at the end of the seventeenth century. In 1695, the Licensing Act of 1662 expired, which was not
uncommon, but this time it was not restored. The increasing war between “the monopolistic system of privilege” (Rose 1993, p. 34), and the growing commerce in the book trade came to a head, and it was clear that the House of Commons was seeking to find a way through this debate. It was in the ensuing years of “no property” - from 1695 to 1710 - that piracy truly became a “cultural category” (Johns 2009, p. 43) for the inhabitants of London. This notion of piracy situated literary pirates in similar terms to today, as “outsiders, against whom a form of propriety could be defined, defended, and upheld as fundamental to order” (Johns 2009, p. 45). Following the enactment of the Statute of Anne in 1710 and the gradual emergence of a system of copyright law (discussed in chapter one) the concept of the pirate started to solidify. However, an analysis of the period in which the public sphere emerges in England, reveals a much more complicated relationship with piracy in practice.

Central to the idea of Habermas’ public sphere was the wide distribution of ideas, which would eventually provide a critical foundation for the expression and legitimacy of a truly democratic, and a truly reasonable, public opinion (Cowan 2004). Indeed, Thomas Paine argues in his tract *The Rights of Man*, that the “dissemination of writing ... would be the very groundwork for the formation of the modern state”. Paine buttresses this point in a letter to Thomas Walker in 1792, arguing that the stone must be kept rolling by “cheap publications”. This “dissemination” relied upon access to channels traversing the national landscape, and so conceptually worked with both notions of intellectual depth and expansion (Laugero 1995, p. 59).

These notions of the public sphere had their equivalent in the “building and improving of roads on an unprecedented scale” between 1750 and 1770, transforming England’s road network, and redefining the previously disjointed individual road network, causing them to operate as a functional part of a productive whole (Laugero 1995, p. 45). These connections between dissemination, infrastructure and expansion are important links to make, because by the end of the eighteenth century, roads and writing were functioning as the “architecture for society” (Laugero 1995, p. 48). However this infrastructural development was a highly uneven process - intellectually and
materially - and it becomes clear that this process had more to do with the “radical and unruly Enlightenment” rather than the oft-imagined “moderate and civilized version found in the Parisian salons” (Jacobs 1994, p. 109), or indeed, in English coffeehouses.

The debt the emergence of the public sphere and the Enlightenment owes to piratical practices becomes clear through a critical analysis of the motivations behind the publication of particular journals in England and the practices of circulation and distribution, which contributed to their large audience. The periodical journalism of Joseph Addison and Richard Steele were central to Habermas’ ideal image of the coffeehouse society. Their journals - the Tatler (1709-11), the Spectator (1711-14), and the Guardian (1713) - were an instant success with a readership of between 60,000 and 80,000 for each issue, encompassing London as well as provincial outposts, and Scotland (Cowan 2004). Coffee houses were so numerous and frequented by such a wide range of people, that journals were required in order to maintain contact between participants and continue conversations and discussions beyond the walls of each individual coffee house (Habermas 1989). Similarly, the fact that by the 1670s, the government considered coffee houses “seedbeds of political unrest” leads Habermas to locate the emergence of an Enlightenment culture through these journals (Habermas 1989, p. 59).

But how did these journals with relatively small print runs; gain such a wide readership, from London to the outer regions and beyond (Cowan 2004)? The answer is piracy, which emerges as one of the key distributive infrastructures of the Enlightenment period. Johns argues that journals like those produced by Addison and Steele, could only reach national circulation, and destinations as far afield as Scotland, through the distribution mechanisms afforded by re-printing, and this had a recursive effect on popular publications. The more popular a book or article became; the more inclined pirates were to reprint them. A popular initial edition would find its way to a re-printer, “which would generate a thousand new copies; one of those would then spark another explosion of copies from another reprint centre; and so on” (Johns 2009, p. 50). This entire process answered Paine’s call for “cheap publications” and spread an array of pamphlets,
journals - and most importantly ideas - beyond the immediate London area, where the major printers were located, contributing to a widening of acceptable political discourse across the country. Johns’ argument also makes specific mention of the pirate networks emerging between countries, claiming that such mechanisms of piracy formed a significant part of the philosophical Enlightenment across Europe and allowed it to function smoothly and effectively.

This claim recognises the fact that motley collections of “hack writers, clandestine publishers, and marginal pamphleteers”, were just as much a part of the Enlightenment as the refined “philosophes”, “reformers” and “radicals” (Jacobs 1994, p. 99). But perhaps too quick to champion the pirate, there is a complexity to piracy during this time that Johns tends to minimise. Piracy was not simply a matter of popular books travelling from city to country or across national borders and getting reprinted and distributed as Johns suggests. Instead this process involved material infrastructures of distribution, complex questions of authorial identity and navigation within and around unique regulatory structures. I draw on the work of Turnovsky (2003) and (Darnton 1971, 1982a, 1982b, 2003) below in order to map out specific examples of these external factors, to contribute to our understanding of the Enlightenment pirate, as well as offering further context for the links Johns makes between piracy and the Enlightenment.

Piracy and authorial identity

Questions surrounding authorial self-identity during the Enlightenment emphasise the influence of the pirate in the development of a stable authorial identity and sheds light on some of the key motivations behind the piratical Enlightenment. The Enlightenment book trade of the eighteenth century was, despite appearances, not one which was as concerned with “payments, income-maximization and literary property”, as it was with personal influence (Turnovsky 2003, p. 391). Two of the key Enlightenment authors, Voltaire and Rousseau had a mixed relationship with their status as earning authors, and did not see either income or property as central to their craft. Indeed, Voltaire
played the book trade “tactically”, and “according to a logic defined by the maximization not of revenues, but of the circulation of his writings”. His “disregard for property rights and droits d’auteur” was just one element of his larger strategy, which “aimed at an optimal use of the book trade as the most effective means for disseminating critical philosophical ideas” (Turnovsky 2003, p. 392).

The need for authors to spread their work can be seen in the intense anxieties that Rousseau held about the book trade; especially once publishing was undertaken primarily as a projection of the authorial self to a reader. In a series of letters to his publisher Marc-Michel Rey, Rousseau complains about the delayed print run of his works, and argues that not only does this lessen the immediacy of his ideas but also raises the spectre of counterfeiters, with Rousseau warning Rey, “[d]o not blame others if counterfeiters are watching, and if your tarrying gives them all the time they need to get ready in order to surprise you” (Turnovsky 2003, p. 398). Turnovsky (2003, p. 401) situates this anxiety within a specific debate about authorial identity during the Enlightenment period, and Rousseau’s “defensive” gestures feature as a form of protection around his work, through the publication process shown in his “[willingness] to abandon his claims to both ownership rights and economic compensation for a surer sense of the work’s survival as an image of his authorial self”. This over-protectiveness speaks more to the anxiety of the authorial persona, than it does to the property claim in a work. Rousseau’s “real stake in the book trade actually lay, like Voltaire’s, in the diffusion of his works” (Turnovsky 2003, p. 393), and the longer the print run was delayed, the more likely his ideas - and therefore his authorial identity - would start to fade.

Voltaire’s relationship with pirate publishers took a similar form, and further emphasises the varying motivations behind this authorial engagement with piracy. Robert Darnton outlines the publishing history of Voltaire’s last great work - Questions sur l’Encyclopédie - and explains that Voltaire willingly engaged with one pirate publisher in neighboring Switzerland, going so far as to provide him with a copy of the official proofs “corrected and expanded” as long as everything took place behind the back of Voltaire’s main publisher. Like
Rousseau, Voltaire saw numerous benefits in such collaborations. He was likely to be pirated anyway, so at least through this arrangement he could control the process, as well as add literary audacities and bolder political claims, which he could later disavow as being the inexact work of a renegade pirate (Darnton 2003). Furthermore, being independently wealthy meant Voltaire did not rely solely on income from his books to survive, highlighting the complexity behind these strategic relationships (Darnton 1982a). These examples echo the earlier analysis of the Atkyns case and reveal the material exchanges between the pirate and the author as well as the importance of the pirate in sustaining and indeed partly developing the concept of authorial identity. They also emphasise the complex publishing ecology in which Enlightenment authors and pirates operated. The pirate Enlightenment didn’t function because of high ideals and authorial charity, but rather was the result of authors and pirates alike, maintaining a keen appreciation of the differing functions of legitimate publishing networks and the underground pirate economy that operated around the edges.

Piracy, distribution and regulation

Johns (2009) discusses piratical practices at length and claims that they are key factors in the Enlightenment but fails to say much about the materiality of piracy during this time. I draw on Darnton’s (1971, 1982a, 1982b, 2003) detailed research on underground literary networks in pre-revolutionary France to outline exactly how popular editions would “find [their] way to a place of reprinting” (Johns 2009, p. 50), and the motivations behind reader demand for such piracy in the first place. Unlike England, which had introduced a statutory right of copyright in 1710, France operated under a monarchical privileges and permissions system with a significant censorship regime attached, until the 1789 revolution. Publishers could request for a permissions publiques, which meant the book would be processed through the state’s censoring and bureaucratic machinery or a permissions tacites for books that censors would not “openly certify”, but weren’t deemed radical enough to be entirely banned (Darnton 1971, p. 219). These two levels of censorship banned “its most advanced philosophy along with its most debased pornography” (Darnton 1971, p. 244), as well as a number of anti-royalist tracts that often worked between the two genres, mixing
political claims with defamatory and pornographic statements about members of the Royal family and their court (see Darnton 1971).

Such a regime meant that amongst the increasingly politically active (and occasionally prurient) sections of the French population there was high demand for particular books and booksellers in the provinces, importing copies of illegal French works from abroad and operating far away from the printing monopolies in Paris (Darnton 1971) were only too happy to take advantage. These distributive networks relied extensively on the postal service, with one foreign printer describing the mail as the “soul of commerce” (Darnton 2003). Foreign printers would receive orders from French booksellers in addition to market recommendations about which authors and genres were selling well in their region. The scale of correspondence was immense, with one foreign publisher receiving “25,000 letters during the twenty years before the French Revolution” (Darnton 2003). This frenzied entrepreneurial activity stood in stark contrast to the legitimate publishing industry, that in taking its publishing monopolies for granted allowed a thriving import-export business of popular and banned books to be built off the back of pirate booksellers and their distribution networks.

These material networks of distribution continued past the correspondence stage and once the books landed in France a cast of characters were involved in transporting the cargo to the heart of Paris. Mule-drivers carried sealed crates of books across cleared paths into France, with merchants bribing agents in advance to avoid import taxes or possible inspection of their wares. The goods would then be transferred to a provincial clearing house, where regional book dealers would pay off members of the local bookselling guild who needed to inspect the goods. These books, if not planned to be sold in the provinces, would then be relayed to a warehouse in Versailles, smuggled into Paris and then distributed to booksellers in the capital who maintained good relationships with the police. All the while within Paris, corrupt literary agents would traverse their networks and collect the latest manuscripts and best sellers and provide them to the foreign printers, beginning the cycle again (Darnton 1971). This was a complex operation, involving the negotiation of numerous layers of regulation and varying forms of distribution and the geographies and methods of
transportation always shifted as authorities, publishers and booksellers engaged in an ongoing cat and mouse game (Darnton 1982a).

