

## Copyright: New Futures, New Agendas Conference

Friday, 18 February 2005

### Program

- 9.00-9.30am **Registration**  
Level 22, Waterfront Place, 1 Eagle Street  
Brisbane  
(Offices of Minter Ellison Lawyers)
- 9.30-9.45am **Opening Address**  
The Hon Philip Ruddock MP  
Attorney-General
- 9.45-10.45am **Session 1**  
**Professor Alain Strowel:** *A Copyright Journey in the EU and the EC Enforcement Directive*  
**Dr Manon Ress:** *The Broadcasters, Cablecasters and Webcasters Treaty: The Wrong Paradigm for Access to Knowledge?*
- 10.45-11.15am *Morning Tea*
- 11.15am-12.15pm **Session 2**  
**The Hon Justice Kevin Lindgren:** *Copyright and Indigenous Communal Moral Rights*  
**Tamara Winikoff:** *Artists: What Do They Want, and When Do They Want It?*
- 12.15-1.30pm *Lunch*  
Brisbane Polo Club  
Naldham House, Cnr Eagle & Felix Streets,  
Waterfront Place, Brisbane
- 1.30-2.30pm **Session 3**  
**Lindy Morrison:** *The Free Trade Agreement Implementation Act 2004 and Performers' Rights*  
**Associate Professor Robert Burrell:** *Fair Use and the US–Australia Free Trade Agreement*
- 2.30-3.00pm *Afternoon Tea*
- 3.00-4.00pm **Session 4**  
**Professor Graeme W Austin:** *De-Constitutionalising Copyright*  
**Dr Dale Spender AM:** *What the Creative Commons offer Authors*
- 7.00pm **Conference Dinner** (for those who have registered)  
Gianni Vintage Cellar Bar, 12 Edward St, Brisbane

# The Speakers

## Professor Graeme W Austin

### *De-Constitutionalising Copyright*

Among the “New Agendas” in United States copyright law has been an increasing tendency to “constitutionalise” copyright. In the “constitutionalising” agenda, scholars and litigants have sought to constrain legislative initiatives in the copyright field by seeking judicial review of various parts of US copyright law. In this paper, Graeme Austin discusses some of these recent challenges to statutes that significantly changed US copyright law to enable the United States to join the Berne Convention. In a number of cases and in recent commentary, litigants and scholars claim that these statutes are unconstitutional, and are advocating a resurrection of formalities for US copyright works. Austin examines these developments from the perspective of authors’ rights, and argues that these challenges may thwart the advantages that digitization and the Internet may offer authors to free themselves from exploitative relationships with traditional publishers. The paper also examines recent case law under the Digital Millennium Copyright Act, and explores how US courts have relied on conventional techniques of statutory interpretation to sidestep some of the more extreme claims that have been advanced by copyright owners under this Act.

**Graeme Austin** is the J Byron McCormick Professor of Law at the University of Arizona, James E Rogers College of Law, where he teaches copyright law, trademarks and unfair competition, international intellectual property, and constitutional law. He holds his first law degrees from Victoria University of Wellington and has a doctorate in laws from Columbia University Law School. He has published many articles on intellectual property law in the United Kingdom, the United States, and in his home country, New Zealand. Prior to taking up his current position, he was a senior solicitor in a large commercial law firm, where he specialised in commercial litigation, and copyright and trademark issues.

## Associate Professor Robert Burrell

### *Fair Use and the US-Australia Free Trade Agreement*

(abstract to be included when available)

**Robert Burrell** is an Associate Professor in the T C Beirne School of Law at The University of Queensland and Associate Director of ACIPA. He is responsible for ACIPA’s Postgraduate Education. Robert worked previously at King’s College London and he has taught for the University of Cambridge and the University of Sussex. He obtained his Bachelor of Laws and Master of Laws at the University of London.

## The Honourable Justice Kevin Lindgren

### *Copyright and Indigenous Communal Moral Rights*

Justice Lindgren will address the protection (with references to shortcomings that have been perceived) presently offered by the law of property to indigenous artistic works, in particular. He will discuss the leading Australian cases. Justice Lindgren will then outline the provisions contained in the Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003, referring, in particular, to questions to which the Bill gives rise.

**Justice Kevin Lindgren** is a Judge of the Federal Court of Australia. Prior to his appointment to the Bench in 1994 he was successively a solicitor, academic (Professor and Foundation Head of the Department of Law at the University of Newcastle), barrister and Queen's Counsel at the Sydney Bar. His Honour's practice at the Bar was chiefly in the areas of Equity and Commercial Law. Since October 2000 Justice Lindgren has been the President of the Copyright Tribunal. Over the years his Honour has been the author or editor, alone or jointly, of a number of books, articles and papers and is on the editorial boards of several legal journals, including the Trade Practices Law Journal.

