

# Foreword

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In the opening chapter, of this volume the editors invite the reader to imagine that he or she has a blank slate when it comes to drawing up a new copyright law. One supposes that there would be a lot of interesting proposals, especially from the non-lawyers whose minds would be less trammelled by copyright's technicality. Some readers might keep the slate blank. The freedom of a blue sky should allow one to conclude that commodification by copyright should play no role in a social system. Anarchists, as well as those libertarians who do not extend natural property rights to intangible objects, might arrive at such a conclusion from first principles. Alternatively, one might conclude on consequential grounds, as Machlup did about the patent system, that if one did not have a copyright law it would be irresponsible to implement one.

None of the contributors to this volume argue for the abolition of copyright. Instead, they suggest feasible changes to copyright systems based on the assumption of a world in which copyright design issues are not settled by a global political economy dominated by the variable of power. The upshot is a set of stimulating and highly readable essays that reflect upon the rules, principles, doctrines and interpretations that would help to draw copyright law into the service of *civitas* rather than the *imperium* of factions or nations.

Aside from the service of bringing these essays into public circulation, the editors show us both the need for and the difficulty of imagining alternatives to existing institutional designs. Social scientists tend to ground their explanations for institutional change in structure or some combination of structure and agency. Obviously a foreword is not the

place to begin an argument about the role of imagination, but perhaps one can agree with the editors that imagination has an important role to play in copyright reform.

Aristotle in *De Anima* suggests that ‘imagination is that in virtue of which an image arises for us’ and importantly ‘imagining lies within our own power whenever we wish’ (see Book III, Part 3 in one of the handily available ebook versions of *De Anima*). When we speak of alternative visions of things we are harking back to this old view of imagination as a capacity or perhaps faculty of being able to see images of how things might be otherwise.

My guess, and it is only a guess, is that copyright and intellectual property more generally have been the object of at least some reimagining. In the early 1990s, my colleague John Braithwaite and I interviewed a small number of Washington policy entrepreneurs and lobbyists who had been working for more than a decade on something the world has come to know as the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS). At that time most of them replied to our questions in terms of the need for a new vision and creative approach to the problems of insufficient protection for investors in intellectual property. Whatever might be said of their vision for the world, and much has been said, perhaps there is some plausibility in the claim that the origin of TRIPS lies in acts of individual imagination, a picture of what else might be. Of course, these individuals had access to resources that allowed them to seed their proposals in think tanks like the Heritage Foundation and the Brookings Institution, and they were part of networks of capital that made the kind of campaign contributions that brought the practiced empathetic eye contact and firm handshake from Congressional representatives.

It is worth focusing for a moment on Aristotle’s observation concerning our power to use imagination whenever we wish. It is a power available to us all. If we do not exercise the power of imagination then legal structures, much like the Berlin Wall, look permanent, immovable, a restraint on our freedom from which there seems little hope of escape. Through the act of picturing another world we inject the first element of contingency into structure, a brick begins to look removable, a structure begins to look indeterminate, a wall comes down.

Acts of imagining alternatives to structures of domination are also acts of power. TRIPS, and the era of trade-driven intellectual property that it ushered in, represents the imagining of a powerful elite. It was always a vision of *imperium*. If it is service to *civitas* that we seek from our institutions of intellectual property then we must begin to imagine that possibility.

The final paragraphs of the final chapter by the two editors suggest that they see reimagining as a method for moving debates about copyright reform in more constructive directions. In this they are surely right. As they say, this project has been a challenging exercise for them, but as the reader of this innovative volume will see it has also been a very worthwhile one.

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This text is taken from *What if we could reimagine copyright?*,  
edited by Rebecca Giblin and Kimberlee Weatherall, published 2017 by  
ANU Press, The Australian National University, Canberra, Australia.