Re-thinking the connection between piracy and the Enlightenment

Darnton’s work contributes some vital detail to Johns’ broad discussion that links piratical practices and the wider impact of the Enlightenment. It becomes clear that rather than pirate booksellers in Lyon, Paris or London operating as lone rangers spreading Enlightenment ideals, these pirates relied on a series of distributive networks - most notably the postal service - in order to maintain their business ventures. Furthermore, piracy was a phenomenon that operated in specific business contexts with pirates and authors alike carrying a keen appreciation for the demands of particular markets and demographics. This adds a significant entrepreneurial slant to Johns framing of piracy as the simple spreading of Enlightenment ideals. After exploring these stories of piracy during the Enlightenment era, it becomes easier to agree with - but also qualify - Johns’ bald statement “No piracy...no Enlightenment” (Johns 2009, p. 50). Piracy and pirates operated within the sphere of an emerging Enlightenment, with their business practices shaped by a number of regulatory and political factors around censorship as well as reacting to broader political and social trends.

It would be dangerous to read too much into the ideals of pirates themselves during this time. As Darnton (1971, p. 238) notes pirates “were tough businessmen who produced anything that would sell”. Piracy during this period involved at best a significant appreciation for the “grey” areas surrounding laws regarding national censorship, the importation of goods and the extent of the royal privilege. At worst it involved corruption, the brazen flouting of laws, and was a canny model of illegitimate publicity only available to self-supporting authors such as Voltaire. No doubt piracy and pirates were important to the existence of the Enlightenment, and a key distributive infrastructure, but they were not necessarily central. Indeed piracy itself owed a significant debt to a number of existing media infrastructures such as the postal service, that were perhaps more quotidian and banal in their nature, but broader in their scope and impact. It would be wise to not valorise piracy or the Enlightenment pirate too
much, but rather approach piracy as a phenomenon that operated as one of many factors that contributed to the Age of Enlightenment.

More interestingly for this thesis, it becomes clear that piracy was also deeply involved in the development of the emerging authorial persona and identity. The collective revelations of Darnton (1971, 1982a, 1982b, 2003), Johns (2009) and Turnovsky (2003) reveal an ongoing relational connection between the emerging subject-positions of the pirate and author. Johns (2009) identifies the pirate and author being forged across from each other in an English courtroom. Darnton (1971, 1982a, 1982b, 2003) and Turnovsky (2003) note that the very identities and personae of the most transcendent authors of this period were reliant on pirates and their networks, not just for distributive means, but also to help shape and maintain their own personae as individual subjects.

Conclusion

My analysis of the early modern pirate provides a series of useful points of departure that further advance this thesis. Throughout these various histories of print and of authorship we see the regular intermingling of the author and pirate subjects. These subjects evolve together, intersecting at different points in time and influencing each other’s socio-cultural position. I suggest that particular scholarly approaches to the pirate have either neglected its unique history by attempting to negotiate the subject solely through the lens of law, or alternatively by taking a teleological approach to the subject of the author.

The first point I want to make is that historical analyses of the pirate such as the one above underline the fact that these “systems of dependencies”, between subjects have a long history, to again quote Foucault (1991). Recent scholarly work tends to position contemporary debates around borderline practices, new subjectivities and their role in authorship, creativity and attribution as only occurring due to recent technological developments and emerging user practices (see Benkler 2006 Bruns 2008a, 2008b; Jenkins 2006). This research also tends to question the long-term value of copyright law as a legal framework and suggests that law is fundamentally destabilised by such developments. I challenge
this narrative and through this chapter show that copyright law and the subjects that are bounded by this legal framework are products of a complex history that has always been defined by ruptures and crisis points. In a similar fashion to today’s changing media environment, the pirate and the act of piracy led to the establishing of new markets, new methods of distribution and new understandings of “authorship”. Furthermore, I show that the author was not simply a reified subject eventually imbued with a Romantic ideology, but instead a flexible subject that negotiated a range of engagements and interrelations with its pirate “other”. This analysis suggests that these subjects can be surprisingly adaptable during these moments of change and the legal framework perhaps more flexible than is suggested by the above scholars.

This chapter also extends my broad claim of relationality advanced earlier in the thesis. The example of the early modern pirate allows us to view these processes as historical, and provides a clear example of how these relations between subjects operate at various strengths and configurations throughout history. The emergent nature of the authorial subject and the nascent status of copyright law meant that during these early years of literary property, the subject-positions of the author and the pirate were constantly engaging with each other. With little legal and cultural weight behind these two subjects, as this chapter notes, pirates and authors regularly conducted commercial transactions. Thus the co-emergence of these subjectivities was not always a process of contestation, but often of co-operation. The example of philosophers using pirates in order to extend their authorial identity underlines how these two subject-positions in law were closely intertwined and developed in relation to one another rather than apart.

As a final point, I want to suggest that taking a relationalist approach to copyright law presents a further challenge to much of the existing scholarship focused on the role of the author. As noted earlier, such work tends to over-emphasise the emergence and role of the author at the expense of other active and present subject-positions, which are often suppressed or ignored in the retelling (see Jaszi 1991, 1992; Rose 1988, 1993; Woodmansee, 1984). Subjects such as the pirate are not provided with an active historical role but are instead
assigned to the margins. Similarly contemporary work which examines creativity acknowledges the author and the user or the producer and the user (see Bruns 2008a, 2008b; Gibson 2006) but the pirate again only features in a minor role. I argue that the pirate can no longer be so easily dismissed. Considering the impact that the pirate had on early notions of the author and practices of consumption, it makes sense to approach these subjects collectively. I encourage future research to acknowledge the complex interactions between these subjects and be alive to the ramifications of these relational processes.

These findings offer a set of conceptual tools, which provide an alternative way through which to understand piracy today and the contemporary pirate, the subject of the following chapter. As well as continuing this chapter’s excavation of the pirate, I will use these tools to test the above propositions about the pirate and piracy and see to what extent these claims hold weight today. The two chapters will provide a chronological bookending of the pirate subject, moving from its birth to its present situation and provide a conceptual lens through which to understand this hidden subject of copyright law. The next chapter will begin this process through a case study of *Roadshow Films Pty Ltd & Ors v iiNet Ltd* where I explore the pirate’s interrelations with both the user and the author, and discuss the possibility of approaching piratical consumption “as a type of production” (Coombe 1998, p. 27).
Chapter Six

CASE STUDY: ROADSHOW FILMS PTY LTD & ORS v iiNET LTD

This chapter continues the re-examination of the pirate begun in chapter five, through an analysis of recent Australian case Roadshow Films Pty Ltd & ors v iiNet. The case centred on the question of authorisation: the Federal Court was asked twice to decide whether or not internet service provider (ISP) iiNet had authorised copyright infringement by failing to disconnect users who were alleged to have engaged in piracy. iiNet worked its way through Australia’s judicial hierarchy - ending up in the High Court\(^2\) - and in so doing instigated a broad conversation around the position of the pirate and the role of piracy in wider society. The following chapter will explore how the pirate was discursively constituted throughout this process and continue this thesis’ examination of the contingent nature of key subjects of copyright law. I outline the complex interrelations that exist between the pirate, the author and the user and assess how legal and cultural discourses during this time influenced the relationships between these subjects.

I will begin the case study by providing cultural and legal background to the iiNet case before embarking on a detailed discussion of the case itself. I will then look at the various cultural discourses that circulated around the quotidian practices of piracy which iiNet focused on, drawing on media reports, the evidence of the court and public commentary. A critical analysis of these discursive spaces follows, where I explore the competing conceptualisations of the pirate. In the conclusions drawn from this intervention, I discuss these findings using the relationalist approach developed throughout this thesis, linking them back to my larger analysis. Referring to an array of socio-legal scholarship (Coombe 1998; Sarat and Kearns 1998; Tushnet 2004), I contend that the iiNet case stands as a paradigmatic example of how the contemporary pirate’s relationships with the user and author are shaped and highlights the role of legal doctrine and wider legal cultures in shaping these relationships.

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\(^2\) The High Court is the highest court of appeal in the Australian judicial system.
iiNet in context: piracy and consumption in Australia during the mid-2000s

Roadshow Films Pty Ltd & ors v iiNet saw thirty four Australian film and television companies attempt to sue Australian ISP iiNet for authorising copyright infringement. Anti-piracy lobby group the Australian Federation Against Copyright Theft (AFACT) was “prominent in the conduct of the claim”, collecting evidence for the companies and also leading the litigation (Roadshow Films Pty Ltd v iiNet Limited [2010] FCA 24 at 6). Interestingly, the case was more than a simple domestic battle between a local ISP and a lobby group representing television networks and distributors. It formed part of a coordinated geo-political response to online piracy, with the president for Asia Pacific of the Motion Picture Association (MPA) confirming that U.S. arm of the MPA (the Motion Picture Association of Americas) “was the mover behind AFACT’s case” (McCallum Jr. 2008). MPAA was determined to avoid publicising its role and so prevailed upon local television network Channel Seven and Australian media company Village Roadshow to be the “public Australian faces” of the case (McCallum Jr. 2008).

So why did AFACT and this assortment of film and television companies launch a legal case on behalf of the MPAA? A brief analysis of Australian media consumption habits in the lead up to the case shows that online piracy was still a key concern for content industries. Flexible user provisions had been introduced into Australian law in 2006 (see chapter four) legalising format-shifting and time-shifting and making it easier for Australian consumers to manage their media legally. In addition to these new provisions, the domestic television market showed an increasing engagement with the digital economy. TV shows and movies were progressively added to the iTunes database offering a simple choice for consumers wanting to purchase content legally (Simon 2009). The ABC also launched a revolutionary “catch up TV” service in the middle of 2008 - ABC iView - which allowed users to stream the last fourteen days of ABC programing online free of charge. This was a strategy the other four free to air channels embarked on in the following years. These changes reflected a
maturing digital marketplace with entertainment companies in 2008 slowly committing to a normative ideal of the tech-friendly consumer.

Within this context, online piracy was still a significant media practice in Australia (see Ewing et al. 2008; Ewing and Thomas 2011). During the Federal Court trial iiNet CEO Michael Malone estimated that Bit Torrent traffic, predominantly used for downloading content for free, constituted half or more than half of traffic across iiNet’s network (Crozier 2009a). A national survey of Australian’s online practices in 2008 (Ewing et al. 2008) also revealed that just under a quarter of respondents had accessed file-sharing services. The majority of respondents were confident that downloading movies from the internet did not affect their legal consumption of either movies (73.6%) or television programs (64.5%), but this persistent piracy in the face of genuine attempts to develop digital markets worried the content industries. While it would be impossible to settle on one true figure, rates of piracy were clearly significant in Australia during the time of the case.