## **Lindy Morrison**

### *The Free Trade Agreement Implementation Act 2004 and Performers' Rights*

The music industry exists around the exploitation of two copyrights, the rights in the musical work (song) and the rights in the sound recording (master). The Free Trade Agreement Implementation Bill (2004) introduced performers copyright in accordance with the provisions of the WIPO Performances and Phonograms Treaty. Will performers gain remuneration from the exploitation of their copyright arising from the new legislation? Lindy Morrison discusses copyright in the music industry, collection societies, sections of the new performers copyright such as assignability of copyright, deemed consent, and the link between copyright ownership and recording contracts.

**Lindy Morrison** toured the world as the drummer with Zero, *The Go-Betweens* and *Cleopatra Wong* from 1978 until 1992. Since 1992, Lindy has worked around Australia, as the musical director / performer in shows, parades and festivals and leading music workshops with many diverse and varied community groups. Lindy has maintained a strong commitment to performers' rights. She has been an Artist Director (elected by Australian artists) on the Phonographic Performance Company of Australia Board (collection society) since 1993. She is Director on the Board of the Music Council of Australia and is the National Coordinator for Support Act Ltd, the benevolent society for musicians and workers in the music industry.

## **Dr Manon Ress**

### *The Broadcasters, Cablecasters and Webcasters Treaty: The Wrong Paradigm for Access to Knowledge?*

The World Intellectual Property Organization (WIPO) is developing proposals to create a treaty on Broadcasting Organizations (the Broadcast Treaty). The original rationale for the Treaty was based on a concern that there is an increase in signal piracy, including broadcast signals and that broadcasters, cablecasters and webcasters need further protections to prevent such piracy. The proposed Treaty aims to extend new rights to broadcast, cablecast and webcast organizations adding to those already granted by existing treaties (Berne, TRIPS, Rome, WCCT and WPPT). The Treaty would give broadcasters, cablecasters and webcasters a range of new rights and expand the scope and duration of existing rights in many jurisdictions. It extends the power broadcasters have to control how consumers/citizens use and record images and sounds including material that is in the public domain.

The question of whether further IPR should be granted to broadcast organizations have been under discussion in the WIPO Committee on Copyright and Related Rights (SCCR) since November 1998. The General Assembly (GA) of WIPO in September 2004 requested that work on this treaty now be accelerated. The WIPO Secretariat, strongly supported by the US

and the EU is pushing for a Diplomatic Conference, the last step in treaty making in face of widespread opposition particularly from developing country delegates. Also at the last GA, there were proposals for a Development Agenda designed to refocus WIPO's work program from continually focusing on expanding property rights to focusing on access to knowledge.

Concerns about the treaty include how the "draft treaty" creates new limits on the rights of consumers to use knowledge goods, undermining important limitations and exceptions in traditional copyright laws, build barriers for innovation in knowledge goods, and increase the opportunity for anti competitive practices such as segmenting markets and raise costs and limit consumer access to information.

**Manon Ress** works for the Consumer Project on Technology (CPTech) and Essential Information, a Washington, DC- based non-profit created about 20 years ago by Ralph Nader and John Richard. Essential Information provides information to journalists, activists and consumers all over the world (<http://www.essential.org>). Manon works on various e-commerce and consumer protection issues such as the definition of consumers, unfair contracts and tort liabilities and on issues related to internet governance such as free speech, privacy protections and fair use rights. Since October 2000, she has been a consumer representative on the US Delegation to the Proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. She is focusing on Intellectual Property issues, building public awareness and interest in debating the value of the public interest in intellectual property rights.

## **Dr Dale Spender AM**

### *What the Creative Commons offer Authors*

One reason that publishers/information multinationals have been able to promote the extension of copyright in their own interest for the past decades, is because they claim they are championing the rights of authors. Yet the authors may be long since dead, or — quite frequently — no longer the copyright 'owners', with the result that the revenue flows to the publishers rather than the struggling artists. Hence the shocking medium income of authors (\$4,800), and the general hostility of authors towards publishers.

But whereas in the past authors have needed publishers, the new technologies are transforming the author-publisher relationship. Some authors are beginning to appreciate that they can now do it for themselves — and seek do so through technological means. The Creative Commons (CC) licence, with its additional layer of conditions, is one means of enabling authors to independently both 'publish' and 'protect' their work. Theoretically, the CC Licence can open up new markets — new futures and agendas for authors. Practically however, there are difficulties. Many authors retain the print mind-set of 'not wanting a single word changed', and this is completely at odds with the culture and customs of the digital world. Remix is what the net is all about. CC licences are designed to help maximise remix — to make creative/ intellectual work freely available (subject to conditions): to be downloaded, changed, modified, repurposed — that is remixed by users, but not readers!