Australia was also the perfect location for the case to be launched. Following the failure of direct enforcement action against infringing individuals in the early-2000s, with fining individuals significant amounts of money for infringement widely seen as a something of a public relations disaster, it was now common practice for content industries to sue the intermediaries through which the infringement took place (see Giblin 2011). The Australian jurisdiction was more amenable to legal action than others. A number of cases were brought against peer-to-peer software providers in the United States through the secondary liability principles of U.S. law. However, “the way in which the cases were resolved left [the] law in a far from satisfactory state” (Giblin 2011, p.97). Similarly the concept of “authorisation” in U.K. or Canadian law was narrowly constituted, which meant that content industries would be risking a public defeat at trial if they engaged in litigation. In contrast “authorisation” in Australian law was broadly constituted in both statutory law and through jurisprudence.

73 Respondents may not report their own illegal activity to surveys like the one cited above and other examples may reveal an even higher rate of piracy in Australia.
A previously successful industry attempt to sue an online intermediary for authorisation in Australia had also seen the courts offer an amenable interpretation for future industry attempts to address online piracy.74 *Universal Music Australia Pty Ltd and Others v Sharman License Holdings Ltd and Others* saw Universal Music accuse the operators of the Kazaa file-sharing network of authorising the copyright infringement of Kazaa users. In his judgement, Wilcox J treated authorisation in a substantially different manner from its existing interpretation in relation to analogue technologies. It was previously made clear in Australian case law that defendants ‘were not obliged to take any indirect steps to prevent infringement’ in order to prevent a finding of authorisation (Giblin 2009, p. 165). However, as Giblin (2009, p. 165) explains, “the Sharman [judicial] analysis turned that certainty on its head by suggesting that the mere retrospective availability of such steps at the design stage could be relevant to eventual liability for third party infringement”.75 This finding was seen to be highly problematic because it potentially placed a pre-emptive obligation on companies to address the extent to which a service could be used for non-infringing uses (Giblin 2009).

The Free Trade Agreement between the United States and Australia (discussed previously in chapter 4) was also an important piece of the geographic and legal puzzle. As part of this agreement, Australian law imported a “safe harbor” regime for ISPs from the United States,76 a law that protects a defendant from liability for authorising infringement if they simply provide “facilities for making, or facilitating the making of, a communication”.77 It is likely that U.S. trade negotiators advised U.S. companies that these legal changes further enhanced the obligation of Australian ISPs to address piratical activity, over and above the requirements of then U.S. law. Furthermore, as scholars noted, the “safe harbor” provisions themselves were narrowly framed with any action above “mere provision” of facilities was liable to render the defense wholly unusable. It was suggested that the framing of the “harbor” itself was problematic, with it

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74 *Universal Music Australia Pty Ltd and Others v Sharman License Holdings Ltd and Others* [2005] FCA 1242.
75 See also *Universal Music Australia v Cooper* [2005] FCA 972
76 See Division 2AA, *Copyright Act 1968* (Cth)
77 See ss 39BB, *Copyright Act 1968* (Cth)
being almost impossible for a provider to simply offer the facilities without doing “something more” (Giblin, 2009, p. 152).

Subsequently, AFACT and the MPAA could have been forgiven for being quietly optimistic as *Roadshow Films Pty Ltd & Ors v iiNet Ltd* began. The case stood as an opportunity for the industry to tighten their control over online piracy, while deflecting enforcement responsibility on to domestic ISPs. A victory would also allow industry to entrench their strong commercial position as emerging digital strategies took hold. It is also worth noting why iiNet was singled out for legal action. A confidential diplomatic cable written by United States Ambassador to Australia Robert McCallum Jr. explains that MPAA wanted to avoid tangling with Telstra - Australia’s former telecom monopoly - whose own ISP “BigPond” had cornered half the market. Telstra had the financial resources to maintain a long and potentially damaging legal battle. In comparison iiNet was large enough to be important in its role as the third largest ISP in Australia, but small enough to lack the resources or energy to defend a well-financed legal campaign headed by an assortment of national and multinational entertainment companies. The fact that “iiNet users had a particularly high copyright violation rate, and that its management had been consistently unhelpful on copyright infringements” thus stood as further motivation for MPAA to pursue legal action (McCallum Jr 2008).

The Pirate in the courtroom: *Roadshow Films Pty Ltd & Ors v iiNet Ltd*

The questions and concepts addressed by *Roadshow Films Pty Ltd & Ors v iiNet Ltd* were relatively narrow. Indeed, it was commonly agreed by both parties that iiNet’s subscribers were engaging in copyright infringement. The case instead centred on questions of authorisation and “reasonable steps”. The Federal Court of Australia, and then the High Court of Australia, needed to decide “whether [iiNet] had, by failing to take any steps to stop infringements, authorised the infringements of particular iiNet subscribers” (Lindsay 2010; also

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78 *Copyright Act 1968* (Cth) s112E
see Lindsay 2012). AF ACT coordinated the litigation on behalf of thirty four film and television production companies, responding to iiNet’s refusal to act on notices sent from AF ACT, which identified users allegedly committing copyright infringement. The judgments and hearings form a productive case study, as they regularly move beyond the issues of infringement and authorisation at hand, to engage with the wider cultural and legal discourses surrounding the pirate. The case had a long chronology, with Roadshow Films Pty Ltd losing and appealing at every step of the way. After the original success of iiNet, an initial appeal to the full bench of the Federal Court of Australia was dismissed, as was the final appeal to the High Court of Australia. The following analysis will examine the case in detail before critiquing the various discourses that circulated around the pirate subject during the case.

Federal Court of Australia: Hearings and judgment

In September 2007, AF ACT hired web security firm DtectNet to investigate “190 Australian ISPs in relation to four different types of file-sharing protocols” (Roadshow Films Pty Ltd v iiNet Limited [2010] FCA 24 at 96). Narrowing their investigations to the BitTorrent protocol and targeting four Australian ISPs - Optus, Internode, Exetel and iiNet - AF ACT went on to assist in the general collection of evidence for the applicants. Aaron Guy Herps, Manager of Digital Affairs for AF ACT signed up to iiNet, and on 27 June 2008, went to mininova.org (a popular torrent site at the time, which has since been shut down) and used uTorrent to download films and television programs of the applicants. A few months later, between 11 February 2009 and 20 February 2009, Herps repeated this process, but employed an IP address filter, which allowed uTorrent to connect only to iiNet users. AF ACT Operations Manager Greg Fraser also assisted in this process, and collectively their efforts, by using the Dtectnet software, allowed AF ACT to prove clear evidence of copyright infringement. They selected twenty of these accounts (herein referred to as RC-20) that would stand in as a representative sample of infringers during the court case (Roadshow Films Pty Ltd v iiNet Limited [2010] FCA 24 at 85).

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79 Dtectnet (2005) is a global anti-piracy company that works with a range of industries including music, software, games and law enforcement.
The authorisation charge levelled at iiNet followed from their alleged refusal to take action in relation to allegations against their infringing users (Roadshow Films Pty Ltd v iiNet Limited [2010] FCA 24 at 98). From 2 June 2008 onwards, AFACT sent weekly emails to Michael Malone, Managing Director of iiNet, alleging that particular iiNet users had infringed copyright. A spreadsheet was attached to each of these emails detailing the date and time of infringement, the IP address of the customer, the particular motion pictures and television shows downloaded and the studio to which the particular piece of copyright was attached. These notices were sent until 9 August 2009. AFACT alleged that as per the terms and conditions of iiNet’s Customer Relationship Agreement, iiNet should have disconnected these users rather than continuing to serve the infringing users, despite “knowing” that they were consistently infringing copyright. The applicants also intimated that the structure of iiNet’s data plans (and their actions or lack thereof regarding users who pirated), suggested that the company had a direct financial interest in continuing to ignore this sort of activity case (Roadshow Films Pty Ltd v iiNet Limited [2010] FCA 24 at 224 onwards).

iiNet argued that the AFACT notices carried no legal weight. While AFACT viewed their weekly notices as clear evidence, iiNet contended that any legal issues should be passed on to the relevant authorities refusing to “take the responsibility of judge and jury in order to impose arbitrary and

80 Comply with all laws
4.1 In using the Service, you must comply with all laws and all directions by a Regulatory Authority and reasonable directions by us.
Prohibited Uses
4.2 You must not use, or attempt to use, the Service:
(a) to commit an offence or to infringe another person's rights;
...  
(e) for illegal purpose or practices;
or allow anybody else to do so.

Cancellation or suspension by us
...
14.2 We may, without liability, immediately cancel, suspend or restrict the supply of the Service to you if:
...
(b) you breach a material term (other than a breach which separately gives rise to rights under this clause 14.2) and that breach is not capable of remedy;
(c) you breach a material term (other than a breach which separately gives rise to rights under this clause 14.2) and, where that breach is capable of remedy, you do not remedy that breach within 14 days after we give you notice requiring you to do so;
...
(i) you breach clause 4 ... or otherwise misuse the Service;
(j) we reasonably suspect fraud or other illegal conduct by you or any other person in connection with the Service;
...
14.3 If we suspend the Service under clause 14.2, then we may later cancel the Service for the same or a different reason.
disproportionate penalties purely on the allegations of AFAC T” (Roadshow Films Pty Ltd v iiNet Limited [2010] FCA 24 at 199 onwards). iiNet also noted that mere provision of the internet could not be seen to be inducing or even authorising copyright infringement, and that the infringements took place exclusively through the Bit Torrent system, which is not an illegal protocol, nor under iiNet’s control. Furthermore, by cutting off a user’s access to the internet, iiNet wouldn’t just be cutting off the means of infringement, but would also be cutting off their access to a host of other services such as access to internet banking, news and email, and that this would represent a disproportionate punishment, especially when based on such limited evidence (Roadshow Films Pty Ltd v iiNet Limited [2010] FCA 24 at 411).

In the initial Federal Court case Justice Cowdroy found in iiNet’s favour. Drawing on precedent set by landmark authorisation case University of NSW v Moorhouse Cowdroy J explained “that the respondent did not provide the ‘means’ of infringement in the sense that the phrase was used by Gibbs J” in Moorhouse. In Moorhouse the High Court of Australia found that the University of NSW “was liable for authorising copyright infringements committed by people using photocopy machines in the university library” (Lindsay 2010). Gibbs J focused on the notion of a “power to prevent” and explained that the university had the ability to control both access to books and the copier:

> In the circumstances, if a person who was allowed to use the library made a copy of a substantial part of a book taken from the open shelves of the library, and did so otherwise than by way of fair dealing for the purpose of research or private study, it can be inferred that the University authorised him to do so ...
> (University of NSW v Moorhouse [1975] HCA 26 at 11)

Jacobs J took a different line of reasoning to reach the same finding. He suggested that authorisation centred on the “terms of the invitation extended by the supply of books and machines” and the fact that “the University did not qualify its invitation to users of the library to use its machines”. (University of NSW v Moorhouse [1975] HCA 26 at 14).

Cowdroy J found that following Moorhouse, a finding of authorisation was predicated on the authoriser providing the “means” of infringement (Roadshow
Films Pty Ltd v iiNet Limited [2010] FCA 24 at 383) and he referred to a range of recent cases to do with copyright infringement through websites and peer to peer systems. He suggested that the creators of websites and peer-to-peer networks, which were largely centred on the facilitation of copyright infringement stood as clear evidence of a party providing the “means” of infringement, as well as evidence of a level of control over the “means”.

Conversely, Cowdroy noted that the evidence merely showed that infringement had taken place through the BitTorrent system, which iiNet had no control over. As iiNet did not provide the means of infringement - in this case, the BitTorrent system, then no authorisation occurred on their part (Roadshow Films Pty Ltd v iiNet Limited [2010] FCA 24 at 413). Furthermore, the respondent did not stand in the way of copyright holders pursuing people who had “directly infringed their copyright” or “constituent parts of the BitTorrent system for authorisation”, and that iiNet had “adopted and reasonably implemented a repeat infringer policy” (Roadshow Films Pty Ltd v iiNet Limited [2010] FCA 24 at 171 and 621).

Undeterred by this decision, the collection of production companies marshalled by AFACT appealed to the full bench of the Federal Court and their appeal was heard by Justices Emmett, Jagot and Nicholas. The appeal was dismissed, but it was a productive move for the rights holders to take. It exposed significant differences across the bench of the full court when attempting to explain what exactly constituted authorisation and the Justices critiqued aspects of Cowdry’s J ruling. For example, Emmett J noted that Justice Cowdroy’s formulation of authorisation was “unconventional” (Roadshow Films Pty Limited v iiNet Limited [2011] FCAFC 23 at 126), and repositioned the case through an assessment of iiNet’s business practices, explaining that it would not be “reasonable” for iiNet to undertake the immense amount of work required to review the series of allegations against its users.

This position was supported by Nicholas J, who noted that although iiNet held a significant amount of legal power over their users, this power was qualified by a number of important considerations, and acknowledged that the decision to terminate an account was not a “simple one” (Roadshow Films Pty Limited v iiNet Limited [2011] FCAFC 23 at 724). Largely in concert with Emmett’s
argument, he acknowledged the difficulty of an ISP making decisions on the absence of applicable regulation or access codes, but both Justices suggested that future warning notices with clearer evidence could lead to a finding of authorisation. In turn, the sole dissenting judgment of Jagot J drew on internal emails to outline how iiNet actively ignored warning notices, and noted that the professional nature of the production companies meant that they were “unlikely to be involved in the making of serious allegations without believing they had a credible foundation” (*Roadshow Films Pty Limited v iiNet Limited* [2011] FCAFC 23 at 402). Although these were a collection of disparate judgments, with even the majority occasionally disagreeing on points of law, the appeal outlined how an ISP could be potentially liable for authorisation of copyright infringement at some point in the future.

**The High Court: Hearings**

Following their loss in the lower courts, AFACT duly appealed to High Court. The hearings began in late November 2011 and were heard over three days by French CJ, Gummow J, Hayne J, Crennan J and Keifel J. The first day began with AFACT barrister Tony Bannon SC outlining the basis for their appeal. Bannon started by challenging Emmett J’s characterisation of a “reasonable step”. In his judgment, Justice Emmett approached the notion in reference to iiNet having the power to suspend or terminate an account, whereas Bannon argued that the simple act of forwarding of a warning notice to a customer could be seen as a “reasonable step”. He also noted that Emmett J found that “only unequivocal and cogent evidence of acts of infringement satisfied any relevant notice requirement”, and subsequently decided that AFACT notices fell short of that standard. Bannon contended that this requirement was at odds with the precedent set by *Moorhouse* (*Roadshow Films Pty Ltd v iiNet Limited* [2011] HCA 54).

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81 During a brief opening, the bench assessed and rejected all but two of six amicus curiae applications. The term ‘Amicus Curiae’ means ‘friend of the court’. The purpose of such a role is to allow interested parties and experts to assist the court in matters not fully covered by the disputing parties. Six parties applied for amicus status – APRA, ARIA, MEAA, the Australian Privacy Foundation, ADA and the communications alliance. The communications alliance and APRA were granted leave to intervene with all other parties rejected.
Bannon spent the rest of the day unpacking this notion of “authorise” as it related to law, and argued that it wasn’t about offering a formal license and assurance of safety and legality, but rather any sort of control over a person’s ability to infringe. In argument, Kiefel J challenged Bannon, noting that despite iiNet retaining control over users’ ability to access the internet, this power seemed to be “a step removed from [controlling] their ability to infringe, which requires more”, but Bannon maintained there was “no way they could offer that service without regulating its use”:

So ... the case simply boils down to, really, an act of infringement which can only be undertaken by the provision of their service ... and then, in effect, being told, look, on your service someone is infringing our copyright, what are you going to do about that, they say, I am going to keep plugging that person back into the internet every day for the rest of their life and there is nothing you can do about it. That is our case.

Summing up AFACT’s position, Bannon declared that inaction following receipt of a warning notice constituted authorisation in the circumstances (Roadshow Films Pty Ltd v iiNet Limited [2011] HCA 54).

The second day began with Bannon wrapping up his argument quickly followed by Mark Leeming SC, representing the Australian Performing Rights Association as amicus curiae, who spoke on the concept of authorisation and how he saw it relating to the ongoing case. Richard Cobden SC - representing iiNet - took up the rest of the day and began with a reference to the CBS Songs v Amstrad [1988] UKHL 15 case in the House of Lords. In that case it was found that, despite selling high speed double cassette players and recorders and advertising their usefulness in the act of dubbing tapes, a practice that could be used to infringe copyright, Amstrad did not authorise any infringement (CBS Songs v Amstrad [1988] UKHL 15). Cobden likened iiNet’s situation to that of Amstrad. He noted that Amstrad advertising the illegality of home copying on their machines would have a minimal effect on home taping. Likewise any finding against iiNet would not preclude infringers from going to other ISPs or solving the problem at hand of endemic piracy.
He also argued that rather than benefiting financially from users who pirated - as alleged by AFAC - iiNet actually encouraged legal access to content. The company had established a “freezone”, partnering with various content providers to offer users access to legal content. For example, users were able to purchase and download up to 50gb of content from iTunes, or watch ABC iView without these activities counting towards their monthly download limit. Cobden also questioned the legibility of the AFAC notices, re-iterating an argument heard in the lower courts. He claimed that rather than being provided with data that clearly outlined an open and shut case of infringement, the AFAC data came in a confusing fashion, was difficult to interpret and would have required a significant amount of effort to organise the data in an actionable form. If iiNet got it wrong, a failed termination could leave the company open to claims of unlawful termination of contract. Finally, Cobden noted that the ISP had a complicated history with infringement notices. One monitoring company - Media Sentry - sent notices that arrived “by the crate load” and Cobden explained that the companies AFAC were representing sometimes automatically generated these notices. He argued that the extent of these notices and their “unreliable” nature influenced iiNet’s reaction to the DtectNet notices sent by AFAC accusing iiNet subscribers of copyright infringement. The day finished with Patrick Flynn who spoke on behalf of the second amicus curiae, telecommunications industry body Communications Alliance, of which iiNet is a member. Unsurprisingly, Flynn was largely supportive of iiNet’s position (Roadshow Films Pty Ltd v iiNet Limited [2011] HCA 54).

The final day saw Bannon summing up the legal contours of AFAC’s appeal and unpacking the ramifications of their argument. Gummow J briefly raised the cost of delivering notices, highlighting the fact that around 900 accounts were identified in a single week, but Bannon noted that iiNet subsidiary Westnet, passed on similar notices from AFAC to their customers. Furthermore, he contended that notice regimes were already in place for other issues to do with iiNet users, such as when they were almost reaching their download limit. Getting to the heart of the appeal, Crennan J underlined the specificity of AFAC’s argument: “[T]his [is a] very narrow argument about continuing to provide the services armed with the knowledge of a past infringement by a
particular account in respect of a particular film” (*Roadshow Films Pty Ltd v iiNet Limited* [2011] HCATrans 325). Bannon agreed with this formulation and said the narrowness was its strength, as it highlighted the targeted nature of AFACT’s claim. Following a brief discussion of possible costs of a notification scheme, the Court reserved its decision and Court was adjourned (*Roadshow Films Pty Ltd v iiNet Limited* [2011] HCA 54).

**The High Court: Judgment**

On April 20, 2012 the High Court unanimously dismissed AFACT’s appeal, with two separate judgments marking the end of a battle between content providers and an Australian ISP that had begun in mid-2008 (see *Roadshow Films Pty Ltd v iiNet Limited* [2012] HCA 16). The judgment of French CJ, Crennan and Kiefel JJ overwhelmingly supported iiNet’s submission, finding that AFACT’s interpretation of authorisation assumed “obligations on the part of an ISP which the Copyright Act does not impose” (*Roadshow Films Pty Ltd v iiNet Limited* [2011] HCA 77). The Justices also found that the AF ACT warning notices “did not provide iiNet with a reasonable basis for sending warning notices to individual customers containing threats to suspend or terminate those customers’ accounts” (*Roadshow Films Pty Ltd v iiNet Limited* [2011] HCA 78).

As a concluding point, the Justices noted that “the statutory tort of authorisation of copyright infringement” was “not readily suited to enforcing the rights of copyright owners in respect of widespread infringements” and looking ahead flagged recent legislative interventions in other countries as possible legislative remedies (*Roadshow Films Pty Ltd v iiNet Limited* [2011] HCA 78).

The judgment of Gummow and Hayne JJ took a more complex approach to the notion of authorisation, drawing on the general principles of tort law as well as outlining a novel approach towards authorisation, “which can be traced to Lord Templeman’s judgment in CBS v Amstrad” (Lindsay 2012). The justices noted the limited power of iiNet due to its purely commercial relationship with subscribers. The ISP could not “control the choice of its subscribers and other users to utilise the BitTorrent software, ... modify the BitTorrent software or take down the appellants’ films which were made available online” (*Roadshow Films
Pty Ltd v iiNet Limited [2011] HCA 137). Their honours also questioned AFAC'T’s framing of “reasonable steps”, noting that warnings may not have had been effective in stemming piracy, and that AFAC'T’s lack of disclosure around the methodology of evidence collection raised questions about the validity of the infringement notices. They too also noted the lack of an effective industry wide policy, explaining that the absence of such a protocol meant that “the iiNet subscribers whose agreements were cancelled by iiNet would be free to take their business to another ISP” (Roadshow Films Pty Ltd v iiNet Limited [2011] HCA 139).