**Dale Spender** held a senior position in the NSW Education Department at an early age, then made the transition to the university sector (James Cook University), and went on to obtain her PhD at the University of London. She has lectured in many of the major international universities and written or more than 30 books (many of which became university texts) and founded publishing imprints (Pandora Press) and academic journals and monograph series. She has also contributed to feature articles and columns for national/international newspapers, to TV and radio treatments (BBC and ABC etc) and courseware for the Open University. She has been an active member of the Australian Society of Authors (ASA), and

of the Australian Internet and Media Industry Association (AIMIA) and is the former chair of the Copyright Agency Ltd (CAL) where she actively promoted the transition to digital and the reskilling of authors.

In the 1990s Dale established her own consulting company — AHOOT (AHead Of Our Time) which has provided policy and implementation advice/educational programmes, to government agencies, corporations and educational institutions. Dale's most recent initiative (with Robert Sanders) is Picassos on the PC (PoP IP) which is a suite of educational intellectual property guides for knowledge workers prepared for the educational sector to enable them to compile their own courses/ guidelines to meet the need for understanding the history, and the social and political implications of IP/ copyright.

## **Professor Alain Strowel**

### *A Copyright Journey in the EU and the EC Enforcement Directive*

The presentation will first offer an overview of the copyright framework in Europe. The case law of the European Court of Justice and the legislative developments at EU level will be revisited. In particular, the seven Directives adopted between 1991 and 2001 in the copyright field will be analysed so as to check whether the existing framework needs to be updated or consolidated. In fact, the Commission has launched a consultation process in 2004 on the topic of the consolidation of the "acquis communautaire", and has now to decide whether further harmonisation initiatives are needed in the Enlarged Union.

Apart from the harmonisation of substantive rules achieved between 1991 and 2001, the EU has adopted in April 2004 an horizontal Directive on the Enforcement of Intellectual Property Rights, which covers, among others, copyright. An overview of this recent piece of legislation—now to be implemented in the national laws—will be conducted in the second part of the presentation. This Directive was intended to harmonise the existing enforcement rules at a TRIPS-plus level. Has it been achieved? Which were the most contentious issues discussed during the legislative process? After having tackled those questions, the presentation will conclude on the future of copyright laws in Europe.

**Alain Strowel** is a Professor at the Saint-Louis University (Brussels), the University of Liège and the Catholic University of Brussels-Leuven, where he mainly teaches copyright and design law. A member of the Brussels Bar since 1988, Alain graduated in law (1983) and obtained a PhD in law (1992) from the University of Louvain-la-Neuve. In addition, he obtained graduate degrees in economics (1984) and philosophy (1985). Prior to joining the US firm Covington & Burling in 2001, where he concentrates on the IP issues in relation to IT, he worked in the Brussels IP section of the Dutch firm NautaDutilh.

He has authored numerous articles and books, including *Droit d'auteur et copyright* (LGDJ and Bruylant, 1993) and *Droit d'auteur et numérique: logiciels, bases de données, multimédia* (Bruylant, 2001). He has also edited a number of books including: *Of Authors and Origins* (with Brad Sherman, Clarendon Press, 1994) and *Prévention et réparation des dommages causés par les médias* (with Fr. Tulkens, Larcier, 1998).

## **Tamara Winikoff**

### *Artists: What do they want, and when do they want it?*

This paper will discuss the tortured glorious secret lives and passions of artists in Australia. Do I have your attention? Actually it will be more about artists' survival and the role the state can play in contributing. To be more precise, a great deal of heat and darkness has been

generated by debates around the proposal for an artists' resale royalty to be legislated in Australia. It currently is in limbo, suspended uncomfortably between two federal government departments. Want to know what all the fuss is about, what has happened thus far and where it could go next? I'll do my best.

**Tamara Winikoff** is well known in Australia both as a cultural commentator and senior arts manager. She has spoken, written and published extensively about cultural and design issues. Involved in arts management for over twenty years, she currently is the Executive Director of the National Association for the Visual Arts (NAVA), the peak national body representing the interests of the sector. At times Tamara also has worked as an academic and ARC funded research project chief investigator. Originally trained as an architect, Tamara has sustained a lifelong commitment to the arts and design as a practitioner and voyeur.