Interestingly, both of these judgments noted the strategic nature of the case as well as the broader policy context in which the case was occurring. It was accepted without contest during the hearing that rationale for AFAC’T’s appeal was “economic ... namely, cost-efficient enforcement of the rights of a copyright owner”, highlighting the difficulties around enforcing piracy at an individual level (Roadshow Films Pty Ltd v iiNet Limited [2011] HCA 55). There were also discussions throughout the hearings, as well as sections of each High Court judgment, which referred to the ongoing policy discussion around piracy and the lack of an enforceable industry code or effective legislative remedies. The war between ISPs and content providers, with representatives from the two parties locked in an antagonistic legal battle rather than working together towards a viable solution, typified the current impasse within the wider industry. This ongoing narrative informed the judgments significantly, with Gummow J and Hayne J directing the appellants to parliament, stating that these pressures were “best resolved by legislative processes rather than by any extreme exercise in statutory interpretation by judicial decisions” (Roadshow Films Pty Ltd v iiNet Limited [2011] HCA 120).

The contested pirate: cultural discourses around iiNet

The arguments and evidence put forward during the case and the various media and public discourses that circulated around the case collectively provide a useful site on which to examine the status of the pirate subject. The following section will draw on media reports, spaces of informal public debate such as
Twitter, as well as the Federal and High Court cases and judgments to provide an account of the contemporary pirate subject and link the issues raised by the case to the broader concerns of the thesis. But before continuing, I briefly want to re-emphasise the importance of this methodological approach. As discussed in the introduction, cultural studies has a tendency to approach law as a discrete body of works or singular texts “which are simply read internally for an understanding of their cultural effects” (Coombe 2001, p. 55). In the following discussion I look to explore how law is imbricated in the lives and practices of everyday people. Rather than operating as a set of unquestioned “cases, statutes and legal doctrine” (Coombe 2001, p. 56), the law and forms of legal subjectivity are figured through these quotidian lenses of practice and culture, and as I show below, the legal institution itself is increasingly recognising its position as just one influential cultural actor amongst many.

Beginning with the initial Federal Court hearing and subsequent judgment, we see the pirate placed in an initially problematic position. As noted earlier in this chapter, AFACT framed the case as a vital space of intervention into the issue of online piracy. However, part of this process involved AFACT positioning the pirate subject as a direct threat to revenues and therefore to the mutually beneficial relationship between authors and users. For AFACT with high levels of online piracy allegedly going unchallenged by iiNet, “a widespread culture of infringement [had] become entrenched” (Crozier 2009a). This culture and the piratical practices it supported, threatened the status of content producers and the careful balance upon which copyright law was structured (see for example Crozier 2009b). This framing of the pirate directly isolated the subject from the general philosophical and practical logics of copyright law and positioned it as a direct menace to well-meaning authors and users alike. This conceptual isolation of the pirate was also clearly present in the material punishment demanded by AFACT for copyright infringement: disconnection of an infringer’s internet connection.

However, the findings of the Federal Court at the first instance directly challenged the discursive framings of piratical excess outlined by AFACT. The court noted that one of the AFACT’s “more adventurous submissions” attempted
to argue that “bandwidth, downloading or quota usage by iiNet users could be considered synonymous with copyright infringing behaviour” (Roadshow Films Pty Ltd v iiNet Limited [2010] FCA 24 at 239). The court highlighted a series of responses from iiNet CEO Michael Malone during his cross-examination to demonstrate the problems with this sort of logic:

But still have all the bandwidth they paid for available for downloading? Yes.

Well, that’s a real attraction to somebody who is interested in illegal downloading, isn’t it?

Michael Malone: Or legal downloading.

... But you promote as a benefit of Freezone as freeing up customer’s quota for, amongst other things, downloading, don’t you?

Michael Malone: Yes, but not all downloading is downloading of illegitimate material or movies, there’s plenty of other things to download on the internet.

... Unauthorised downloaders are the sort of customers who need more and more bandwidth; you agree?

Michael Malone: No. I think again you’re trying to paint all downloads as illegal (Roadshow Films Pty Ltd v iiNet Limited [2010] FCA 24 at 246).

The Federal court subsequently found that infringement was “not a primary or even significant usage of quota on [the RC-20] accounts”, even when looking at the “worst examples” of infringement (Roadshow Films Pty Ltd v iiNet Limited [2010] FCA 24 at 437). These findings, which saw infringers engaging in piracy in a haphazard fashion, challenged the notion of the pirate discursively constructed by AFACT - a criminal opportunistically stealing from artists, continually flouting and destabilising the legal framework.

Instead - on the evidence - piracy existed as a minor media practice that was occurring alongside a number of other mundane activities conducted by users like emailing, listening to radio online and streaming television. The RC-20 engaged in a range of practices, of which piracy was just one, and in so doing challenged AFAC'T's attempt to locate and isolate pirates through the framework of copyright law. The evidence presented to the court instead highlighted some of the grey areas around piracy and positioned it within broader patterns of
practice and use that were perhaps more befitting of a user than a pirate, an interrelation that will be explored later in this chapter. Was this notion of the “criminal” pirate still a relevant or productive way to understand and conceptualise the online piracy? The Federal Court’s judgment suggested that this notion of the pirate was problematic at best, and failed to accurately account for how piracy occurred in Australian homes.

Actor and AFAC’s ambassador Roy Billing continued this “criminal” framing of the pirate in the days following the Federal Court judgment, writing an opinion piece for Melbourne broadsheet The Age. In the article Billing (2010) re-articulated the AFAC’s narrative stating that he was “disappointed” by the decision, which in his eyes would threaten “the future of homegrown Australian TV and films”. Members of the public reacted strongly and offered an alternative discourse through which to understand copyright infringement and the pirate subject. In the comments section of the article only fifteen out of ninety five commenters supported his contention that piracy is “stealing”. Commenters instead outlined various rationales for piracy, questioning the framing of infringement as theft, arguing that content providers had not done enough to engage with the digital economy and noting the significant price differentials between Australia and the U.S., which left consumers paying more for content. It was also noted that particularly in Billing’s case - as an Australian actor working on local productions - Australian content was already funded in some circumstances by the taxpayer so in effect the public had already “paid”. The poor quality of locally produced film and television and the lack of access to older films and television both in stores and online were also mentioned as rationales for piracy.

When looking at these responses to Billing’s claims we again see a willingness to directly challenge AFAC’s framing of the pirate. Throughout the comments respondents claim that copyright infringement does not equate to theft because

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82 These commenters were not representative of society as a whole but rather a body of respondents who were actively interested in the case. However, by virtue of their position as respondents to opinion articles and with no declared professional interest in the case they became situated as a public ‘voice’ on the issue.

83 Five responses did not directly engage with Billing’s article
the theft is not tangible or because of the difficulty of finding content online. The following comments of “PaulRobert” and “CheshireCat” respectively provide an example of the tenor of debate following Billing’s article:

@Craig: “Just because it’s digital doesn’t mean it’s not a physical product.” Err, yes it does. When you steal the chocolate bar, it’s gone. When I download a movie, nothing has been lost. Digital copying is not theft.

(‘PaulRobert’ in Billing 2010)

In my opinion the shades of grey between legal and illegal lead people to care less about doing something they might know is morally wrong. And the poor behaviour of the media companies in actively fighting new technology and seeking unreasonable compensation for infringements gives them the feeling of justification breaking the copyright.

If you want to contribute to the discussion Roy then comment on the information provided by others don’t just peddle the same worn out ‘piracy is theft’ mantra.

(‘CheshireCat’ in Billing 2010)

This re-examination of the pirate, which sought to account for the “shades of grey” (‘CheshireCat’ in Billing 2010) continued after the subsequent High Court decision in favour of iiNet.

To provide a brief example, an opinion article published on ABC website The Drum that critiqued the strategy of AFAC throughout the case found significant support from commenters. Out of 193 comments, 108 comments were in favour of the decision, or defending piracy as a rational solution in order to access content and only 39 comments were in favour of AFAC.84 Again, the bulk of the comment thread was focused around the term “stealing” and a number of respondents challenged the framing of copyright infringement as “theft, pure and simple” (‘WP’ in Stilgherrian 2012b). The discussion focused strongly on broader ideas, which stemmed from legal theories of property and economic

84 43 comments were significantly off topic, or simply complaining about the poor quality of Hollywood fare, without directly discussing copyright law or piracy. Three comments were posted twice accidently.
ideas of non-rival goods. Throughout this discussion, there was a real sense that
the majority of commenters wanted to problematise notions of infringement as
theft. These prosaic challenges highlighted both the limits and depths of legal
language in a manner similar to existing literature, which has explored the
metaphors and rhetoric of intellectual property law in some detail (Hemmungs
Wirten 2006; Loughlan 2006, 2007; Reyman 2009).

These justifications of piracy, in a similar fashion to the Federal Court judgment,
presented a challenge to AFACT’s strict discursive definition of a pirate. The
arguments made by members of the public often carry more than a hint of self-
justification of questionable activity, but they also point to a cultural discourse
that rests upon an expanded definition of piracy and a reconceptualisation of the
pirate. In the comments above members of the public suggest that piracy is an
act motivated by a range of concerns. Questions of consumer access, archival
capabilities, the rights of taxpayers to access local content and the limits of the
term theft as opposed to use, suggested that the public carried a complex vision
of the role of piracy, one that in the end had little to do with the pirate subject
that was often raised by AFACT during the case.

This complex and strategic engagement with piracy and the pirate subject was
also evident in smaller media outlets and technology-focused websites’ analyses
of the High Court decision. Online news website Crikey dedicated an editorial to
the case and interestingly took a strongly pro-user line, arguing that the case was
not so much about piracy, but rather about “industries that are too outdated to
frame their expectations around the way the internet actually works” (‘iiNet
decision not the end of the story’ 2012). The website also published an article by
Stilgherrian (2012a), who focused on the judicial suggestions of legislative
redress in the judgment and noted that certain laws in other countries, which
blocked internet access for repeat infringers, could be in breach of a user’s
human rights. itnews.com.au’s initial report quoted a number of stakeholders
across the copyright and technology sector including the Australian Digital
Alliance, the Pirate Party of Australia and a tweet from Hackett, all of whom
were effusive about the judgment (Hilvert and Hutchinson 2012). Their coverage
ended with a legal analysis of the case with five lawyers offering their largely
supportive readings of the High Court judgment (Crozier 2012c). Technology website ZDNet was equally comprehensive, offering a suite of articles, a video and a podcast in response to the decision. The website chose not to stray too far from the major players, only quoting AFACT, iiNet, Telstra and a handful of lawyers for context and analysis, but the supporting podcast hosted by Stilgherrian claimed the case as a win “3 – 0 for the Internet” (see Taylor 2012).

It is interesting to reflect on the motivations behind this support of iiNet and the unwillingness of these organisations to frame copyright infringement as the sole preserve of the pirate. In contrast to more traditional, institutional media organisations surveyed, such as the Fairfax and News Limited stable of newspapers, who presented a balanced approach towards iiNet in their reportage, these news organizations were online media businesses. Their corporate identity was forged in opposition to traditional media and many were involved in reporting the daily goings on of the I.T. community. Their services sought to augment or replace the “dying” media organisations represented by the film, television and print industries and their readers would also be sympathetic to these technological changes. iiNet, as a member of this digital vanguard, with its commercial income solely related to the digital sphere was a fellow traveler. This led these organisations to view piracy as a signal to older businesses that their traditional industrial models were failing, rather than an infringement of copyright and a violation of a legal framework, outlining an alternative cultural interpretation of law.

A further space where a significantly influential discourse emerged around the pirate subject was on Twitter.85 Twitter users became a noticeable public

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85 It is worth noting the specificities of Twitter as a communication medium and how they may have impacted on this publics’ interpretation of the case. There are between one and two million active Twitter accounts in Australia, meaning only five to ten per cent of the Australian population are using twitter (Bruns 2011). Recent research also suggests that Australian users ‘are somewhat skewed towards relatively urban, educated, affluent users aged between 25 and 55’ (Bruns, 2013) suggesting a well-read and tech-friendly audience is present on Twitter. A senior lawyer representing iiNet Leanne O’Donnell was active online throughout the judgment and contributed to the shaping of the online discourse on twitter around iiNet. She regularly updated her twitter feed throughout the trial, interacted with journalists who were reporting on the case and responded to interested users and other lawyers. This activity stood in dramatic contrast to AFACT, which did not have a twitter account. Thus Twitter was only the communication medium of a comparatively small audience, and a space where the legal and corporate views of iiNet maintained a strong presence throughout the debate.
throughout the trial and were identified as a representative source of public opinion by commentators (see Farrer 2010). There was little activity on Twitter in the days leading up to the High Court decision, with only regular legal and I.T. tweeters noting the announcement of the judgment date on April 13, but there was an instant reaction following the news of the High Court with the hashtag #iitrial quickly trending worldwide. On a smaller scale, active tweeter and a member of iiNet’s legal team Leanne O'Donnell (@mslods) was trending in Australia during the morning of the announcement. A study of tweets on the day of the High Court decision reveals a strongly pro-iiNet response to the decision, with no support for AFACTER evident on the #iitrial hashtag.

Figure 4: a selection of publicly available tweets published on the day of the iiNet decision

In a similar fashion to the other conceptualisations of the pirate discussed above, discussions on Twitter sought to complicate AFACTER’s framing of piracy and underline the quotidian nature of much pirate activity.86 Twitter users questioned the poor legal and business decisions of AFACTER and film and

86 For a broadly representative but not definitive sample see http://storify.com/techgeek/twitter-reaction-iinet-trial. At the time of writing all tweets are still searchable on Twitter through the hashtag #iiTrial
television companies more generally and criticised AFACt who mentioned in their press conference that they would turn to Government in order to find a legislative response to piracy. Once again throughout these debates there was a suggestion that the banal nature of content consumption motivated piratical activity and that people in the community had a complex view of piracy and the motivation behind such actions. The pirate was framed as a problematic subject, with tweeters suggesting that the limitations of existing content distribution methods were more to blame for lost industry profits than an army of determined pirates.

Understanding the relational pirate: narratives of theft, authorship and use

To briefly summarise the discourse analysis conducted above, we see a range of competing visions of the pirate circulating during the iiNet case. There are also various attempts by parties to claim an authoritative position through legal doctrine and cultural discourse and sustain their framing of the pirate subject. AFACt drew on statistics that underlined the rise of online piracy and the celebrity status of Australian actor Roy Billing to argue for a concept of the pirate that emphasised its illegal activity and the threat piracy carried to sustainable legal frameworks of consumption and production. In contrast, journalists, commenters on opinion articles, Twitter users, small media companies and indeed the courts themselves significantly problematised the content industries’ concept of the pirate and piracy through a range of different narratives. These competing narratives of piracy provide an excellent example of how discourses help to shape subjects of copyright law and an example of how legal doctrine and broader legal cultures interact. The following section will extend these points and examine the implications of these narratives for the pirate subject and its relationships with the author and user.

The judgments of the Federal Court and High Court accounted for a broader conceptualisation of the pirate than the framing of the pirate provided by AFACt, but also provided clear evidence of law operating as more than a simplistic tool of regulation. This is an important point to acknowledge,
especially as previous cultural analyses of law have afforded too much force, structure and inflexibility to law (see Gaines 1991; or Coombe 1994, 1998 for a critique of this tendency). Throughout iiNet we see the flexible process of law in action with judges in each level of the judicial system aware of law’s active role in shaping the future of the piracy debate. Emmett and Nicholas J of the Full Bench of the Federal Court and French CJ, Crennan and Kiefel JJ of the High Court did not hesitate to suggest that the pressures of technological change were best dealt with by parliament rather than through “extreme … statutory interpretation” (see Roadshow Films Pty Ltd v iiNet Ltd [2012] HCA 16 at 120). Similarly Cowdroy J of the Federal Court outlined a wide array of media practices which the identified pirates also engaged in, problematising the strict doctrinal account of piracy presented by AFACT.

These judgments showed an understanding of the wider cultural context in which this debate around piracy operated and the power of law to shape (but not wholly define) cultural discourse. These judges were unwilling to simply offer a strict doctrinal interpretation and enforcement of the pirate subject, aware of the limiting scope that such an approach offered. The importance of recognising law as an important cultural signifier, albeit one imbricated in a wider cultural milieu is emphasised by Austin Sarat and Thomas Kearns (1998, p. 10) when they write:

Law is simply one of the signifying practices that constitute culture, and, despite its best efforts, it cannot be divorced from culture. Nor, for that matter, can culture be divorced from law. To recognize that law has meaning-making power, then, is to see that social practices are not logically separable from the laws that shape them and that social practices are unintelligible apart from the legal norms that give rise to them [my emphasis].

Therefore, following Sarat and Kearns, I consider these judgments, which reframe the pirate and position the act of piracy as part of a broad quotidian engagement with various media products, to significantly impact our understanding of the pirate subject. Rather than the courts reifying the pirate through doctrine, iiNet is an example of how law is imbricated in a wider dynamic cultural sphere.
It is when we turn to the varied reactions of members of the public and the media to *iiNet* that this dynamic cultural sphere comes to the fore. We see an alternative set of publics discussing the case and in turn discursively constructing their own notion of a pirate subject. These developments underline the importance of cultural understandings of law and their impact on how particular subject-positions in law are shaped. As Sarat and Kearns again (1998, p. 8) note:

> Because they are produced in concrete and particular social relations, the meaning and the materiality of law are inseparable. Litigants, clients, consumers of culture, and others bring their own understandings to bear, they deploy and use meanings strategically to advance interests and goals. They press their understandings in and on law and, in so doing, invite adaptation and change in the practices of law.

In short, culture challenges and develops, rather than simply reflects, legal concepts of piracy. As such these debates have a material effect on both law as a cultural object *and* the subjects which the legal framework seeks to shape and sustain. The interactions between these different discourses also highlights the importance of such “meaning-making” processes to both sides in the case and underlines the contingency of the pirate as a subject in law.

So what do these contesting and intertwining narratives of the pirate developed by legal cultures and legal doctrines and situated in a broader cultural milieu tell us about this subject? The tensions around the pirate throughout *iiNet* confirm that the pirate is subject to ongoing contestation and change with its possible modes of being and action always critiqued and questioned. This contingency sees the borders between the pirate and other subjects of copyright law weaken at interesting points during the case. The discursive tensions that cause these weakening borders emphasise the instability of the pirate subject and as I will outline below, opens up a space for us to explore the complex relationships between the pirate and the user, and the pirate and the author.

**The pirate and the user**
When we look at the discourses that circulated across Twitter, in the media, in the comments sections of articles and in the judgments of the Federal and High Courts, we see a clear interrelation between the subject of the pirate and the user. Turning firstly to the varying cultural discourses that surrounded the case, as noted earlier Twitter users, commenters and elements of the media sympathetic to iiNet preferred to reframe piracy by claiming that particular piratical practices were the actions of disgruntled users rather than “pirates” (see responses to Billing 2010; Stilgherrian 2012a, 2012b). These publics - active in the iiNet debate - considered the category of the pirate to be somewhat redundant, and instead advanced the subject of the user as a viable alternative. This strategy subsumed a number of piratical activities under this more amenable cultural category and relied on the subject of the user to make a broader argument about the difficulty of accessing legitimate content and the broader rights that should be afforded to users of the internet as noted earlier.

Of course this interpretation was highly strategic, with it being much easier to talk about and defend the rights of users, rather than argue for the rights of an unrepentant pirate. As Sarat and Kearns (2003) noted above, such interpretive work is a prime example of the strategic and informal readings of law that form part of the broader law and culture dynamic. However, the emergence of the user and the decline of the pirate is still a notable feature. It is a significant difference from earlier debates around piracy where the pirate was a cultural category often worn with pride and where an array of peer-to-peer networks strongly advocated piracy. As Cowdroy J noted, an earlier peer-to-peer service Kazaa, had engaged in a direct public campaign that overtly encouraged piracy:

Kazaa was perceived and used by its users primarily for copyright infringement of music … the advertising of the Kazaa system itself, particularly the ‘Join the Revolution campaign’ … constituted positive encouragement to use the Kazaa system to infringe (Roadshow Films Pty Ltd v iiNet Limited [2010] FCA 24, 397).

The change is revealing. It shows an overlapping of these two subject-positions of copyright law and underlines the importance of media practice and cultural
conversations in challenging existing subject formations, a process previously discussed in chapter four. This emerging discourse was a clear recognition by a range of people that when reflecting on their own media practices, they may potentially inhabit both subject positions at different times.

This overlapping of subjects was also acknowledged in the judgment of Cowdroy J. His Honour underlined the generative power of law, its ability to recognise these moments of imbrication and the ongoing possibility for re-interpretation of these subjects. Questioning AFAC\textquoteright s positioning of the RC-20 as unrepentant pirates and critiquing a range of factors, including the scope of the RC-20\textquoteright s piracy, the broader uses to which the internet could be put, and the importance of regular access to the internet within daily life, Cowdroy J substantially challenged this framing of the pirate. In a similar fashion to the publics above, this approach intimated that piracy was one of many media practices undertaken by users and not necessarily a revolutionary or oppositional practice. AFAC attempted to place the pirate on the outer limits of law as an infringer and blatant flouter of the law, but this judicial re-positioning of the pirate in a quotidian setting revealed that the user and pirate were two subject positions more closely interrelated than AFAC suggested.

The pirate and the author

These relational connections are also present between the author and the pirate, seen when looking at the piracy of the representative iiNet subscribers - the RC-20 - and the work of Rosemary Coombe (1998) and Rebecca Tushnet (2004) provides a useful conceptual framework to understand these connections. The initial legal action brought by AFAC rested on the historically and institutionally supported conceptual separation between the author and pirate, explained by Coombe (1998, p. 253) as the “institutionalisation and legitimation of certain modalities of production, circulation, and consumption” at the expense of others. Such a separation supports particular cultural and legal framings of piracy, seen only as an activity that causes economic loss for copyright holders (an interpretation critiqued extensively in chapter five). As
also noted in that chapter, the separation of these two subjects ignores the generative capacities of piracy and authorial capacities present in the pirate.

Tushnet’s (2004) work functions as a productive point of departure, helping us to reframe the quotidian piracy of the representative sample of iiNet subscribers. Looking to challenge the broad interpretation of non-transformative copying as a passive activity, devoid of cultural weight, through a detailed legal analysis, she outlines how copying can establish distributive infrastructures of access in developing nations, contribute to the development of self-expression through the shared consumption of cultural material, and can require the exercise of judgment and creativity. These practices are materially generative activities, which are supported and sustained by non-transformative copying and in many cases by what the law would otherwise term piracy. Importantly, Tushnet (2004, p. 586) also disavows the term “transformation” in an effort to question an “individualist” reading of U.S. copyright law, which assumes that copying does not essentially change the meaning of words, and that “identification with another’s words is not as valuable as disagreement”. In challenging the fair use exceptions offered by U.S. copyright law, Tushnet opens a theoretical space to appreciate the types of non-transformative copying conducted by the RC-20 as potentially authorial.87

Her argument is supported by Coombe (1998) who questions the abstract separation of subjects inherent in the text of copyright law. Coombe notes that such abstractions ignore the “dialogic” nature of culture, and the political and material ways in which such a dialogue is instantiated. She suggests that the struggle to fix meanings of cultural property through the use of intellectual property rights, limits this ability to “respond to a sign with signs”. Coombe’s work provides a useful explanation of the quotidian effects of law, where certain forms of authorship and copying are allowed and others marginalised. The everyday mundane examples of the RC-20, allow us to reframe copying as a form of cultural communication, required in a culture, which has seen the emergence of increasingly restrictive corporate control over cultural signs. This

87 I note that Benjamin Kaplan’s (1967) lecture “Plagarism Re-examined” suggested that copying could be viewed as an act of substantial social benefit.
communication can take place in overt displays of cultural critique, such as the transformative practices of parody and satire, but even non-transformative copying can be viewed as a form of authorial agency, with the use and consumption of cultural signs and goods adding to greater cultural literacy, communication and connection, as people engage with the contemporary cultural milieu (Coombe 1998).

Of course in iiNet the question of infringement was never a point of contestation: both parties agreed that iiNet users were infringing copyright. However, it is productive to speculate on the above theoretical approaches when assessing the case. As a starting point, I find it interesting that these approaches to copying, which interrogate and challenge the separate roles of the author and pirate, rarely feature in discussions around online infringement. As the above scholars note, there is a substantial complexity to copying, however this complexity is regularly elided in these cases, with the functional nature of copyright law allowing legal doctrine to avoid these issues. If a copyrighted work has been downloaded without the sanctioned approval of the copyright holder, then infringement is found and there is little interest in exploring the motivations behind these infringements or the possible cultural and economic role of copying in copyright law more generally. I am not suggesting that every future case around online infringement needs, or indeed can, address these conceptual issues or excuse copyright infringement of copyrighted work. But I do argue that there is a long-term benefit for both copyright theory and legal doctrine in attempting to address and continually “refining narratives of authorship and conceptualisations of copying” (Arewa 2007, p. 551).

Conclusion

This analysis of iiNet attends to the complexities that surround and inform such acts of piracy, the ongoing evolution in relationships between the pirate, the author and the user and the ways in which borderline practices constantly demand law and culture to legitimise and re-legitimise subject-positions. The above analysis presents an interesting end point for this section’s analysis of the pirate, outlining a different set of engagements between each subject position. As
chapter five suggested at its conclusion, different relations emerge between each subject over time, and as the iiNet example outlines, the pirate has a changed set of relationships in comparison to its position in the early modern era. This changed role still sees the pirate overlapping with other subjects of copyright law, but just in a different fashion.

In early modern England, the user did not figure as a cultural or legal subject and it was the subject-positions of the pirate and the author that shared a deep and complex relationship. The pirate itself was also seen as entrepreneurial and commercial, selling goods to consumers and engaging in innovative marketing practices that are archetypal forms of commerce in the late-capitalist marketplace today. However, as the iiNet example shows, pirates are no longer operating as commercial entrepreneurs but instead are often seen to be the consumers themselves. As outlined in this case study, various publics directly connected the subject position of the pirate with the user, refusing the structurally distinct roles presented by AFACT. This tendency was also present in the Federal Court judgment, suggesting that piracy is a complex practice that operates in tension between the two subjectivities presented by a strict reading of copyright law - the unrepentant pirate and dutiful user - and demands a constant re-negotiation of these two subject positions.

Conversely, the author and the pirate are no longer as closely connected as they once were, but as Coombe (1998) and Tushnet (2004) explain, there is still a residual tension around non-transformative copying and it is a practice that carries a significant amount of meaning. The practice forms part of our “dialogic” interaction with culture and is imbued with cultural weight (see Coombe 1998). This theoretical re-framing reveals the authorial capacities present in piratical activity in a similar fashion to chapter five, outlines the tensions that exist between the author and the pirate and reveals the cultural work that must be constantly undertaken in spaces of both culture and law in order to maintain a clear separation between these two unstable subjects. Despite attempts throughout history to delineate between piracy and authorship, the act of piracy itself can carry a generative scope that is not so much explained
away as ignored, with the silence of law itself speaking volumes about the contributions to culture that copyright law cannot directly address.
Conclusion

Discussion of findings

This thesis has explored how three subjects of copyright law - the author, user and pirate - interact with one another and has assessed the implications of these interactions for copyright law. I have considered these subjects across a number of cultural, legal and historical trajectories and by using a modified relationalist approach as a methodological lens have shown that the author, user and pirate are engaged in a series of complex and inter-woven relationships. I noted at the beginning of this study that these relationships stand unaccounted for in the liberal political philosophy that currently undergirds theories of copyright law. Therefore, I have sought to outline the particular ways these relationships between subjects are constituted through a series of examples and case studies. I have also suggested that attending to the relationality between these subjects provides greater clarity around the role and function of law itself and the cultural impact of copyright law as a regulatory framework.

I began this analysis in chapter one, arguing that the subject of the author had rarely been discussed in relation to other subjects of copyright law. I noted that literature central to the field had explored the author to some extent, but often tended to presume a persistent strain of Romanticism in copyright law's current configuration (see Jaszi 1991, 1992; Rose 1988, 1993; Woodmansee 1984). In contrast, I offered a different method of analysis and - drawing on the work of Foucault and Barthes - argued for the value of examining the author's “system of dependencies” (Foucault 1991) through a relationalist lens. This analysis suggested that viewing the author as a hegemonic subject did not accurately explain the complex processes of boundary setting in law. By using this analytical lens I proposed to provide an account of the processes of subjectification, which saw the author, user and pirate engaging in an ongoing series of negotiations and contestations.

In chapter two, I began to analyse these “dependencies” of the author through a case study of how moral rights were introduced into Australian copyright law. An
archival analysis of the journey towards moral rights in Australia revealed the contested nature of the author and showed how various discourses of use and theft also circulated around this figure. I suggested that this situated example of authorial evolution underlined the radically contingent nature of the authorial subject and the struggles involved in trying to maintain and police the borders around this subject. Rather than emerging *ex nihilo*, the author – the subject of the statutory provisions - gradually appeared through a process of bargaining and compromise. An assessment of how moral rights worked in practice also showed that these complexities did not disappear once the laws were in force. Rather than the moral rights provisions functioning as simple proof of a Romantic strain in copyright law, the author was shown to be a pragmatic subject, able to be shaped through a series of formal and informal legal discourses.

I turned to the subject of the user in chapter three and through a brief contextual analysis of the user outlined the limitations of the liberal political philosophy that supports copyright law. I began by arguing that in contrast to the claims of current scholarship (see Liu 2003; Gibson 2006) law had attended to the concept of the user in some fashion. However, I suggested that the emergence of the creative user in the first decade of the twenty first century indicated a changed relationship between the author and user, and provided an additional complexity to the user subject. This chapter critiqued optimistic discourses of user rights, which I argued often failed to recognise authorial creativity and potentially set up problematic hierarchies of creation in law. In this chapter I also made a methodological point, noting that a relationalist framework was a useful way of locating these interstitial subjects of law.

In chapter four, I developed this analysis of the user through a case study of the *Copyright Amendment Act 2006*, which introduced a series of new exceptions to copyright into law. Noting that the Australian Government sought to delineate a clear separation between authors, users and pirates in their discussion of the reform process, a subsequent analysis revealed the impossibility of this approach. Examining the discourses that circulated through legal and cultural sites I identified three framings of the user that were prominent in discussions
and noted that each carried a complex understanding of the user that overlapped at points with acts of creativity and theft. Furthermore, this analysis also noted that quotidian engagements with law would also challenge these attempts at separation, explaining that moments of legal codification would always be put under pressure by continual cultural changes, underlining the contingency of these three subject positions.

Then in chapter five, I examined the subject of the pirate. I began by making a case for analysing this subject as a cultural and historical subject in its own right, arguing that legal scholarship had to approach this subject beyond the definitional parameters of law. Drawing on a range of historical (see Blagden 1955, 1958, 1960a, 1960b; Cowan 2004; Darnton 1971, 1982a, 1982b, 2003; Feather 1988, 1992, 1994; Johns 2009; Tukonovsky 2003;) and postcolonial (Larkin 2004, 2008; Liang 2005a, 2005b; Pang 2005; Sundaram 2010) scholarship I offered an analysis that explored the complexities surrounding the pirate. Through an examination of the existing literature, I noted particular points where the author and pirate interrelated, locating these relational tendencies at a nascent stage in copyright’s history. In addition, I also critiqued the work of Adrian Johns (2009) combining a range of extant scholarship in order to provide an account of the informal distributive structures present around the Enlightenment period.

Finally, I returned to the present day, offering an analysis of recent Australian case Roadshow Films Pty Ltd & ors v iiNet in chapter six. Using this case as a site from which to examine the pirate in the contemporary era, I outlined how various cultural discourses of piracy circulated around the case. A narrative around the case emerged which sought to link the pirate closely to the subject of the user, challenging restrictive conceptualisations of piracy put forward by the content industries during the case. These developments demonstrated the changing nature of relationality, with the shifting status of the pirate revealing that subjects in law operated in different strengths and configurations over time. In addition, the recognition of these cultural discourses by the Federal Court at first instance, as well as the High Court, also showed that law recognised the
complexities of these interrelations, as well as law’s role as a shaper of cultural discourse.

Significance of study

The findings above outline a series of situated examples of how subjects of copyright law interact with one another and explore the broader implications of these interactions. In so doing this thesis intervenes in the existing literature around copyright law and presents a number of key contributions. This thesis is the only analysis I am aware of that accounts for all three subjects of copyright law - the author, user and the pirate - through a relationalist paradigm. The benefit of such an approach is that it offers a level of conceptual detail that has been missing from existing histories of authorship (see Jaszi 1991, 1992; Rose 1988, 1993; Woodmansee 1984) as well as more recent works, which have attempted to account for the user (Cohen 2005; Gibson 2006) or pirate (Liang 2005a, 2005b; Philip 2005; Sundaram 2010) in copyright law. This approach has subsequently allowed the thesis to detail fine-grained processes of subjectification un-accounted for in previous analyses.

I have also recast the author, user and pirate as radically contingent subjects, always open to reinterpretation through complex interactions between legal and cultural discourses. At various points during this thesis, I have noted that particular discourses have assigned creativity to different subject positions or developed a concept of use that extends beyond the subject of the user. Through noting these moments of interrelation, I have presented an account of copyright law that recognises the generative and flexible nature of law, the role of law as a cultural text as well as the importance of cultural discourse and cultural practices in the constitution of law. Collectively, this analysis has challenged binary approaches towards the framework of copyright law that typifies much of the existing literature (see Cohen 2005; Gibson 2006; Philip 2005) and analyses that identify an authorial hegemony in copyright law (see Halbert 2007, Jaszi 1991, 1992; Rose 1993; Vaidhyanathan 2003), an analytic narrative that affords too much inflexibility to law.
This thesis also extends an emerging body of research around copyright law and relationality, developed from an earlier strain of feminist philosophy. As noted earlier in this thesis, Carys Craig (2007; 2011) has conducted the most significant work in this area and has attempted to use this theoretical framework to answer fundamental questions about creativity. Another analysis has used Craig’s work to develop legal principles from her theoretical approach (see Shi 2010). In contrast I noted that in addition to challenging how creativity is approached in law, this theoretical framework could also be used to interrogate relationships between subjects, challenging existing accounts of subjectivity in copyright law. My approach echoes earlier scholarship around relationality in law, which called on scholars to account for relationships and interdependencies (Nedelsky 1993), and also offers an alternative pathway for scholars who wish to engage in future relationalist analyses of copyright law.

In addition, this thesis conducts a disciplinary intervention combining cultural studies and legal analysis. Copyright scholarship can benefit from this sort of interdisciplinary work because cultural studies carries with it a number of methodological tools that make it useful for studying copyright law and subjectivity. Cultural studies’ ongoing attention to questions of power, governance and subjectivity has allowed this thesis to pay particular attention to how power relations are structured in copyright law, the ways in which subjects shift and change depending on particular modes of authority, as well as explore the ongoing dynamics between culture and law in greater detail. Attending to cultural discourse in its broadest sense and locating sites of informal legal discourse that previously have been ignored (see Leckey 2008), has allowed this thesis to carefully examine the relationships between the author, user and pirate.

Thinking more broadly, I suggest that cultural studies’ willingness to deal with the relational (Streeter 2010), the iterative and the everyday provides a useful disciplinary frame through which to view the results of this thesis. Unlike legal scholarship, which understandably is attuned to legal doctrine and the need for practical resolutions, cultural studies does not need to seek definite answers. Instead it can delve into the messy and complex realities of subjectivity and present a series of changing relationships, cultural discourses and difficult
moments of reform and change without arriving at a final answer. This is not to avoid a concluding point, but rather to move towards one. I am suggesting that studying the quotidian realities of law reveals complexities that as Chander and Sunder (2013) point out are often elided by more instrumentalist and formalist legal analyses. Rather than considering the existence of relationality between subjects as an intractable problem or an analytical issue to address and solve, I suggest attending to the issue as an ongoing dynamic process.

It is worth noting that these interventions are limited by the scope of my study. My general analysis of relationality was wide-ranging in its approach but my case studies were limited to the Australian jurisdiction. I was comfortable in locating my project in one territory as it allowed me to accurately locate the author, user and the pirate within a particular legal culture and context. Therefore, rather than searching for a meta-analysis that explained the rationale and logics of copyright law and subjectivity, I have been happy to use this thesis as a way of opening up spaces for debate and locating points of interest from a very specific site. I see this project as a continuation of a long-standing scholarly attempt to engage with questions of law and subjectivity (see Coombe 1989, Boyle 1990), but also as a way of approaching these questions from an alternative methodological perspective. I suggest that these issues around subjectivity could be productively explored in future research across a range of legal contexts and geographies.

This thesis has also only attended to three subjects of copyright law. This selection of subjects was influenced by both popular discourses around copyright law and the existing literature. But this limitation perhaps also says something about how our own scholarly language frames copyright law. We still tend to focus on these subjects of the author, user and pirate. Of course, these three subjects are convenient cultural categories through which to understand the complex processes of cultural production and consumption. But research that interrogates the role of the franchise (Bowrey and Fowell 2009; also see Boyle 1991) and the brand (Coombe 1998; Duguid 2010) has noted the importance of these actors to copyright law’s current operation. It would be worthwhile in the future to perhaps question our own scholarly discourses around copyright law
and begin the process of working out where these corporate actors fit into our ongoing discussions around subjectivity and law.

Future implications and emerging questions

So what do these findings mean for future analyses of copyright law and indeed for copyright law more generally? As an initial point, I suggest that scholarship in copyright law needs to embrace a broader notion of interdisciplinary research than has currently been the case. At certain points existing scholarship has celebrated the array of interdisciplinary work that has been conducted around copyright law (see Vaidhyanathan 2006 for an example). However, the most significant spaces of interdisciplinary research in law are law and economics or legal sociology. There is still a clear need for research around copyright law that substantively embraces cultural research and the value of its methodologies and conclusions. Of course there are notable exceptions (see Bowrey 1994, 1996; Coombe 1998; Gaines, 1991; Hemmungs Wirten 2004, 2006, 2008; Rose 1993, Sarat and Kearns 1998, Sarat and Simon 2003) but it is worth noting that the majority of these exceptions see lawyers engaging with cultural scholarship and not the other way around.

This situation is changing. Prominent legal scholars have recently called for interdisciplinary engagements within cultural research (Cohen 2012; Sunder 2012). However, they have done little more than point to relevant works in the area. This is a significant step forward but does not yet represent a substantial methodological engagement with cultural studies. Of course, as Sean Andrews (2009) notes cultural studies has its own limitations as a discipline, with scholars rarely engaging substantively with law beyond forms of contest and resistance. In writing this thesis I have kept these disciplinary contestations in the forefront of my mind and so have attempted to address the law on its own terms, while still engaging strongly with the cultural studies tradition that has shaped my own scholarly trajectory. I have taken a risk in doing so, but I suggest that these are risks that scholars need to take (even in the face of possible failure), if we are going to move towards a truly interdisciplinary account of copyright law.
These questions of separation and interaction are of equal concern to the analysis that lies at the heart of this thesis and indeed the policy discourse that originally sparked this scholarly intervention. I suggest that the analysis conducted above can be viewed in two different ways, each setting copyright law on a different pathway. One path sees this relationality as an inherent problem for copyright law. Interrelations directly challenge individualist accounts of copyright law because they imply messiness and complication. Corporate narratives of copyright law, as seen throughout this thesis, prefer delineated subjects where authors, users and pirates are cleanly identified (see Williams 2012). Similarly, scholars who directly challenge copyright law also dislike these relational interactions. Keenly aware of the power imbalances that flow through copyright law, these critics worry about the possibility of normative hegemonic cultural discourses impacting on processes of subject formation (see Gibson 2006; Halbert 2007). For both of these parties relationality stands as a problem to be rectified, an ongoing issue in a legal framework that is supposed to be able to anticipate technological change, locate acts of creativity and maintain an equitable balance between subjects.

An alternative approach would be to acknowledge that copyright law is contradictory and does not have a clear and unbreakable logic to it, but still stands as the best system of cultural regulation available to us today. This stance could embrace the ongoing relationality between subjects and the messiness, flexibility and complications that such a process entails. I am of a mind to follow this line of thinking because it acknowledges the power of culture, the power of conversations about law and the ability for copyright law to change iteratively over time. It is worthwhile remembering that it was not until the nineteenth century that our modern notions of intellectual property emerged (Sherman and Bently 1999). This history of copyright law suggests that this flexibility in legal and cultural interpretation and the changing set of relationships between author, user and pirate is simply how copyright law is supposed to work. Therefore, while this regulatory framework may be at something of a crisis point at the moment, it is entirely possible that copyright law has within it, its own tools to solve its own crisis.
This concluding point stands as a relevant reminder in the current policy context. As I finish writing this thesis, copyright law is in a state of flux and reform is on the agenda at the national and supranational level. The Australian Law Reform Commission has just handed its final report on copyright law and the digital economy to the Attorney-General the Hon George Brandis QC, who has expressed qualified support for further enforcement measures in order to protect content creators (see Brandis 2013). There is also the possibility of a fair use exception being introduced into Australian law (Australian Law Reform Commission 2012). In addition to this domestic reform process, Australia is also in negotiation with eight countries, seeking to develop a free-trade area of the Asia-Pacific via the Trans-Pacific Partnership Agreement (TPP). A recent leak of the draft IP chapter from the treaty revealed a restrictive set of provisions which, if agreed upon, could lock Australia into a limiting intellectual property framework with little opportunity to alter the terms of the treaty in the future (see Weatherall 2013).

These very different processes of reform have not come out of nowhere. Reform only occurs when there is an ongoing failure in the legal framework and it is clear that copyright law is struggling in the current environment. However, this thesis sends a note of caution to parties who want to engage in substantive reform of copyright law. Throughout these processes detailed above, as well as reflecting on the failures of copyright law, it is worth remembering one of the central arguments of this thesis: that law is robust and open to change. As shown in each chapter, rather than functioning as an institutional deadweight, copyright law is very much alive and ordinary citizens, legislators and judges have all played a key role in shaping the law in a material and cultural sense. The changing role of pirates, authors and users over the years and the shifting nature of their relationships, in fact reveals the flexibility inherent in law, and its ability to actually respond to demands in an intelligent and imaginative fashion.

Therefore, I wonder about these domestic and supranational reform narratives, which presume the need to ‘fix’ copyright law. I welcome the review conducted by the ALRC but I hesitate in echoing demands for a subsequent spate of new legislation. Similarly, although I worry about the introduction of the TPP I am
also confident about the possibility of non-institutional challenges to this overarching framework. The current focus within policy circles around these two issues points to a disproportionate interest in institutions, downplaying the potential of culture to change copyright law. As shown throughout this thesis, our own cultural practices and discourses can be equally effective in changing law, especially when these changes are viewed across decades and centuries rather than years. In acknowledging law’s flexibility we must not just acknowledge the ability of legislation and the judiciary to adroitly respond to cultural change but also recognise our own power to reform law at the level of practice and everyday engagement. In the face of national assessments of copyright law and restrictive supranational agreements, it is worth recalling the various technologies, discussions and practices detailed throughout this thesis which have problematised notions of authorship, infringement and use and helped to reshape relationships between subjects of copyright law. These cultural forces have helped to change our understanding of copyright law in the past and therefore can do so again.
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